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## Antitrust (Over-?) Confidence

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# ***RESPONSE TO THE ANTITRUST MARATHON***

## **Antitrust (Over-?) Confidence**

By Thomas A. Lambert\* & Joshua D. Wright\*\*

### **I. Introduction**

On October 5, 2007, a group of antitrust scholars convened on Chicago's Near North Side to discuss monopolization law.<sup>1</sup> In the course of their freewheeling but fascinating conversation, a number of broad themes emerged. Those themes can best be understood in contrast to a body of antitrust scholarship that was born eight miles to the south, at the University of Chicago. Most notably, the North Side discussants demonstrate a hearty confidence in the antitrust enterprise – a confidence that is not shared by Chicago School scholars, who generally advocate a more modest antitrust. In particular, the North Side discussants (for the most part) contemplate a “big” antitrust that would place equal emphasis on Sections 1 and 2 of the Sherman Act and would expand private enforcement of Section 2. As scholars who are more sympathetic to Chicago School views, we are somewhat skeptical.

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<sup>1</sup> See *Editor's Note*, 20 LOY. CONSUMER L. REV. 114, 114 (2008).

The Institute for Consumer Antitrust Studies at Loyola University Chicago School of Law and the Competition Law Forum of the British Institute of International and Comparative Law sponsored “The Antitrust Marathon,” a half-day roundtable discussion on monopolization law hosted by Loyola. The “Marathon” will continue April 11, 2008 in London.

## II. A “Big” Antitrust

An overarching theme of the North Siders’ discussion is that the antitrust enterprise should be more ambitious. Thus, Professors Stucke<sup>2</sup>, Carstensen<sup>3</sup>, Davidson<sup>4</sup>, and Waller<sup>5</sup> and Judge Cudahy<sup>6</sup> all invoke the historical context and legislative history of the Sherman Act to support more aggressive use of the antitrust laws to combat corporate power generally, regardless of its effect on consumer welfare. Professors Waller<sup>7</sup> and Carstensen<sup>8</sup> push this intuition a step further, contending that merely *being a monopolist* should render a company subject to antitrust intervention, regardless of whether the company engaged in conduct that could be deemed unreasonably exclusionary. Of course, to police the mere act of being a monopolist, antitrust tribunals would have to impose structural, rather than conduct, remedies. But that is not a problem for many of these discussants. At numerous points, the discussants express an optimistic view of structural remedies in monopolization cases.<sup>9</sup>

The muscular antitrust the North Siders envision would also expand antitrust’s objective beyond combating allocative inefficiency and thereby maximizing consumer welfare.<sup>10</sup> Professor Foer, for

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<sup>2</sup> Transcript, *The Antitrust Marathon: A Roundtable Discussion* (pt. 1), 20 LOY. CONSUMER L. REV. 115, 135 (2008) [hereinafter Transcript part 1].

<sup>3</sup> Transcript part 1, *supra* note 2, at 137.

<sup>4</sup> Transcript part 1, *supra* note 2, at 141-42.

<sup>5</sup> Transcript, *The Antitrust Marathon: A Roundtable Discussion* (pt. 2), 20 LOY. CONSUMER L. REV. 115, 159-60 (2008) [hereinafter Transcript part 2].

<sup>6</sup> Transcript part 2, *supra* note 5, at 166.

<sup>7</sup> Transcript part 2, *supra* note 5, at 159-60.

<sup>8</sup> Transcript, *The Antitrust Marathon: A Roundtable Discussion* (pt. 3), 20 LOY. CONSUMER L. REV. 115, 178-79 (2008) [Hereinafter Transcript part 3].

<sup>9</sup> Transcript part 1, *supra* note 2, at 137; Transcript part 3, *supra* note 8, at 178-80; Transcript, *The Antitrust Marathon: A Roundtable Discussion* (pt. 4), 20 LOY. CONSUMER L. REV. 115, 201, 04, 07, 13-14, 16 (2008) [hereinafter Transcript part 4]. In addition, Professors Foer (pp. 210-11) and Carstensen (pp. 213-14) suggest that regulators and courts might reshape the structure of markets by forcing dominant firms to subsidize incumbent or incipient rivals, and Professor Waller argues for market restructuring via mandatory licensing (or access) under a reinvigorated essential facilities doctrine (pp. 208).

<sup>10</sup> Moreover, this muscular antitrust would readily “make examples” of bad actors. Professor Carstensen, for example, recommends (tongue-in-cheek) that we “[h]ang Bill Gates” and “lop off a hand or two” (pp. 136), because “the occasional

example, suggests that a goal of antitrust should be macroeconomic growth, which requires innovation and flourishes in markets containing numerous competitors. (The upshot being that antitrust should ensure the existence of substantial numbers of competitors).<sup>11</sup> Professor Waller would give antitrust a political objective; unchecked corporate power, which he says is antitrust's chief concern, "is corrosive in a variety of political and economic ways."<sup>12</sup> Professor Fiebig argues that antitrust should account for externalities such as pollution<sup>13</sup>; after all, a firm that can externalize its costs will have unfair advantages over rivals that cannot do so. And Steve Shadowen contends that antitrust's ultimate goals should be those that the public, acting via juries, deem appropriate.<sup>14</sup> The common thread running through these remarks is that antitrust should not be narrowly focused on benefiting consumers by maximizing market output.

Chicago School thinkers – as well as many of those, such as Professor Herbert Hovenkamp and Justice Stephen Breyer, who would align themselves with the "New Harvard" School<sup>15</sup> – have rejected these hallmarks of big antitrust.

With respect to the role of history, Chicago (and New Harvard) theorists generally conclude that it should play little role in the interpretation and implementation of the antitrust laws.<sup>16</sup> The fact is, scholars who have studied the Sherman Act's legislative history have long disagreed on the enacting Congress's intent.<sup>17</sup> For most

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execution of the monopolist may be good" for preserving salutary market dynamics (pp. 137). While these remarks were obviously hyperbolic (and presumably assume that those made examples have been proven guilty), they call to mind Robert Bork's observation about the bad old days, when antitrust was "in the good old American tradition of the sheriff of a frontier town: he did not sift evidence, distinguish between suspects, and solve crimes, but merely walked down main street and every so often pistol-whipped a few people." ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 6 (1993).

<sup>11</sup> Transcript part 2, *supra* note 5, at 156-57.

<sup>12</sup> Transcript part 2, *supra* note 5, at 159.

<sup>13</sup> Transcript part 2, *supra* note 5, at 162.

<sup>14</sup> Transcript part 2, *supra* note 5, at 164.

<sup>15</sup> See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 38 (2005) (describing a new Harvard School of antitrust analysis).

<sup>16</sup> See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 48-56 (3d ed. 2005).

<sup>17</sup> Professor Bork, for example, contends that the framers were concerned with allocative efficiency as measured by neoclassical economics. Robert Bork,

Chicago and New Harvard theorists, history is irrelevant. The sparse, vague statutory language that incorporates common law concepts (e.g., “restraint of trade”) amounts to a delegation of authority to the courts to fashion a common law that is based on our evolving understanding of competition and is focused on maximizing output.<sup>18</sup>

Chicago and New Harvard scholars also reject the notion that merely being a monopolist should violate the antitrust laws and give rise to a remedy.<sup>19</sup> First, monopoly profits – the prize for becoming a monopolist – play a key role in economic development. Businesses innovate in order to produce economic returns in excess of their costs. Such supracompetitive profits eventually attract other competitors into the market, expanding output and driving down price to competitive levels. As Professor Hovenkamp has explained, “[t]he continual creation of monopoly, and its eventual correction by competitive entry, is part of a never-ending process that explains most of the technical achievements of modern industry in market economies.”<sup>20</sup> Thus, antitrust should not reflexively “shoot the winner.”

In addition, a rule that penalizes monopolists would be nearly impossible to implement effectively. Presumably, such a rule would exempt natural monopolists; otherwise, consumers would suffer because economies of scale would be sacrificed. But to identify natural monopolists, courts would have to determine whether multiple firms operating in the market could attain minimum efficient scale. This is extremely difficult for most economists and well beyond the competence of common law courts.<sup>21</sup> Thus, any doctrine of “no fault” monopolization would risk thwarting scale economies

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*Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). Others say Congress was concerned with fair business behavior, regardless of efficiency concerns. See Louis Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1976). Some say Congress was seeking to prevent wealth transfers from consumers to monopolistic or collusive producers. See Robert Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). Still others insist the Sherman Act was protectionist legislation intended to benefit small businesses. See George Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT’L REV. L. & ECON. 73 (1985).

<sup>18</sup> Hovenkamp, *supra* note 16, at 52-56.

<sup>19</sup> See *id.* at 275-76.

<sup>20</sup> *Id.* at 275.

<sup>21</sup> See *id.*

and thereby sacrificing consumer welfare. Moreover, given that merger pre-clearance laws already forbid mergers to monopoly, a no fault monopolization doctrine would apply only to firms that had developed by internal growth and would thus force courts to break up companies lacking obvious “fault lines.”<sup>22</sup>

That brings us to the next characteristic of the North Sider’s big antitrust – the affinity for structural remedies. Chicagoans and their New Harvard cousins do not share the North Siders’ optimism about such remedies. As a matter of fact (a fact some of the North Siders acknowledge<sup>23</sup>) most structural remedies that have been attempted have failed miserably.<sup>24</sup> That should not be surprising. Structural remedies require courts or regulators to determine – far from the action – how productive resources should be allocated so as to minimize the costs of production (*i.e.*, to maximize productive efficiencies). They also must keep market power-induced allocative inefficiencies at a minimum.<sup>25</sup> Nobel laureate F.A. Hayek predicted such centralized planning would fail because planners, absent price signals, simply do not possess the time- and place-specific information (and information-processing capacities) needed to

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<sup>22</sup> *Id.* at 276.

<sup>23</sup> Transcript part 3, *supra* note 8, at 191-92; Transcript part 4, *supra* note 9, at 200.

<sup>24</sup> See generally RICHARD A. EPSTEIN, *ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE* (2007).

<sup>25</sup> In his discussion of the structural remedy that broke up the Bell System, Richard Epstein emphasizes this problem of limited information:

The chief vice of the decree was that Judge Greene was confident that he knew the ideal structure of the industry—with the Regional Bell Operating Systems taking monopoly positions in the local exchange market, while competitive long line carriers facilitated calls between the various RBOCs. But the administrative costs of running this system proved astronomical, and [sic] did the distortions between carriers that did, and did not, fall under the consent decree. ... No one could have expected [Judge Greene] to understand the changes in technology that rendered his decree obsolete. But, even if he could not predict the direction of these developments, he should have been aware of the pace at which these developments would take place.

Richard A. Epstein, *Structural Remedies in Section 2 Cases*, remarks prepared for joint hearings by the Antitrust Division of the U.S. Dept. of Justice and the Fed. Trade Comm’n (Mar. 28, 2007) available at [http://www.usdoj.gov/atr/public/hearings/single\\_firm/docs/222291.htm](http://www.usdoj.gov/atr/public/hearings/single_firm/docs/222291.htm).

allocate resources effectively.<sup>26</sup> The failure of Eastern Europe's centrally planned economies seems to have proven him correct.<sup>27</sup>

Finally, Chicagoans reject the idea that antitrust law should pursue objectives other than ensuring competition so as to enhance consumer welfare.<sup>28</sup> Macroeconomic growth, the avoidance of political corruption, the elimination of externalities – these are all worthy policies. The same might be said for certain forms of redistribution and subsidization of favored businesses. But antitrust law, the contours of which are shaped by unelected, non-expert judges, and which largely is implemented by juries, is a remarkably blunt tool for pursuing such policies. A wiser course would be to limit antitrust to what it does well: protecting consumers from reduced output and higher prices occasioned by collusion, mergers to monopoly, and a few obviously anti-competitive unilateral practices. Refined social engineering should be addressed through more targeted legislation.

Thus, the Chicago School's antitrust modesty stands in sharp contrast to what is perhaps the broadest theme of the North Siders' discussion – the call for a big antitrust. Chicago (and perhaps New Harvard) thinking would also diverge from two more focused themes of the discussion.

### III. Equal Emphasis on Sections 1 and 2 of The Sherman Act

The first of these more focused themes is the suggestion that antitrust enforcers have mistakenly allocated resources toward cartel enforcement rather than monopolization under Section 2 of the Sherman Act. For example, Professor Waller observes that monopolization enforcement in the United States has “become the secondary stepchild to questions of conspiracy.”<sup>29</sup> Professor Waller goes on to argue that this less active state of monopolization enforcement in the United States, at least relative to cartel

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<sup>26</sup> F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

<sup>27</sup> See, e.g., ALAN GREENSPAN, *THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD* 123-41 (2007) (discussing how the failure of Eastern European economies demonstrates the intractable difficulties of centralized planning).

<sup>28</sup> See Bork, *supra* note 10, at 17-21.

<sup>29</sup> Transcript part 1, *supra* note 2, at 128.

enforcement, is inappropriate “as a matter of history and policy.”<sup>30</sup> Does monopolization enforcement suffer from an inadequate allocation of resources relative to cartel enforcement? If it does, are consumer outcomes helped or harmed by this state of affairs?

As a preliminary matter, it is not clear that modern monopolization enforcement is especially inactive. Federal Trade Commission Chairman Deborah Majoras has noted that one must go back to 1971-76 to find a period in which the Federal Trade Commission brought more cases involving dominant firm conduct.<sup>31</sup> Nonetheless, Professor Waller raises an interesting question: Why are modern antitrust enforcement resources allocated so heavily toward cartel enforcement rather than monopolization? The discussants appear uniformly to favor increased monopolization enforcement, despite the difficulties associated with identifying anticompetitive single-firm conduct and the related problem of false positives.

But the fear of false positives *should* be a primary concern when considering whether to expand the use of Section 2. While reasonable disagreement about the frequency of false positives and the magnitude of their social costs might generate divergent views on the appropriate scope of Section 2 enforcement, it should not be controversial that Section 2 enforcement should be responsive to our empirical knowledge of the competitive effects of single-firm conduct. Surprisingly, the North Siders never explicitly acknowledge that empirical evidence on single-firm conduct and its competitive effects should inform Section 2 enforcement policy. The prominence of empiricism at the heart of the Chicago School approach to antitrust analysis contrasts sharply with the North Siders’ relegation of empiricism to little or no role.

So what would an empirically informed Section 2 enforcement program look like? It would likely begin with the “error-cost framework,” which recognizes that socially optimal antitrust rules are those that minimize the expected social costs of false acquittals, false convictions, and administration. One virtue of the error-cost framework is that it allows antitrust rules to be informed by our collective empirical knowledge of the competitive effects of various practices. In addition, the error-cost framework accounts for the fact that the social costs of false convictions in the

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<sup>30</sup> Transcript part 1, *supra* note 2, at 129.

<sup>31</sup> Deborah P. Majoras, Chairman, Fed. Trade Comm’n., *Maintaining our Focus at the FTC: Recent Developments and Future Challenges in Protecting Competition and Consumers*, Keynote Address at the ABA Fall Forum (November 15, 2007), available at <http://ftc.gov/speeches/majoras/071115fall.pdf>.



antitrust context are likely to be significantly larger than the costs of false acquittals. As Judge Frank Easterbrook observed, while judicial errors that wrongly excuse an anticompetitive practice will eventually be undone by competitive forces, judicial errors that wrongly condemn a procompetitive practice are likely to have significant social costs, as that practice is condemned across the entire economy and the condemnation is not offset by market forces.<sup>32</sup> The error-cost approach thus combines the existing empirical evidence on single-firm conduct with Easterbrook's original insight regarding the expected asymmetry of error costs to design antitrust rules. It forces those advocating liability rules to take the reasonable step of confronting the available empirical evidence in order to establish a reasonable estimate of the likely effects of banning or permitting the conduct at issue.

The error-cost framework explains a number of well-established antitrust doctrines. For example, the error-cost approach justifies application of per se rules to naked horizontal price-fixing. That conduct almost always has pernicious effects on consumers, rendering it preferable to condemn the occasional example of benign price-fixing in order to prevent socially harmful false acquittals.<sup>33</sup> Another obvious case of the application of the error-cost framework is the law of predatory pricing. Here, the paradigm suggests that socially optimal antitrust rules should be somewhat underdeterrent. This is because both the theoretical and empirical literature on predatory pricing strongly suggest that the vast majority of discounting benefits consumers. This implies that the social costs associated with false positives are significant. Further, the judicial error rate is likely to be high. Courts likely will struggle to distinguish potentially anticompetitive discounts from their procompetitive counterparts. Finally, the costs of administering a rule that attempts to seriously evaluate whether a set of prices is

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<sup>32</sup> See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984) (discussing incommensurate harms occasioned by false positives and false negatives).

<sup>33</sup> Application of the error-cost framework has been used by a number of commentators to evaluate antitrust rules. See, e.g., David Evans & Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73 (2005); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001); Luke Froeb et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005).

predatory are high. Together, these observations suggest that predatory pricing ought to be governed by substantive antitrust rules that give defendants significant pricing discretion without fear of antitrust liability.<sup>34</sup>

It is instructive to briefly examine the current state of the empirical literature concerning vertical restraints and monopolization in order to assess the implications of the error-cost framework for Section 2. The empirical evidence, in combination with conventional insights about the costs of false positives and administration costs, strongly support the view that the discussants purport to challenge: that antitrust enforcement resources should be invested heavily in favor of cartel and merger enforcement relative to monopolization.

Two recent empirical surveys summarize the empirical literature and come to very similar conclusions about the likely competitive effects of various vertical contracts such as exclusive dealing, tying, resale price maintenance, exclusive territories, and loyalty discounts. Cooper et al., examine the competitive effects of various vertical restraints and conclude that “vertical restraints are likely to be benign or welfare-enhancing.”<sup>35</sup> Lafontaine and Slade reach a similar conclusion:

[T]he empirical evidence concerning the effects of vertical restraints on consumer wellbeing is surprisingly consistent. Specifically, it appears that when manufacturers choose to impose such restraints, not only do they make themselves better off, but they also typically allow consumers to benefit from higher quality products and better service provision. In contrast when restraints and contract limitations are imposed on manufacturers via government intervention, often in response to dealer pressure due to perceptions of uneven bargaining power between manufacturers and dealers, the effect is typically to reduce consumer welfare as prices increase and service levels fall. The evidence supports the conclusion that in these markets, manufacturers and consumer welfare are apt to be aligned,

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<sup>34</sup> Application of the error-cost approach is also consistent with *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), where the Supreme Court abandoned the per se rule against minimum resale price maintenance, which had become incoherent in the face of modern economic theory and empirical evidence suggesting that the practice was rarely anticompetitive.

<sup>35</sup> James Cooper et al., *Vertical Restrictions and Antitrust Policy: What About the Evidence?*, 1 COMPETITION POL’Y INT’L 45 (2005).

while interference in the market is accomplished at the expense of consumers (and of course manufacturers).<sup>36</sup>

In sum, if one takes the approach that optimal antitrust policy should economize both error and administration costs as well as display some sensitivity to the empirical evidence concerning likely competitive effects of a particular restraint, it should follow rather plainly that resources should be allocated toward those areas where enforcers can more confidently predict that intervention will help rather than harm consumers.

#### IV. More Private Enforcement of Section 2

Another theme of the North Siders' discussion is that the increased enforcement in the monopolization area ought to come not only from the public antitrust enforcers, but from private plaintiffs in particular. The discussants contend that private enforcement of Section 2 is especially important both because the government has not been particularly active in the monopolization area and because private enforcement is necessary for general deterrence.<sup>37</sup> There are, however, several reasons to doubt the virtues of private Section 2 enforcement.

First, as discussed above, it is not clear as an empirical matter that public enforcers have been unwilling to bring monopolization cases. Recent public monopolization cases include such high profile cases as *Microsoft*,<sup>38</sup> *Dentsply*,<sup>39</sup> and *Rambus*.<sup>40</sup>

Second, error-cost analysis suggests that focusing enforcement on cartel behavior and mergers to monopoly rather than monopolization makes sense from a consumer perspective. It is more likely in the cartel and merger context that the *average* enforcement action can confidently be said to increase welfare when error and administration costs are taken into account. The empirical case for

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<sup>36</sup> Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in HANDBOOK OF ANTITRUST ECONOMICS, X (Paola Buccirossi ed., 2006).

<sup>37</sup> Transcript part 4, *supra* note 9, at 199-200.

<sup>38</sup> *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>39</sup> *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005)

<sup>40</sup> *In Re Rambus, Inc.*, No. 9302, 2006 FTC LEXIS 60 (F.T.C. Aug. 2, 2006).

expansion of Section 2 enforcement, whether public or private, is very weak.

Third, the possibility that treble damages and follow-on suits from competitors would invite frivolous claims and deter efficient practices and aggressive competition has been a troublesome aspect of private enforcement.<sup>41</sup> A number of defenses can be made for private enforcement of antitrust actions in general, but for several reasons these defenses are especially vulnerable in the context of monopolization enforcement. As discussed, the argument that relatively inactive monopolization enforcement justifies additional private actions is weak because such an allocation of resources is consistent with public enforcement that economizes on social costs.<sup>42</sup> Further, the trebling of monopolization damages in private enforcement actions generally is not justified on deterrence grounds. While a damages multiplier may be justified to account for the slim likelihood of detecting and successfully prosecuting clandestine offenses such as conspiracy, most monopolistic practices are open and notorious. Trebling in monopolization cases is not likely to serve the purpose of general deterrence, but rather to deter efficient practices, suggesting that single damages are most the appropriate remedy in such cases.<sup>43</sup>

Fourth, one particular weakness of private enforcement in Section 2 cases is that juries are especially ill-equipped to make the types of complex determinations necessary to disentangle the issues when monopolization is alleged.<sup>44</sup> A recent example of a private monopolization action exemplifying these issues is *Conwood Co. v. United States Tobacco Co.*, where a jury deliberated for a total of

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<sup>41</sup> See, e.g., Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 563–67 (1991); William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICH. L. REV. 2151, 2162–65 (1990); William J. Baumol & Janusz Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 1 (1985); R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of Antitrust Laws*, 1 J. STRATEGIC MGMT. EDUC. 3 (2004).

<sup>42</sup> Accord Hovenkamp, *supra* note (3 or 4), at 60, 108–111.

<sup>43</sup> *Id.* at 66. See also RICHARD A. POSNER, ANTITRUST LAW 272 (2d ed. 2001). Dennis Carlton recently advocated a similar position.. Dennis Carlton, Antitrust Modernization Committee Commissioner, Commission Final Report, Separate Statement, 399–400 (“I favor a reduction in the multiple to single damages when the actions are overt (e.g., exclusive dealing), and an increase in the multiple when there are some parties affected by the act who are unable to sue (e.g., foreign consumers in an international price fixing case”).

<sup>44</sup> *Id.* at 61, 80.

four hours before issuing the then-largest private antitrust verdict in history. Despite evidence of tortious conduct from the defendant, the evidence of actual consumer harm in the case almost was entirely absent from the record.<sup>45</sup>

In sum, the case for expansion of private enforcement of Section 2 is weak – considerably weaker than the case for expanding private enforcement in other areas where actions are not overt or there are adversely affected parties that are unable to sue. The erroneous foundation of the argument that monopolization enforcement should be as vigorous as cartel enforcement, as well as the desired expansion of private enforcement under Section 2, both originate from the view that the average public or private monopolization enforcement action will increase consumer welfare. The empirical evidence in the context of the error-cost framework suggests otherwise. Similarly, as we have argued here, a quite probable outcome of the expansion of private enforcement, in particular, is the chilling of procompetitive conduct and reduced consumer welfare.

## V. Conclusion

Judge Harold Leventhal famously remarked that examining legislative history is a bit like looking across a crowded room in search of your friends – you are sure to find what you are looking for.<sup>46</sup> No doubt the same can be said of transcript analysis. Given that our task was to draft a critical analysis of the October 5 conversation, we saw much to criticize. But much of the conversation – the faces that did not immediately jump out at us, since we were looking for matters to criticize – comports with our own views, some of which are articulated here. In particular, a number of discussants recognize the danger of false positives in

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<sup>45</sup> *Conwood Co. v. United States Tobacco Co.*, 290 F. 3d 768 (6th Cir. 2002). See also Joshua D. Wright, *An Antitrust Analysis of Category Management: Conwood Co. v. United States Tobacco Co.*, 17 SUP. CT. ECON. REV. (forthcoming 2009), demonstrates that the defendant's conduct was not likely to harm competition and does not justify liability under traditional Section 2 standards; Hovenkamp, *supra* note 16, at 180 (describing *Conwood* as “deeply troublesome and offensive to antitrust policy”).

<sup>46</sup> Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (recounting Judge Leventhal's observation about legislative history).

regulating unilateral conduct,<sup>47</sup> the chilling effect they can have,<sup>48</sup> the tendency of monopolies to degenerate,<sup>49</sup> and the need to craft administrable rules for separating the pro-competitive wheat from the anti-competitive chaff.<sup>50</sup> Others emphasize the need for systematic empirical inquiry into the efficacy of remedies – what works and what does not work?<sup>51</sup> We applaud these insights and inquiries. Most of all, we applaud this sort of discussion in general. As Judge Easterbrook has observed, the “puzzle of exclusionary conduct” is a tough one, for much procompetitive conduct literally excludes, and efforts to stamp out the bad may unwittingly deter the good.<sup>52</sup> Conversations such as that which occurred in Chicago on October 5, 2007, and that which will occur in London in April 2008, surely help as we endeavor to solve the puzzle.

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<sup>47</sup> Transcript part 1, *supra* note 2, at 133-36.

<sup>48</sup> Transcript part 1, *supra* note 2, at 138-39; Transcript part 2, *supra* note 5, at 160-61.

<sup>49</sup> Transcript part 2, *supra* note 5, at 161.

<sup>50</sup> Transcript part 1, *supra* note 2, at 134-35, 139.

<sup>51</sup> Transcript part 4, *supra* note 9, at 209-210.

<sup>52</sup> Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345.