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Review of *Antitrust Stories*

(E. Fox & D. Crane eds., Foundation Press 2007)

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In the eye of the historian, published judicial decisions are badly incomplete accounts of the disputes they resolve. Some incompleteness stems from the nature of the judicial process. For example, courts have neither the means nor the duty to recount the parties' choice of litigation strategies. Nor can a judge discuss, except by speculation, the actual effects of a decision just taken. Other gaps can result from the court's vanity. Wanting to seem unassailably correct, judges sometimes replace the losing party's best facts and arguments with flimsy straw men, who collapse beneath the tribunal's awesome logic. Some decisions give such lopsided portrayals of events that one wonders why the vanquished party ever joined the battle.

To give the fuller historical context and consequences of famous law cases, Foundation Press created its *Stories* series of texts. The essays assembled by Eleanor Fox and Daniel Crane in *Antitrust Stories* show the wisdom of the endeavor.¹ The antitrust collection serves two valuable ends. First, the essays will help experts and novices understand the origins, disposition, and consequences of thirteen disputes that shaped the U.S. antitrust system. Foundation's *Stories* series mainly targets students in U.S. law schools, but even competition policy experts who think they know it all are likely to come away from this well-con-

1 ANTITRUST STORIES (Eleanor M. Fox & Daniel A. Crane eds., Foundation Press 2007).

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ceived volume with renewed intellectual curiosity and excitement about U.S. cases they have heard about, debated, or even read dozens of times.²

A second major contribution of *Antitrust Stories* is to inspire broader reflections about how an economic system evolves. Antitrust is a natural home for the social scientist. Extensive discussion about the influence of economics on antitrust has overshadowed the power of other social science disciplines to explain the development of law and policy. *Antitrust Stories* shows why literacy in history should be standard equipment for competition economists and lawyers.

This review assesses *Antitrust Stories* from two perspectives. It first considers how well the contributors met the editors' challenge "to scratch the legalistic surface and unveil the human dimension" of the cases.³ This discussion considers the techniques the contributors have used to tell their "stories" and, more generally, discusses how one might best prepare histories of antitrust cases.

The second focus of this review is the interpretations that the authors give to their case histories. The main weakness of *Antitrust Stories* is the lack of a stand-alone, critical essay that identifies important themes that link individual chapters, assesses the soundness of the narrators' stories, and alerts the audience to important alternative interpretations. This omission matters most for the volume's three first-person accounts, where the narrators were contestants in the disputes. For an audience that will consist substantially of those new to the U.S. antitrust system, the volume ought to have tried harder at least to alert readers to plausible alternative interpretations that students of competition law ought to know.

I. The Essays and Their Methodology

From several perspectives, the thirteen cases examined in *Antitrust Stories* provide an excellent tour through U.S. competition policy experience. Professors Fox and Crane chose wisely. This is no surprise. Eleanor Fox is one of the world's preeminent antitrust scholars and is one of a handful of commentators who invented the field we know today as international competition law. Daniel Crane is as good as they come among the younger generation of the world's antitrust academics. Assembling this type of volume requires a sure grasp of both technical doctrine and broader policy concerns, and the results here reveal the editors' sharp eye for cases that illuminate the development of the U.S. antitrust system.

2 *Antitrust Stories* will have a particularly strong appeal to readers who have enjoyed the detailed case study approach taken in the superb, economically oriented collection of essays assembled by John Kwoka, Jr. and Lawrence White in *THE ANTITRUST REVOLUTION* (J. Kwoka, Jr. & L. White eds., 4th ed. 2004).

3 Eleanor M. Fox & Daniel A. Crane, *Introduction*, in *ANTITRUST STORIES* (E. Fox & D. Crane eds., 2007).

The selection of cases here provides well-balanced coverage of the substantive areas of competition law: horizontal restraints (*United States v. Socony-Vacuum Oil Co.*,⁴ *United States v. Topco Associates, Inc.*,⁵ *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,⁶ *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*,⁷ and *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*⁸); vertical restraints (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁹ and a combined treatment of *United States v. Arnold, Schwinn & Co.*¹⁰ and *Continental TV Inc. v. GTE Sylvania Inc.*¹¹); mergers (*Federal Trade Commission v. Staples, Inc.*¹² and *General Electric/Honeywell*¹³), and monopolization (*Standard Oil Co. v. United States*,¹⁴ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,¹⁵ and *United States v. Microsoft Corp.*¹⁶). There also is an appealing assortment of the old and the new. The cases are set out chronologically from *Standard Oil* in 1911 to *Empagran* in 2004. Readers can take them in order by the calendar and see broader doctrinal

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4 310 U.S. 150 (1940).

5 405 U.S. 596 (1972).

6 441 U.S. 1 (1979).

7 493 U.S. 411 (1990).

8 542 U.S. 155 (2004).

9 220 U.S. 373 (1911).

10 388 U.S. 365 (1967).

11 433 U.S. 36 (1977).

12 970 F. Supp. 1066 (D.D.C. 1997).

13 On the U.S. Department of Justice consent decree in this matter, see Press Release, U.S. Department of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001). On the proceedings in the European Community, see Commission Decision in Case COMP/M 2220, General Electric/Honeywell (July 3, 2001), action for annulment dismissed, Judgment of the Court of First Instance of 14 December 2005, Case T-210/01, General Electric Co. v. Commission, 2006 O.J. (C 48) 49.

14 220 U.S. 1 (1911).

15 472 U.S. 585 (1985).

16 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

and policy themes change over time or review them in topical categories along lines that the editors suggest in their Introduction.¹⁷

The cases examined in *Antitrust Stories* also promise to have a long shelf life, either because the selected episodes serve today as main cases in antitrust courses (e.g., *Sylvania*, *Broadcast Music*, *Microsoft*, and *Staples*) or continue to figure prominently in modern discussions about the U.S. antitrust system (e.g., *Standard Oil*, *Socony*, *GE-Honeywell*, and *Topco*). Even cases such as *Aspen* and *Dr. Miles* that the U.S. Supreme Court recently has repudiated or questioned¹⁸ are so skillfully reported that they deserve to make the cut in a second edition. The most noteworthy class of omissions consists of matters (such as *Federal Trade Commission v. Indiana Federation of Dentists*¹⁹) in which seemingly small cases made big law and whose histories have yet to receive a fuller treatment. The only issue for the future with respect to coverage is whether the editors and Foundation desire to enlarge the book and enlist other authors to augment the roster of cases.

The storytellers are a formidable lot. They bring diverse, impressive professional experiences to their assignments. Some are accomplished authors of legal history whose chapters (Daniel Crane on *Socony*, James May on *Standard Oil*, Rudolph Peritz on *Dr. Miles*, Spencer Waller on *Alcoa*) draw extensively from previously published books or current book projects. Others are renowned legal scholars who use the chapters to take a further look at cases they have discussed previously in articles and other commentary (Warren Grimes on *Schwinn/Sylvania*, Peter Carstensen and Harry First on *Topco*, Stephen Calkins on *Broadcast Music*, George Priest and Jonathan Lewinsohn on *Aspen*, and Eleanor Fox on *GE-Honeywell*). Three chapters are first-person accounts by narrators who have achieved the triple crown of serving with distinction as government antitrust enforcement officials, academics, and practitioners in law firms or economic consulting groups (Donald Baker on *Superior Court Trial Lawyers*, Jonathan Baker and Robert Pitofsky on *Staples*, and Douglas Melamed and Daniel Rubinfeld on *Microsoft*). The final contribution (on *Empagran*) comes from the volume's only team of economist co-authors, a world-famous pairing of Alvin Klevorick and Alan Sykes. This is an extraordinary ensemble.

By itself, choosing a superb collection of cases and narrators might not have been enough to ensure that the book would appeal to potential adopters in uni-

17 The editors' suggestions for organizing the readings by subject matter appear in Fox & Crane, *Introduction*, *supra* note 3, at 1-2.

18 In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), the Supreme Court abandoned the rule of *Dr. Miles* that resale price maintenance is illegal per se. In *Verizon Communications v. Law Office of Curtis Trinko*, 540 U.S. 398, 409 (2004), the Supreme Court placed the analysis of *Aspen Skiing* "at or near the outer boundary of §2 liability."

19 476 U.S. 447 (1986).

versities or to individual readers. The editors of *Antitrust Stories* confronted the challenge of defining how the contributors should examine familiar cases, most of which have been extensively talked out. There is no shortage of readily accessible commentary—much of it with a historical bent—on the cases treated in *Antitrust Stories*. It is easier to name the North American antitrust academics who have not written about *Alcoa* or *Sylvania* than it is to list those who have. The older the case, the more likely it is that everyone has taken a shot at it, although many treatments that purport to offer history are written by economists or lawyers whose research techniques and interpretative methods make genuine historians weep.

Much of the existing commentary also appears in a form that is cost-free and easily available to the reader, be it free access to legal literature data bases that law students enjoy through their universities or free-of-charge postings available to the world on the web. An anthology of essays provides convenience and thematic treatment, but those traits might not induce adoption by instructors who are familiar with the existing literature, are energetic enough to rouse themselves to identify and organize the secondary literature to complement the themes of the course, and can add articles to the syllabus with links to databases that students can use at no cost.

To be compelling, *Antitrust Stories* had to offer something new, and the editors set out to do that. Professors Fox and Crane asked their contributors to provide fresh, engaging interpretations of familiar events with an emphasis on the human touch:

“The cases on which [the contributors] write are casebook opinions—some interesting; many dense (as in *Standard Oil*) and give little hint of the humanity that lies behind them. We have encouraged our authors to scratch the legalistic surface and unveil the human dimension.”²⁰

The editors seem to have left decisions about how to “unveil the human dimension” to their authors. The desired “human dimension” seems to encompass elements such as the business context of the case, the spark that set off the dispute, the behind-the-scenes debates about the decision to prosecute, the personal traits of the advocates, the presentation of evidence in the courtroom, the public’s awareness of the case, the deliberations of the judges, and the actual effect of the court’s decision.

²⁰ Fox & Crane, *Introduction*, *supra* note 3, at 1.

One way to evaluate the essays in *Antitrust Stories* is to assess the breadth and intensity of the authors' efforts to illuminate these features in their narratives. A researcher can use various tools to explore the "humanity that lies behind" the case, including sources such as:

- contemporary news accounts;
- articles or books that provide biographies of key participants, company histories, accounts of the litigation, or studies of effects;
- pleadings, briefs, or other litigation documents filed by the parties;
- transcripts of arguments before the courts;
- internal government records;
- papers of individuals connected to the case, including judges, prosecutors, and business officials;
- the authors' own recollections of experiences as insiders; and
- oral histories and interviews with litigants and other participants in the dispute.

The age of the case significantly sets the researcher's choice of sources. For older cases, it is easier to obtain documentary records, including the internal records of public agencies and the papers of judges who ruled on the disputes. For more recent cases, the researcher can find and interview more individuals who were involved in the prosecution or defense of the lawsuit.

The most informative narratives in *Antitrust Stories* make the broadest and most imaginative use of these resources. A more expansive research plan tends to unearth more undiscovered facts and to provide a more confident basis for drawing conclusions that previously had rested upon mere hunches. Consultation of more sources, especially materials that give a fuller account of the motivations and thinking of both litigation contestants, also presses the researcher to see the case more clearly as both sides saw it and to avoid caricatures that ignore important forces that motivated the prosecution and the defense.

The best of the essays is the Carstensen & First study of *Topco*. Their research is masterful—comprehensive and broad-ranging. Through their imaginative use of primary source materials, they truly capture the human dimension that the *Antitrust Stories* editors sought to showcase. Among other research techniques, the authors studied the secondary literature, read the parties pleadings and briefs, examined the record of the trial, including key exhibits, obtained the internal records of the plaintiff, the U.S. Department of Justice (DOJ), reviewed the papers of Supreme Court justices, including Harry Blackmun, William Douglas, and Thurgood Marshall, and interviewed participants from the litigation teams of both parties.

Professors Carstensen and First believe commentators have unfairly damned *Topco* as a wrongheaded application of per se rules to condemn. They sympathetically portray the DOJ's decision to prosecute and the Supreme Court ruling that found liability, but they do not get there by cheating the arguments of the defendant's advocates or by suppressing infirmities in the government's preparation and presentation of the case. Even those who scorn *Topco* will find a lot to learn and admire in this essay. Any number of passages—such as the discussion of Donald Turner's crucial role as Assistant Attorney General in forming the theory of the case and insisting that the DOJ Antitrust Division attorneys not present evidence of actual economic effects—will tell even experienced observers

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something new and compelling about why the case unfolded as it did. By using little-known information to stimulate a rethink of widely accepted views, the paper does everything that good history ought to do.

Other essays in the collection use largely untapped sources to provide arresting portraits of the cases. For example, James May sheds new light on the *Standard Oil* litigation by focusing on the briefs submitted by the two sides before the Supreme Court and in the proceedings in the lower courts. Rudolph Peritz plumbs the contemporary trade press, historical works on pharmacology, and lesser-known federal and state judicial decisions from the late nineteenth and early twentieth centuries to describe developments in the patent medicine industry and present the struggle between conceptions of competition law and intellectual property rights that ran throughout the *Dr. Miles* litigation. Drawing on contemporary news accounts and other materials, Daniel Crane vividly reconstructs the trial in *Socony-Vacuum* and underscores the jarring nature of the change in policy accomplished by the DOJ's decision to indict individuals and seek criminal sanctions for horizontal agreements that officials in Franklin Roosevelt's first New Deal had formally or informally endorsed. Warren Grimes unearths wonderful details about the government's prosecution of the *Schwinn* case with telephone interviews and email exchanges he conducted with major figures in the trial and appeal of the case. Professor Grimes also adds new depth to our understanding of the dispute in *Sylvania* by tapping the knowledge of Lawrence Sullivan, who acted for the plaintiff during the case. Stephen Calkins uses a variety of sources to trace the origins of the blanket licensing programs at issue in *Broadcast Music*, provides pungent biographical portraits of the advocates for the parties, recalls the artists whose efforts to protect their creative works figured in the development of the challenged blanket licensing arrangements, and mines briefs and argument to bring the issues into sharp relief and place the reader directly into the courtroom.

Perhaps the most impressive use of interviews and email records appears in the Priest & Lewinsohn essay on *Aspen*. No reader will set aside the Priest &

Lewinsohn essay without marveling at how the authors used interviews to recreate the business ventures and personalities that transformed Aspen into a world-renowned ski resort and the subject of a formative Supreme Court antitrust decision. Particularly masterful is the painstaking reconstruction of the development of the skiing operations of the two litigants and relations between the antagonists. The account is so complete in many respects that one wishes the authors might have discovered why the defendant's trial counsel failed to lodge proper objections to jury instructions on market definition and left the defendant trapped on appeal with monopoly power in a relevant market confined to Aspen, Colorado. Further interviews also might have explored the dimensions of an earlier State of Colorado lawsuit, cited in the Supreme Court's *Aspen* decision and which had challenged the combined, all-Aspen area ticket as improper horizontal collaboration.

To read these essays is to wonder how excellent individual chapters might have become still better if the authors collectively had discussed possible methodological approaches and had read each other's drafts as the project unfolded. A regular and more extensive sharing of research methods might have induced each author to use techniques that yielded excellent results in one or more of the other essays. Here are a few examples of how common discussion about methods and research conventions might have strengthened the final product.

- Adopting the technique that Spencer Waller used to revisit *Alcoa*, Professor May might have woven in material from the official histories of Standard Oil and its successors about the litigation of the case and about the sanguine view that executives in some affiliates secretly took of the prospect of a divestiture decree that would liberate them from the control of Standard's headquarters.²¹ In turn, Professor Waller might have copied Professor May's technique of drawing more extensively from the DOJ's briefs to illuminate tensions over the formulation of the government's theory of the case in *Alcoa*. (Would persistent dominance suffice to establish liability, or was some element of conduct required to show illegal monopolization? Was the DOJ's theory of the case that Alcoa in the 1930s was adding too much capacity, or too little?) Selections from the papers of the DOJ and also from what is now the Department of Defense would have added some additional useful detail to the discussion of the decision to prosecute *Alcoa*.
- Professor Crane might have borrowed Professor Calkins's technique of giving more extensive biographical detail about the advocates. One litigator worthy of discussion in the *Socony* essay is William "Wild Bill" Donovan, who successfully represented the defendant in *Appalachian Coals, Inc. v. United States*,²² acted for *Socony* before the Supreme Court,

21 See, e.g., GERALD T. WHITE, *FORMATIVE YEARS IN THE FAR WEST: A HISTORY OF STANDARD OIL COMPANY OF CALIFORNIA AND PREDECESSORS THROUGH 1919* 378-84 (1962) (describing how top management of Standard of California welcomed the divestiture decree that set up their subsidiary as an independent entity).

and during World War II became the head the Office of Special Services, a forerunner of the U.S. Central Intelligence Agency.²³ As Professor Crane indicates, *Appalachian Coals* played an important part in *Socony*. Partly owing to Donovan's advocacy earlier in the decade, the Supreme Court in *Appalachian Coals* accepted the idea that the exigencies of the Depression in the early 1930s could shield an agreement of rival coal producers to set prices and otherwise cope with "overproduction". In approaching the Court in *Socony*, Donovan hoped the argument that had succeeded only a few years before in *Appalachian Coals* would work again in *Socony*, at least to shield the firm from criminal liability. Professor Crane brilliantly dissects the *Socony* majority's contorted efforts to explain away its earlier decision in *Appalachian Coals* and skillfully juxtaposes the reasoning in *Appalachian Coals* and *Socony* to highlight the jarring shift in policy that the Court accomplished by using a per se ban (backed by criminal sanctions) to condemn the challenged collaboration by the defendant petroleum companies and a number of their employees. Coverage of Donovan's role in these events would have provided an intriguing glimpse of the human dimension.

Future researchers also would welcome more extensive footnoting in Professor Crane's essay. The *Socony* chapter shows that Professor Crane collected a great deal of first-rate material. Sparse footnoting is visually soothing to many readers, yet future researchers will write better histories by consulting the resources Professor Crane found. For example, researchers may want to read the speech by H.T. Ashton, a *Socony-Vacuum* manager, that introduced the "dancing partner" metaphor which would figure prominently in the case or to see the transcript displaying W.P. Crawford's flamboyant advocacy for the government during the trial or to find the place in Justice William Douglas's papers where the author of *Socony* sought comments from Justice Hugo Black about the portion of the draft of the Supreme Court opinion dealing with the defendant's objections to some of Crawford's theatrics. Particularly for a volume that derives its strength substantially from the application of new or lesser-known information, a general editorial convention of having contributors err on the side of more citations is appropriate.

- Judging from their narratives and footnotes, relatively few contributors appear to have followed the path of Professors Carstensen and First in examining the papers of Supreme Court justices. For example, Professor Grimes' chapter on *Schwinn* and *Sylvania* would have benefited by draw-

22 288 U.S. 344 (1933).

23 Donovan's appearances in the two Supreme Court cases are noted in *Appalachian Coals*, 288 U.S. at 346 and *Socony-Vacuum*, 310 U.S. at 158. Donovan's contributions to the development of the U.S. intelligence services are recounted in ANTHONY CAVE BROWN, *WILD BILL DONOVAN: THE LAST HERO* (1982).

ing on the exceptional human dimension material in the papers of Justice Lewis Powell, who authored the majority opinion in *Sylvania*.²⁴ Among other points, the Powell papers reveal the Justice's arduous efforts to get four votes to grant certiorari (the Supreme Court nearly passed up the opportunity to take the case) and his conscious strategy to use *Sylvania* to reformulate vertical restraints law and back the Court away from expansive reliance on per se prohibitions generally. Powell's papers also confirm how deeply Donald Turner's amicus brief for the Motor Vehicle Manufacturers Association influenced Justice Powell's thinking about the proper disposition of *Sylvania*. Among other examples, the papers of Justices Blackmun and Marshall would have enriched Donald Baker's study of *Superior Court Trial Lawyers* and the Priest & Lewinsohn paper on *Aspen* by offering some insight into the Supreme Court's internal deliberations.

- Some authors employed interviews less heavily than perhaps they might have to sharpen the images in their narratives. In her chapter on *GE/Honeywell*, Professor Fox recreates the clash that took place between William J. Kolasky, a Deputy Assistant Attorney General in the DOJ's Antitrust Division, and Mario Monti, the EC Commissioner for Competition, at the Fall 2001 meetings in Paris of the Competition Committee of the Organization for Economic Development (OECD). The occasion was the inauguration of the OECD's Global Forum on Competition, an event attended by observers from over 40 developing country antitrust agencies in addition to representatives of the OECD's member countries. The opening ceremony was designed to feature gracious introductory comments by the OECD Secretary General, the Secretary General of the United Nations Committee on Trade and Development, Commissioner Monti, and Deputy Assistant Attorney General Kolasky.

Everyone followed the feel-good script except Kolasky, who spoke last. As Professor Fox notes, Kolasky pointedly criticized the EC's decision to block the *GE/Honeywell* deal. She recounts the episode well, and fuller reliance on interviews with those who watched these proceedings could have helped in the telling. Interviews with attendees could have captured the slack-jawed amazement of the delegates, especially the developing country officials who expected a genial affirmation of international cooperation and witnessed a smash-up instead. Attendees could have reconstructed the scene as delegates and journalists poured from the meeting room and rushed to a press conference. The news event had been set up to celebrate the Global Forum, but reporters instead besieged Monti with questions about Kolasky's comments. Professor Fox also might have mentioned how speeches by other

24 See, e.g., Andrew I. Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, 17 *ANTITRUST* (Fall 2002), at 8 (using the Lewis-Powell papers to discuss the Supreme Court's review of *Sylvania*).

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officials at the Directorate-General for Competition (DG Comp) on *GE/Honeywell*, when responding to Kolasky, adopted the habit of pointing out in a footnote that he had acted on behalf of one of the parties in the EC proceeding on the merger before joining the DOJ. Interviews also would have revealed the surprise that DG Comp officials experienced in the first half of 2001 when they were lobbied by individuals who only recently had left top management positions at the DOJ and the Federal Trade Commission (FTC) and now were appearing on behalf of the merging parties.

Interviews also may have enriched the Klevorick & Sykes analysis of *Empagran*. Their chapter uses the case as an excellent point of departure to examine the choices that an antitrust system faces in deciding how best to achieve optimal deterrence. The essay contains less of what Professors Fox and Crane call the human dimension than any other essay in the volume. This may have been unavoidable, as *Empagran* is the most recent of the cases and the authors were not participants who could offer first-person observations. Nor could the authors obtain sources such as the papers of Supreme Court justices or internal government records concerning the decision of the U.S. Solicitor General and a number of foreign governments to file amicus briefs opposing the efforts of the foreign plaintiffs to prosecute their treble damage actions in the United States. Interviews might have enabled the authors to add some detail about parties and the amici, as well as insights into how the advocates shaped their litigation positions. The essay omits an assessment (even based on speculation) about why the public competition agencies and their governments closed ranks to oppose the plaintiffs and decided that the deterrent effect of greater detection provided by amnesty programs outweighed the deterrent effect of greater exposure to damages for violators.

Some of the hardest questions of methodology arise in the three engaging, first-person narratives in *Antitrust Stories*: Donald Baker's account of *Superior Court Trial Lawyers*, the Jonathan Baker & Robert Pitofsky paper on *Staples*, and the Melamed & Rubinfeld chapter on *Microsoft*. In theory, insiders are ideally situated to unveil the human dimension. Among other things, they have seen the internal deliberations that shaped their client's position, and they can provide otherwise unobservable detail about the presentation of a case. Subject to constraints on revealing client confidences or, in the case of government officials, disclosing non-public information, insiders can provide uniquely informative observations. And sometimes they do. For example, Donald Baker reveals how disagreements among the *Superior Court Trial Lawyers* defendants about how to argue the appeal to the Supreme Court, and disputes between Baker and his co-counsel about litigation strategy, yielded clumsy compromises that undermined

their presentation of the defense.²⁵ Baker's revealing treatment of these tensions suggests a warranty that all first-person narrators ought to give their readers: a commitment to tell what the insider knows of the good and the bad, alike.

In practice, first-person narrators may not be entirely reliable scribes. The sirens of personal reputation constantly beckon first-person storytellers to exaggerate their accomplishments, diminish the contributions of others (especially perceived rivals against whom readers might measure the narrator), and omit information that would cloud a preferred memory of events. Only the fairest-minded and ruthlessly disciplined first-person narrators can resist the temptation completely. To account for distortions that can arise from conscious and unconscious filtering, conference organizers and book editors often pair first-person narrators with discussants who either are neutral observers or advocates for the narrators' adversaries.

The Melamed & Rubinfeld essay on the DOJ's monopolization lawsuit against Microsoft is an illustration of a first-person narration that foregoes opportunities to discuss issues that would reveal important human dimensions of the case but might be awkward to address. The two former DOJ officials played major roles in the *Microsoft* case, and the plaintiffs' success in attaining a substantial degree of success in this difficult and path-breaking endeavor owes much to their contributions. Their analysis of the doctrinal features and policy implications of the litigation is informative and thoughtful, especially in their well-considered efforts to recall the commercial and policy setting in which the government plaintiffs initiated the case. Beyond a few details about the main figures in the litigation (e.g., the leaders of the parties' trial teams and the district judge were not known to be extensive users of personal computers)²⁶, the authors provide little of the human dimension that Professors Fox and Crane asked their authors to explore.

No human dimension ingredient in *United States v. Microsoft* was more intriguing than the unraveling of the trial judge, Thomas Penfield Jackson. During the

25 Donald I. Baker, *The Superior Court Trial Lawyers Case - A Battle on the Frontier Between Politics and Antitrust*, in *ANTITRUST STORIES* 257, 279-80 (E. Fox & D. Crane eds., 2007).

26 A. Douglas Melamed & Daniel L. Rubinfeld, *U.S. v. Microsoft: Lessons Learned and Issues Raised*, in *ANTITRUST STORIES* 287, 296 (E. Fox & D. Crane eds., 2007). Melamed & Rubinfeld's sparse introduction of the dramatis personae stands in contrast to the sketches that *Antitrust Stories* contributors such as Stephen Calkins and Donald Baker provide for the litigators in their chapters. The line up of attorneys and economists in the *Microsoft* litigation presents ironies that Melamed and Rubinfeld could have touched on. In the 1970s, David Boies, the DOJ's chief trial attorney, and Franklin Fisher, the DOJ's principal economic expert, previously had acted for IBM in helping fend off the DOJ lawsuit charging illegal monopolization of the computer industry. In the 1970s, Richard Schmalensee, Microsoft's main economic expert, had served as an expert for the U.S. Federal Trade Commission in its shared monopoly case against the leading U.S. producers of breakfast cereal. Beyond these role changes, the authors also might have noted how John Warden, Microsoft's lead trial counsel, had achieved great prominence as an antitrust litigator in the late 1970s by helping Eastman Kodak achieve a nearly complete reversal of a significant adverse judgment in the landmark monopolization case of *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

trial, Judge Jackson gave private interviews to journalists on the condition that the writers could report the conversations only after the judge issued his decision on remedies. The first story based on the interviews appeared in the *Wall Street Journal* the day after Jackson released his remedy decision. The *Journal's* story recited, as many subsequent reports would do, the judge's memorably unfavorable views of the defendant and its top officials.²⁷ One writer later quoted Jackson as likening Microsoft to a gang of murderous drug dealers whose trial Jackson had overseen.²⁸ The U.S. Court of Appeals for the DC Circuit concluded that the animus in Jackson's remarks required his removal from the case. To the relief of the government plaintiffs, the court did not require a re-trial.²⁹

Nothing about Judge Jackson's indiscretion, and the grave hazard his behavior posed for the case, appears in the Melamed & Rubinfeld essay. One can imagine the dismay and swings of emotion within the government's case team on the morning they learned of Jackson's reckless behavior. Only one day before, the plaintiffs had won exactly the relief they wanted: a breakup of Microsoft into two companies. The authors declined to recreate the sensation of seeing an astonishing victory tarnished—perhaps, endangered—by an unimaginable lapse by the trial judge.

There are other noteworthy, but less dramatic, instances in which the *Microsoft* chapter does not explore the human dimension that the editors sought to showcase in *Antitrust Stories*. Here is a short list of what the *Microsoft* narrators might have discussed from their first-person perspective.

- Running a case with co-counsel from another law firm or another government agency is no easy matter under the best of circumstances. The state and federal government plaintiffs publicly depicted their cooperation in *Microsoft* as amicable and useful in accomplishing results that neither could have attained alone. Privately, to journalists and academics who followed the case, some state officials said the DOJ would not have sued Microsoft without prodding by the states, that the states were the “backbone” and the “conscience” of Joel Klein, the Assistant Attorney General for Antitrust. These remarks often made their way to the Antitrust Division trial team. Adopting the approach that Donald Baker took in discussing relations among the advocates for the defendants in *Superior Court Trial Lawyers*, the authors might have given their assessment of the contributions of their litigation partners to the prosecution of Microsoft and how the relationship between the state and federal prosecutors affected the presentation of the case.

27 John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue*, WALL ST. J., June 8, 2000, at A8 10.

28 KEN AULETTA, *WORLD WAR 3.0* 368-69 (2001).

29 The future Chief Justice of the United States Supreme Court (John Roberts) appeared for the United States to make the argument to the court of appeals that Jackson's behavior did not require a new trial.

- At Judge Jackson’s request, Judge Richard Posner mediated an attempt to reach a settlement between the parties. The effort failed, and Judge Posner attributed the outcome to the intransigence of the state government plaintiffs.³⁰ Do the authors share Judge Posner’s view that the states overreached? Was the DOJ otherwise ready to accept a settlement, or did the DOJ team hope the settlement talks would collapse to pave the way for a divestiture decree that they expected Judge Jackson to issue?
- Judge Jackson held a brief hearing on the government plaintiffs’ remedies proposal, which included a breakup of Microsoft. Judge Jackson closed the hearing by saying he contemplated no further proceedings on remedies. The court of appeals later cited Judge Jackson’s refusal to conduct fuller proceedings on remedies as a basis for remanding the case.³¹ At the moment Judge Jackson closed the remedy proceedings, counsel for the plaintiffs raised no objection, even though they must have sensed the judge was taking a big risk by abruptly ending deliberations on so crucial an aspect of the case. What thoughts swept across the plaintiffs’ table in the instant it became clear that the judge likely had guaranteed a remand on the remedy?

The authors might respond to these suggestions by saying these topics fall outside the intended scope of their essay, which seeks “to explain why we believe the case was indeed a significant antitrust case that has important implications for antitrust enforcement in the 21st Century.”³² They accomplish their stated aim convincingly, and they correctly could add that the reader can find discussions of matters such as the Jackson’s implosion elsewhere. Yet the foregone topics deal intimately with the *Microsoft* case’s human dimension, which is an important focus of *Antitrust Stories*. As the *Microsoft* chapter indicates, readers also can turn elsewhere to find the authors’ previous excellent treatments of the doctrinal and policy elements of the case.³³ What they cannot find in other work (by the authors and by others), and what is largely missing here, is the authors’ first-person perspective on the human dimensions of litigation strategy and judging that imbued the case.

WHAT THEY CANNOT FIND IN OTHER WORK, AND WHAT IS LARGELY MISSING HERE, IS THE AUTHORS’ FIRST-PERSON PERSPECTIVE ON THE HUMAN DIMENSIONS OF LITIGATION STRATEGY AND JUDGING THAT IMBUED THE CASE.

³⁰ AULETTA, *supra* note 28, at 360-61.

³¹ *United States v. Microsoft Co.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

³² Melamed & Rubinfeld, *U.S. v. Microsoft*, *supra* note 26, at 288.

³³ *Id.* at 289, n.2 & 302, n.10 (noting two of Professor Rubinfeld’s previous papers on *Microsoft*).

II. The Quality of Interpretation

A second way to assess *Antitrust Stories*, beyond asking how the authors prepared their case studies, is to examine the quality of their interpretation of events. Two focal points for possible improvements of this excellent volume come to mind. One deals with the rigor of the essays' exploration of alternative interpretations, and the second deals with the lack of an essay to connect and discuss themes that run across different essays.

A. THE ROLE OF THE STORYTELLER

An issue closely related to the choice and examination of research sources is to specify the role of the storyteller. Beyond illuminating the human dimension of the cases, what approach to the exposition and interpretation of events should the narrators take? The charge to write a "story" of a case is tantalizingly ambiguous. Is the author to prepare a "story" in the sense of a "chronicle" or record of events? Or does the narrator have license to tell a "tale" that might not stand up to an assault of the fact checkers?³⁴ Or maybe the story can be something in between—for example, a narrative that is accurate as far as it goes but must be read alongside other narratives to account for the tendency of individual observers to perceive events differently, by seeing varied packets of information associated with a specific event, or by attaching different interpretations to the same facts as a product of pre-existing biases.³⁵

A practical way of thinking about the issue of interpretation in *Antitrust Stories* is to ask how much effort the contributors should devote, in the course of identifying a preferred interpretation of events, to presenting competing views of the cases. Should the authors (especially the first-person narrators) at least alert readers (especially those new to the U.S. antitrust system) to contrary perspectives? Professors Fox and Crane appear to have given their contributors broad latitude to decide how to answer these questions about perspective and interpretation. The Introduction to *Antitrust Stories* observes:

“This is a volume of antitrust stories. They are stories of power or imagined power. The storytellers of Microsoft see real power in a corporate giant plundering Americans. The storyteller of the case of the striking lawyers sees real

34 These and related alternative meanings appear in many dictionaries. See, e.g., WEBSTER'S NEW AMERICAN DICTIONARY 988 (1957).

35 In other work, Professor Fox introduced the helpful metaphor of the movie *Rashoman* to refer to the tendency of different observers in an antitrust system to perceive specific events and information differently.

power on the side of the FTC Goliath attacking the legal service Davids who are trying to help the poor.

This volume attempts to bring a baker's dozen of great antitrust cases to life in the story-telling tradition. At least sometimes, the story is in the eyes and mind of the teller; for story-telling depends on perspective and in nearly all of the great cases there are the proverbial two sides to the story. We have assembled an exciting group of authors—historians, legal scholars, economists, scholarly litigators, and former antitrust officials; and we let them tell their stories.”³⁶

The editors note that in most of their cases there are “the proverbial two sides to the story,” but the style and content of the essays suggest that the contributors did not always feel compelled to tell one of the sides very completely. One would not expect or desire that the contributors suppress their personal preferences in writing these essays. Because the intended audience for *Antitrust Stories* consists substantially of those who will have little familiarity with the U.S. antitrust system, the contributors ought to alert the reader to the existence of important contrarian perspectives concerning the wisdom or significance of the case in antitrust history.

The Carstensen & First essay on *Topco* is a good illustration of an essay that achieves a proper degree of balance. Professors Carstensen and First show their sympathy for the DOJ's decision to prosecute and for the Supreme Court's resolution of the case, but they provide sufficient discussion in the text and citations to literature hostile to *Topco* to enable the reader who is new to the U.S. antitrust system to understand why the case has attracted severe criticism. The Carstensen & First essay informs the reader about “the proverbial two sides to the story” at no cost to their aim of stimulating a rethink of what they believe to be an unfairly belittled case.

Using the Carstensen/First chapter as a good practical model of implementation, readers ought to be able to expect three things from the essays in *Antitrust Stories*:

- 1) that contributors will research the case carefully enough to spot major issues;
- 2) that contributors will press themselves to alert the reader to competing points of view, if only by a footnote that identifies publications that take issue with the author's assumptions about facts or interpretations of events; and

³⁶ Fox & Crane, *Introduction*, *supra* note 3, at 1.

- 3) that contributors will avoid taking the easy way out of the problem by assuming away the best arguments or facts for the other side.

With disclosure of significant known objections or important alternative views, the narrator can freely cherish and advocate particular interpretations.

Not all of the essays do so well on this score. The main gap in *Antitrust Stories* is the shortage of cautions—either within individual essays or in a separate chapter of criticism—about the interpretations offered. The cautions are most urgently needed in the first-person narratives. Sometimes the continuing intensity of a commitment to a position originally defended in the case seems to deflect needed attention away alternative, plausible explanations for a result the narrator disfavors. Donald Baker’s treatment of *Superior Court Trial Lawyers* is perhaps an example of such a tendency. Baker’s highly informative essay adds much fresh material to the examination of the extensively-debated case, where the Supreme Court reaffirmed the utility of per se rules to condemn horizontal group boycotts. It is a delightful case study, but it has a serious blind spot.

Baker sets up the case as a misguided attempt by the Reagan Administration’s FTC appointees to punish attorneys (Baker’s clients) who engaged in a group boycott to induce the District of Columbia to pay higher fees for their services as counsel for indigent criminal defendants. By the end of the first paragraph, the reader knows whom to root for in this contest. Baker’s lead sentence reads: “If ever there were a high-visibility antitrust case that was much more about political principles than immediate practical consequences, *Superior Court Trial Lawyers* was it.”³⁷ Baker presents the lawyers’ boycott as political speech that properly sought to secure a level of fees that would give the indigent criminal defendants adequate representation, a right protected under the Sixth Amendment of the U.S. Constitution. The trial lawyers’ opponents “were some ultra free market Federal Trade Commission officials who welcomed the chance to bring a high-visibility price-fixing case against lawyers and probably had little sympathy for the respondents’ Sixth Amendment concerns.”³⁸

Baker depicts the FTC’s decision to intervene in what he calls “a highly local dispute”³⁹ as nearly spiteful. The prosecutors are “ultra free market” Reagan appointees who like to sue lawyers⁴⁰ and do not appear to care if poor criminal

37 Donald I. Baker, *The Superior Court Trial Lawyers Case - A Battle on the Frontier Between Politics and Antitrust*, in *ANTITRUST STORIES* 257 (E. Fox & D. Crane eds., 2007).

38 *Id.*

39 *Id.* at 258.

40 *Id.* at 265 (FTC Chairman James C. Miller III, an economist, “liked the idea of bringing some cases against lawyers.”).

defendants, contrary to constitutional guarantees, go to jail because they are inadequately represented. The essay does not cite secondary literature in which the responsible officials defend their decision to prosecute, nor does the author seem to have interviewed the other side to get their reaction to his assessment of their motives. Baker closes his narrative by quoting a newsletter article that appeared in 1990 just after the Supreme Court issued its *Trial Lawyers* decision. The article provides what Baker calls “a wonderfully irreverent epitaph on the case.”⁴¹ The newsletter observed:

“We think congratulations are in order to the entire [Federal Trade] Commission for succeeding where all others have failed: prosecuting antitrust charges against a respondent with so few financial resources that it qualified for *pro bono* representation. A true Reagan Administration landmark.”⁴²

The placement and content of this passage suggest that Baker sees the comment as not only “a wonderfully irreverent epitaph,” but also a precisely correct assessment of the FTC’s actions.

With the contest framed this way, even a reader convinced of the utility of a bright line ban on supplier collusion might think the FTC acted stupidly and, perhaps, vengefully. Is that all there is to it? Baker faintly indicates that something else was going on in the case, at least to the extent of saying that the government had some valid interest in preserving the integrity and clarity of the *per se* rule against collusion-related boycotts and in acknowledging that “[m]any saw the case as a potential example of the ‘hard cases make bad law’ principle—with the defense opening the door to economically-powerful bullies disrupting governments and markets.”⁴³ He also notes that Justice John Paul Stevens, whom he describes as “a liberal and a generally pro-antitrust jurist” who generally is sympathetic to the political speech arguments advanced by the defendants,⁴⁴ joined the 6-3 majority in favor of the FTC case and wrote the opinion for the Court, a move he interprets as a result of Stevens’s desire to avoid erosion of the *per se* rule against horizontal price-fixing.

⁴¹ *Id.* at 286.

⁴² *Id.* (quoting *FTC:Watch*, No. 314, at 11 (Jan. 29, 1990)).

⁴³ *Id.* at 258.

⁴⁴ *Id.* at 284-85.

The serious blind spot in Baker's essay can be summed up in two words that do not appear in his *Trial Lawyers* story: government procurement. In key respects, *Superior Court Trial Lawyers* was a case about public purchasing. The treatment of the group boycott issues had major implications for the government's acquisition of goods and services—activities that account for about 17 percent of gross domestic product in the United States. The District of Columbia was the buyer of the services at issue in *Trial Lawyers*, and a key group of the providers of those services boycotted the District government to induce it to pay more. Baker and his co-counsel argued in *Trial Lawyers* that the good reasons for which they sought higher hourly rates for their services—to vindicate the constitutional command that indigent criminal defendants receive adequate legal representation—dictated that their collective refusal to deal be evaluated under a rule of reason that would determine whether the government relented to the request for higher fees because of the persuasive effect of the defendants' political argument or because of their economic power.

To see the effect of an enforcement approach that would have acquiesced in the conduct at issue in *Trial Lawyers*, or to foresee the impact of a Supreme Court ruling that would have applied a rule of reason instead of a per se ban, consider the following scenarios:

- Boeing, Lockheed Martin, and Northrop Grumman announce they have agreed not to submit bids to develop a new fighter aircraft for the Department of Defense (DOD). The three firms, which are DOD's only suppliers of fighter aircraft, say they will participate in the procurement only if the government increases the amount it will pay for the new aircraft. The firms say that existing weapons procurement policy provides inadequate means for the firms to devise new technologies that are essential to the national defense. A representative of the group explains: "At stake are the security of our country and the survival of the young pilots whom we send into harm's way to protect our way of life."
- The Association of Highway and Bridge Construction Companies discloses that its member firms, which include all construction companies doing business in Minnesota, have agreed not to submit tenders for new highway or bridge construction and maintenance projects until the state government raises the fees it will pay for such services. The president of the association says: "Recent catastrophes resulting from the failure of infrastructure assets show that the State of Minnesota is endangering the lives of its citizens by not investing enough in bridges and highways. We cannot obtain adequate quality on the cheap. This is a public safety issue of the greatest urgency."

Would the element of what might be called political speech in these scenarios entitle the suppliers to a rule of reason analysis for their collective refusals to deal? Would arguments about public safety and the shortchanging of public works by government agencies permit the road pavers, bridge builders, and

countless other service providers which have been the target of hundreds of DOJ criminal antitrust bid-rigging cases to avoid grand juries and, at worst, face civil prosecution under a rule of reason?

Public procurement lawyers in the United States closely watched the prosecution and resolution of the *Trial Lawyers* case. The principle that Baker advanced for his clients would have implicated countless other procurement programs. Had the containment of the per se rule been breached, government contractors large and small may have felt emboldened to act together to withhold their products and services to induce purchasing authorities to pay more, and to justify their concerted refusals to deal as political speech necessary to draw attention to threats to the public's wellbeing. Would they have succeeded in pulling themselves within the protection from per se condemnation that a defendant's victory in *Trial Lawyers* might have provided? The answer to that question is uncertain. The existence and magnitude of the procurement issue are not. A telling of the *Trial Lawyers* story that teaches novices to see the case as "much more about political principles than practical consequences" should at least acknowledge an alternative interpretation in which the practical public procurement consequences were immense and supplied a context that the FTC and the Supreme Court could not overlook.

Another form of distortion comes from the tendency of first-person narration to enhance the significance of the storyteller's accomplishments by diminishing the accomplishments of other actors. One example appears in the Melamed & Rubinfeld essay on *Microsoft*. The government's largely successful prosecution of the *Microsoft* case was an extraordinary accomplishment. To magnify its significance, the authors say Microsoft was "the first government Section 2 case of any kind in nearly 20 years."⁴⁵ With a small amount of reflection, the authors would have seen this could not be so. The government's narrative in the *Microsoft* case portrayed Microsoft as seeking to disable Netscape only after Netscape had rebuffed Microsoft's suggestion that the two firms, in effect, divide up the browser market. Relying on a theory of attempted monopolization, the government argued that the bell of illegality rung the moment that Microsoft made its offer of accommodation to Netscape. The doctrinal foundation for this approach, cited on many occasions in the government's *Microsoft*

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⁴⁵ Melamed & Rubinfeld, *U.S. v. Microsoft*, *supra* note 26, at 302.

briefs, was *United States v. American Airlines, Inc.*,⁴⁶ a Section 2 attempted monopolization case filed by the Reagan Administration's DOJ well within the 20-year period mentioned in the Melamed & Rubinfeld paper. Take away *American Airlines*, and the government's narrative on facts and liability in *Microsoft* changes materially.

Another first-person narrative in *Antitrust Stories* that relies on a similar technique to magnify the authors' work is the Jonathan Baker & Robert Pitofsky essay on *Staples*. The case is a great success story in modern FTC litigation experience, and the decision remains an important foundation for Commission merger enforcement. The FTC's exceptional victory would not have come to pass without the contributions of Professors Baker and Pitofsky, and their essay does justice to this formative case. The Baker & Pitofsky retelling of *Staples* succeeds on several levels. It does a first-rate job of capturing both the development of the theory of the case and the qualitative and quantitative analytical techniques that the Commission used to prove its hypothesis of harm. One could question whether the authors overstate the contribution to the case of the econometric evidence on pricing effects. Although the econometrics informed the decision to prosecute, the authors note that the trial judge (Thomas Hogan) "later said he decided the case based on company documents rather than the econometrics."⁴⁷ In the interview to which the authors refer, Judge Hogan gave a somewhat more pointed assessment. He said "the econometric evidence that the government had . . . was not at all convincing to me."⁴⁸ This observation leads one to ask whether the econometric evidence that informs an agency's internal deliberations about whether to challenge a merger is likely to be "convincing at all" to the typical federal district court judge.

The Baker & Pitofsky narrative also is adept at weaving in colorful episodes from the gathering and presentation of evidence. Among other vignettes, the authors recount the field trip that Judge Hogan took at the suggestion of the FTC's trial staff to visit stores in the Washington, DC area to see for himself whether the relevant market consisted only of office supply superstores instead of a market that included other retail outlets and electronic networks that sold office supplies.⁴⁹ They also recreate the memorable courtroom scene in which counsel for Staples blundered in its cross-examination of David Painter, a Commission employee who testified on efficiency issues. The defense tried to unhinge Painter by mocking his professional credentials. Painter and the

46 743 F.2d 1114 (5th Cir. 1984).

47 Jonathan B. Baker & Robert Pitofsky, *A Turning Point in Merger Enforcement: Federal Trade Commission v. Staples*, in *ANTITRUST STORIES* 311, 321 (E. Fox & D. Crane eds., 2007).

48 AULETTA, *supra* note 28, at 221.

49 Baker & Pitofsky, *Turning Point*, *supra* note 47, at 325.

Commission clearly won the round. Judge Hogan’s opinion blocking the merger took pains to praise Painter and rely on his testimony.⁵⁰ The botched cross-examination of Painter underscores a human dimension theme that Professors Baker and Pitofsky might have developed more fully. The visible contempt that defense counsel sometimes showed toward the FTC helped galvanize the agency’s litigation team and spurred exceptional efforts that put the Commission in a position to prevail.

One might think there would be enough to champion in having been the architects of a major litigation victory and an influential legal precedent that attracts intense attention around the world. Not quite. In their *Staples* essay, Professors Baker and Pitofsky aspire to be the Men Who Saved Merger Policy. The authors set this up with a quick review of merger policy leading up to their arrival at the FTC in the mid 1990s. They observe that “[m]erger enforcement in the United States has been remarkably inconsistent over the years.”⁵¹ Federal agency merger enforcement was too intrusive in the 1960s and too passive in the 1980s when, “during the second term of the Reagan Administration, merger enforcement came close to disappearing.”⁵² Against this backdrop, the challenge to the Staples/Office Depot merger was “a major test of [the FTC’s] ability to restore effective and sensible merger enforcement—avoiding the undue activism of the 1960s and the extreme under-enforcement of the 1980s. . . .”⁵³

This is the Goldilocks interpretation of antitrust history. Where previous merger policy first was too hot and then was too cold, Professors Baker and Pitofsky conclude that the FTC from the mid to late 1990s got it just right. To showcase their attainment of the “effective and sensible” golden mean, the authors paint a gloomy picture of the federal antitrust agencies before the Baker & Pitofsky era at the FTC begins in 1995. In the run up to 1995, the two agencies had a “mediocre won-loss record” in merger cases.⁵⁴ The FTC’s weak performance engendered “two common perceptions”—that the agency would accept cheap, “half a loaf” settlements and, in the “rare instances” when it sued to block transactions, the superior forces of opposing counsel would scorch the Commission in the courtroom.⁵⁵ Enter Professors Baker and Pitofsky. The *Staples* case is not merely an important merger challenge. It is epochal. “The common perception,” the authors observe,

50 *Id.* at 322-23.

51 *Id.* at 315.

52 *Id.*

53 *Id.* at 315-16.

54 *Id.* at 318.

55 *Id.*

“was that the Staples/Office Depot challenge would be David versus Goliath.”⁵⁶ David slays the giant, sets the FTC and its merger program on a path to future success, and helps redeem the agency from a past in which “[f]or most of its history, a succession of independent scholars and other analysts have consistently found the FTC wanting in the performance of its duties.”⁵⁷

In an academic conference, this type of first-person narrative would face tough going from a discussant familiar with modern merger enforcement. Among other points, such an observer would ask for the numbers that document the “mediocre won-loss record.” (My review of the outcomes of FTC litigated challenges in the 1980s and 1990s does not bear this out. From 1981 until Robert Pitofsky’s tenure as FTC Chairman began in 1995, the FTC’s record in litigated merger cases initiated in the federal courts was 11 wins and 3 defeats; the FTC’s record in similar cases from the time of Robert Pitofsky’s arrival as FTC Chairman in 1995 until his departure in 2001 was 4 wins and 3 defeats.) The discussant also would wave off unsubstantiated intuitions about “common perceptions”. Nor could an author go unchallenged when characterizing all or part of the 1980s as a period of “extreme under-enforcement” unless the author identified at least some transactions that the federal agencies should have challenged in the 1980s and did not. Because the essay is part of a volume (like *Antitrust Stories*) intended for an audience consisting mainly of those new to the U.S. antitrust system, the discussant would insist on some explicit recognition that the scholarly commentary contains a significant alternative interpretation of modern antitrust history. The authors need not endorse the alternative; for their likely readers, they should at least identify it.⁵⁸

THE DISCUSSANT WOULD INSIST ON SOME EXPLICIT RECOGNITION THAT THE SCHOLARLY COMMENTARY CONTAINS A SIGNIFICANT ALTERNATIVE INTERPRETATION OF MODERN ANTITRUST HISTORY. THE AUTHORS NEED NOT ENDORSE THE ALTERNATIVE; FOR THEIR LIKELY READERS, THEY SHOULD AT LEAST IDENTIFY IT.

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56 *Id.* at 318-19.

57 *Id.* at 330.

58 The most important alternative interpretation appears in Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105 (2002). In Leary’s interpretation, federal merger enforcement across the 1980s and 1990s features significant stability and incremental adjustment rather than the inconsistency and policy swings that provide the precursor for the “just right” era that begins in the mid 1990s in the Baker & Pitofsky narrative. Professors Baker and Pitofsky cite Leary’s paper in a footnote (see Baker & Pitofsky, *Turning Point*, *supra* note 47, at 315-16 & n.10), but they do not mention his critique of the assumptions on which they build their portrayal of merger policy before *Staples*.

B. AN INTERPRETATIVE ESSAY: SYNTHESIZING THE ESSAYS

Antitrust Stories would be a still more impressive volume with the addition of a critical essay that surveyed the thirteen case studies. Such an essay could have improved the book in at least two ways. The first is to exert valuable discipline on the contributors in their treatment of specific topics and to press individual contributors to address difficult issues that they either sidestepped entirely or treated superficially. The second is to identify common themes that connect the essays.

To some degree, the Fox & Crane Introduction serves this purpose by drawing some connections between the individual essays. For the most part, the Introduction is descriptive. It is difficult for the editors to serve as critics. One cannot easily expect editors to recruit contributors—especially contributors of the stature of the *Antitrust Stories* essayists—and then write an essay that criticizes their work.

The Fox & Crane Introduction does not raise questions about the contributions to the volume. In some places the Introduction is inexplicably careless, as when it amplifies, without qualification, the most debatable interpretations of the contributors to *Antitrust Stories*. To the editors, Donald Baker's essay on *Superior Court Trial Lawyers* "shows that the FTC's action against a small, competitively insignificant group of criminal defense lawyers grew out of a conservative agency's desire to turn antitrust enforcement away from business interests and toward a traditionally left-leaning constituency."⁵⁹ The defendants are said to have "reason to understand the antitrust enterprise as a nakedly ideological assertion of political power."⁶⁰ Like Baker, the authors do not mention the public procurement implications of the case.

To preview the Jonathan Baker and Robert Pitofsky paper on *Staples*, the editors repeat and accentuate the state of enforcement malaise that Professors Baker and Pitofsky say they inherited on arriving at the FTC in 1995. Professors Fox and Crane write:

"Beginning in the 1980s, we entered a period of calm on the merger front. This was particularly true at the Federal Trade Commission, which was seen as a sleepy agency. Then along came the appointment of Bob Pitofsky as Chair of the FTC, the appointment of Jon Baker as Director of the FTC's Bureau of Economics, and the announcement that Office Depot and Staples, [...], planned to merge."⁶¹

⁵⁹ Fox & Crane, *Introduction*, *supra* note 3, at 4.

⁶⁰ *Id.*

⁶¹ *Id.*

If there was any sleepiness among the FTC's merger units in the 1980s, it was probably because the agency's attorneys and economists were fatigued from spending so much time litigating merger cases, often at concentration thresholds that were more ambitious than the perimeter that the Pitofsky Commission chose to police.⁶² In the Fox & Crane summary of the Baker & Pitofsky narrative, one casualty is the Chairmanship of Janet Steiger. In the Introduction, the story of FTC merger policy jumps from the 1980s directly to the Baker & Pitofsky era. Janet Steiger's chairmanship, a period in which the FTC achieved several noteworthy litigation victories in merger cases,⁶³ vanishes.

A standalone critical essay would do more than challenge specific propositions in the essays. It could derive overarching themes from the individual essays. Consider the application of antitrust policy to the petroleum industry. As Professor May's essay points out, the *Standard Oil* case led to one of the most important divestitures in the history of U.S. monopolization litigation. Professor Crane discusses how the DOJ in *Socony* punished some of the prominent successor companies to Standard Oil for combining with each other and with other firms to stabilize gasoline prices. Professor Crane concludes that "Socony's conviction did not bring long-term harm to the company"⁶⁴ and notes that in 1999 Exxon merged with Mobil to create Exxon Mobil Corporation. "In January of 2007," he writes, "Exxon Mobil announced a record profit for any U.S. company—\$39.5 billion on revenue of \$377.6 billion in 2006, or more than \$75,000 for every minute in the year. Harold Ickes and Thurman Arnold both rolled over in their graves."⁶⁵

Under whose chairmanship did the FTC permit Exxon to merge with Mobil, albeit with significant divestitures, and create the firm whose earnings Professor Crane suspects set Harold Ickes and Thurman Arnold spinning? That would be the chairmanship of Robert Pitofsky. To continue the thread of the May and Crane essays, the chapter on *Staples* could have said something about the petroleum

62 A sampling of relevant FTC cases in this period include *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381 (7th Cir. 1986); *FTC v. PPG Indus.*, 798 F.2d 1500 (D.C. Cir. 1986); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984). To these one can add the FTC's lawsuit in 1981 to block Mobil from purchasing Marathon, its action in 1982 to prevent Gulf from acquiring Cities Service, and its filing of a suit in 1981 to prevent LTV from buying Grumman. The highest level of post-merger concentration presented in any of these cases occurred in PPG, which would have reduced the number of market participants from four to three. All of the other transactions would have left at least five participants in the relevant market. None of the merger cases that the FTC litigated under Pitofsky in the 1990s would have resulted in more than two surviving firms.

63 These include *FTC v. Alliant Techsystems Inc.*, 808 F. Supp. 9 (D.D.C. 1992); and *FTC v. Imo Inc.*, 1992-2 Trade Cas. (CCH) ¶ 69,943 (D.D.C. 1992).

64 Daniel Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in *ANTITRUST STORIES* 91, 118 (E. Fox & D. Crane eds., 2007).

65 *Id.* at 118.

industry mergers of the 1990s (transactions that combined a number of the successors of the original Standard Oil trust, including defendants in *Socony*) and could have discussed why deals that were thought to be impossible on any terms in the 1980s made their way through the Commission with modifications in the 1990s. ▼