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I. MARK D. ANDERSON: A TEACHER'S TEACHER AND A SCHOLAR'S SCHOLAR

by Wendy Gerwick Couture*

After 38 years on the College of Law faculty, Professor Mark D. Anderson will be retiring from the University of Idaho College of Law at the end of the 2019-2020 academic year. Professor Anderson joined the faculty in 1982, after earning his A.B. from Macalester College, earning his J.D. from the University of Chicago Law School, and practicing antitrust and corporate law at a top firm in Minneapolis/St. Paul.

Through his teaching, Professor Anderson has influenced several generations of College of Law graduates, including several sets of parents and children. Indeed, his first-year Criminal Law course and upper-level Business Associations course are regarded as rites of passage at the College of Law, and alumni enjoy bonding over their shared experiences in the classroom of the "spookily smart" Professor Anderson. In recognition of Professor Anderson's status as a "teacher's teacher," he has been awarded both the Peter E. Heiser Award for Excellence in Teaching and the Alumni Award for Excellence nine times apiece.

Professor Anderson's students are especially appreciative of his deeply thoughtful approach to the course material. For example, he developed the following metaphor for his Criminal Law students: "In this course, imagine that you are building an onion from the inside out. Start with the core, and then add layers of complexity. By the end of the semester, you should be able to slice through the material and see how the different segments relate to each other." Likewise, in his Business Associations course, Professor Anderson wove a simple theme through the complex material: "Fundamentally, this course is about the allocation of power and money and the interrelationship between them, such as the power to force a buy-out or a liquidation."

Professor Anderson is also an impactful scholar, primarily in the area of antitrust law.¹ Professor Anderson's early work came at a time of real change in antitrust law, after the tectonic shifts of the late 1970s, which he experienced as a young antitrust attorney. He recalls writing his first article, *Vertical Agreements*

* James E. Wilson Distinguished Professor of Law at the University of Idaho College of Law. The author would like to acknowledge the contributions of Max Huffman, Professor of Law at Indiana University Robert H. McKinney School of Law, to this essay, including unquoted contextualization of Professor Anderson's scholarly work.

¹ See, e.g., Mark Anderson, *The Enigma of the Single Entity*, 16 U. PA. J. BUS. L. 497 (2014); Mark D. Anderson, *The False Duality of Efficiency and Predation in the Analysis of Monopolizing Conduct*, 33 SANTA CLARA L. REV. 1 (1993); Mark D. Anderson, *Federalism and Conspiracy: Is Governmentally Compelled Conduct Per Se Lawful Under § 1 of the Sherman Act*, 40 OKLA. L. REV. 209 (1987); Mark D. Anderson, *Vertical Agreements Under Section 1 of the Sherman Act: Results in Search of Reasons*, 37 UNIV. FLA. L. REV. 904 (1985).

Under Section 1 of the Sherman Act: Results in Search of Reasons,² by hand on yellow legal pads. In that piece, Professor Anderson identified the analytical flaws in the Supreme Court's analysis of the existence of an "agreement" under Section 1 of the Sherman Act and argued for the adoption of a "dependence test" for the existence of concerted action; and he is planning to write a follow-up in light of subsequent developments in the law. In *The False Duality of Efficiency and Predation in the Analysis of Monopolizing Conduct*,³ Professor Anderson analyzed the conduct element of the monopolization offense under Section 2 of the Sherman Act, which he characterizes as "the hardest question that he took on as a scholar." In that piece, he demonstrated the failure of the Supreme Court's efficiency-predation dichotomy by identifying competitive conduct that is neither predatory nor efficient and argued that the conduct element should legalize monopolies that engage in ordinary competitive acts, even if those acts are not efficient. Professor Anderson has also made scholarly contributions in the area of business associations. For example, in *Entity Exit: Rights, Remedies, and Bounded Rationality*,⁴ Professor Anderson explained how the obligation of an entity owner to remain part of the entity and the strength of the remedy upon an owner's attempt to exit work together to impact the fragility of the entity; and he made the breakthrough insight that, for some entity forms, the strong remedy operates as a form of specific performance that does not require going to court.

Professor Anderson has also had a fruitful scholarly collaboration with fellow antitrust law expert Max Huffman, Professor of Law at Indiana University Robert H. McKinney School of Law. To date, they have co-authored two articles in print and a third nearing submission—not counting their collaborations that are still in desk drawers. Together, Professors Anderson and Huffman have analyzed the potential for sharing economy firms, like Uber and Airbnb, to be treated as hub-and-spoke cartels under antitrust law⁵ and, using antitrust law to demonstrate a trans-substantive approach, argued that the stringency of notice pleading standards should depend on both the cost and likelihood of false positive errors.⁶

Professor Huffman describes Professor Anderson as "a scholar's scholar, with a deeply reflective analytical process that starts with 'what would happen if that were the law, and is that an acceptable outcome, and if not, what should change?'" Professor Anderson analogizes their collaborative process to "the Vulcan mind meld because you can't look at any page and say 'that page is mine' or 'that page is Max's'—every idea and every word is the product of joint thinking." Indeed,

² Mark D. Anderson, *Vertical Agreements Under Section 1 of the Sherman Act: Results in Search of Reasons*, 37 UNIV. FLA. L. REV. 904 (1985).

³ Mark D. Anderson, *The False Duality of Efficiency and Predation in the Analysis of Monopolizing Conduct*, 33 SANTA CLARA L. REV. 1 (1993)

⁴ Mark Anderson, *Entity Exit: Rights, Remedies, and Bounded Rationality*, 17 HOUS. BUS. & TAX L.J. 1 (2016).

⁵ Mark Anderson & Max Huffman, *The Sharing Economy Meets the Sherman Act*, 2017 COLUM. BUS. L. REV. 859.

⁶ Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1 (2010).

their phone conversations are so lengthy that Professor Anderson purchased a headset, which only increased the impression that they were in each other's heads. Professor Huffman agrees: "Mark's and my approach to the law of antitrust often starts from very different directions and converges as we progress on a project. Our joint work has married his analytical depth with my varying flirtations with new theories, such as behavioral antitrust and procedural law."

In addition, Professor Anderson has served as a mentor for innumerable students, who appreciate his interest in them, not only as future lawyers, but also as people. There is often a line of students down the hallway during his office hours, as students seek help with their studies, ideas about their career paths, and overall life advice. Several students have expressed that they "wouldn't have made it through law school without Professor Anderson." And the appreciation is mutual—what Professor Anderson will miss most about being a full-time faculty member is his students, in particular their "enthusiasm, questions, and desire to learn."

Finally, Professor Anderson is a valued and respected colleague because he demonstrates genuine interest and curiosity in everyone. Indeed, Professor Anderson says that he "has learned more from those who are dissimilar to me than those who are similar." On a personal note, Professor Anderson has also mentored numerous junior faculty, myself included. For example, after I was too intimidated to speak up at my first faculty meeting, he set me straight: "You are a member of this faculty, and you have a duty to contribute your insights and opinions." After I stumbled while teaching a class, Professor Anderson shared the following simultaneously encouraging and humbling perspective: "Your worst day teaching isn't as bad as you think it is, but your best day isn't as good as you think it is either." Most precious of all have been the lengthy phone conversations probing various business entity statutes, as we simultaneously flipped through the code, asking each other: "But what if X? And surely the answer can't be Y?"

As he enters retirement, Professor Anderson leaves behind a legacy at the College of Law, not only as a teacher's teacher and a scholar's scholar, but also as a mentor and a friend.

Additional Comments from Faculty, Staff & Students

Patrick Fackrell '16

Dear Professor Anderson:

Congratulations!! Your classes were like no other. From Criminal Law to Business Associations, you taught me how to approach learning the law and solving legal problems. You also taught me much more. Your class presentations invariably demonstrated preparation and the value of effective delivery, virtues that are at the very core of a lawyer's craft. Your time outside class in particular, meeting to discuss practice exams demonstrated the necessity of an effective mentor. I sincerely thank you for your dedication.

Carolyn Todd, Staff

Mark: When I started working at the circ desk and was working with old exams, I discovered Mark's CrimLaw exams, peopled by Able, Baker, and Charlie (and multiple other folks). Those guys got into so much trouble - stealing cars, blowing up each other, illegal fishing, you name it. They never learned their lesson

but they make for a great read. I also fondly remember meeting him at the snack machine back when we could both eat Snickers bars in the afternoon (well, I ate Snickers bars).