BOOK REVIEW
ON THE USES OF ECONOMICS: A REVIEW OF THE ANTITRUST TREATISES


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When Judge Herbert Goodrich, former dean of the University of Pennsylvania Law School, was Director of the American Law Institute in the late 1950s, he asked me whether the Institute should embark upon a Restatement of Antitrust Law or a Model Antitrust Law. I responded with an unhesitating negative. The subject was political, I said, and the recommendations of the Institute would reflect largely the biases of the reportorial staff, and even more certainly the inherent conservatism of the elite of the bench and bar. The Institute would do as well to embark upon a Restatement of Constitutional Law or Due Process. The antitrust laws have a constitutional scope and import,¹ and as in constitutional interpretation it is of the essence that interpretation be evolutionary, foregoing any attempt at absolute and final divination of the legislative goals of the draftsmen.

My counsel to the Director of the Institute was given in the light of my then-recent experience with President Eisenhower's Attorney General's National Committee to Study the Antitrust Laws.² There, an elite group of antitrust lawyers, the overwhelming majority of whom represented "Big Business," was able to make

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² See The Attorney General's National Committee to Study the Antitrust Laws (1955) and my dissent, quoted in part at id. 390-93, and reproduced in full at 1 ANTITRUST BULL. 37 (1955).
thirty-five proposals to soften the antitrust laws without even embarking on an empirical investigation into the impact on public welfare of the laws as they stood. I do not for a moment suggest that these positions were explicitly client-directed or unpatriotically disregarding of the public interest. One who has experienced antitrust administration as a constant threat, annoyance, or obstruction need not be insincere or stupid to identify the public interest with reduction of this irritating set of governmental constraints on entrepreneurial freedom.

I am, however, now uneasy about the counsel I gave against ALI intervention in the passionate political controversy over antitrust. Foreign relations and tort law are certainly not less controversial or political, and the Institute has not disgraced itself in those fields. Moreover, someone was bound to come along and restate antitrust law with, inevitably, his own biases, his own economic myths, his own political faith. Three eminent scholars have in fact addressed the task. Professors Phillip Areeda and Donald F. Turner of Harvard Law School offer a massive treatise entitled Antitrust Law—An Analysis of Antitrust Principles and Their Application. Three volumes are already in print, three more in prospect. The first two volumes take us through Part One, Preliminary and Pervasive Issues: Antitrust Goals, Coverage, Procedure, and Economics. Volume III carries us halfway through Part Two, Market Structure Issues, a topic to be completed in Volume IV. Part Three, Restraints of Trade: Horizontal and Vertical, will be the subject of Volumes V and VI. Professor Lawrence A. Sullivan of the University of California School of Law, Berkeley, meanwhile offers a notable monograph in West Publishing Company’s Hornbook Series, calling it Handbook of the Law of Antitrust. The two works invite comparison. It is enough to say preliminarily that Areeda and Turner have produced something close to what the American Law Institute would have sponsored: a comprehensive, powerfully analytical antitrust compendium in the cautious midstream of opinion. The eccentricities of “Chicago School” economics on the right are avoided. The “populism” of the left is abjured. Sullivan

3 The Attorney General’s National Committee to Study the Antitrust Laws (1955).
4 See Restatement (Second) of Foreign Relations Law of the United States (1965); Restatement (Second) of Torts (1965).
5 P. AREEDA & D. TURNER, ANTITRUST LAW (1978).
has given us the book I should like to have written, combining admirable technical analysis and precision with a broad humanism, imagination, wit, skepticism, and literary grace.

I shall have some harsh things to say about the Areeda and Turner treatise as a guide to antitrust policy. It is therefore important to stress its many admirable qualities and features. In the tradition of classic encyclopedias like Wigmore's and Williston's, it is both a monument and an indispensable guide. Its magisterial pronouncements will, for a generation, be the starting point of research by practitioners, judges, and students of law and industrial organization. One can only hope that policymakers, including judges, will not be overwhelmed by its manifest authority and make Areeda and Turner the terminal point as well. The authors' pedagogical experience and orderly minds show themselves in the luminous introductions to each new problem; in the careful unraveling of every thread of the skein; in the revealing captions on nearly every paragraph; in the rigorous pursuit of each idea until it is pinned down, shorn of excrescences, included in the canon or placed in the Index; in the crisp briefs of leading cases; in the frequent, lucid summaries in which conclusions are tidily recapitulated; and in the excellent, detailed table of contents and index.  

I. Populism

The key to Areeda's and Turner's approach to antitrust issues, intellectually, is an obsession with "populism." Juxtaposing it to "economics," "efficiency," and optimum allocation of resources, they present populism as a crude, confused yearning for income equalization, dispersion of economic and political power, and "atomization" of industry, and an aspiration for the virtues of yeomanry. According to Areeda and Turner, "populist goals should be given little or no independent weight in formulating antitrust rules and presumptions." The errors of populism are attacked with theological fervor that is at times self-caricaturing, as when "populists" are chastised for the "peculiar and perverse" rejection of

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8 Sullivan's Handbook is, in contrast, very poorly indexed. Important subjects, carrying captions in the text, fail to appear in the index. For example, Chapter 9, Part B, Section 238, Governmental Action and Its Solicitation, finds no analogue in the index; there are no entries under Government Action, State Action, Noerr-Pennington, or even Defenses. In the case of Section 244c of the same chapter, Collateral Effects, there are no index entries under Collateral Estoppel, Estoppel, or Res Judicata. Other missing headings are Civil Actions (cf. Ch. 9, Pt. B, §244, Civil Actions), Procedure, Trial, Remedies, and Equitable Relief. Some relevant references do appear, however, under other headings. L. Sullivan, supra note 6.

the right to develop and practice new and more efficient methods of doing business or to provide consumers with better products and services. Those who have espoused the primacy of [populist] goals have either indulged in euphemism, mistakenly assumed that one man's entrepreneurial initiative would rarely if ever limit the options of others, or simply failed to think their concepts through.\footnote{10}

One would be hard put to find protagonists of the perverse "primacy" that the authors so mercilessly expose, or indeed any critics of Areeda's and Turner's policy stance who march under the banner of populism. "Populism" becomes, therefore, merely an epithet, a stick to beat people and ideas, useful against "fellow travelers" as well as against heterodox sectaries. It is sad that "populism" can be so used, but this reviewer sees hope and portent in the history of populism's tenets which have become today's orthodoxies: antitrust laws, railroad regulation, regulation of stock and commodities markets, wage-hour legislation, protection of collective bargaining, child labor laws, and taxation of income at progressive rates.\footnote{11}

A. The Confusion of Learned Hand

Among the misguided ones who, according to Areeda and Turner, have "failed to think their concepts through" is Learned Hand. (L. Hand a populist?) They focus on Judge Hand's famous observations in the \textit{Alcoa} case: \footnote{12} "We have been speaking only of the economic reasons which forbid monoply; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results." Such views are scornfully dismissed as "casual, gratuitous, or unsupported," \footnote{14} a "confusion" \footnote{15} (perhaps on the part of the readers of Hand), the baneful consequences of which are then traced through subsequent merger decisions of the Supreme Court. The authors here ignore an important maxim of prudence: when you shoot at a king you must kill him. Hand comes away from the encounter unscathed. The authors argue that he

\footnote{10 Id. \S 110, at 24.}
\footnote{11 See O. CLANTON, \textit{KANSAS POPULISM} 232 (1969); C. COWING, \textit{POPULISTS, PLUNGERS, AND PROGRESSIVES} (1965).}
\footnote{12 United States v. Alum. Co., 148 F.2d 416 (2d Cir. 1945).}
\footnote{13 Id. 428, quoted in 1 P. AREEDA & D. TURNER, \textit{supra} note 5, \S 104, at 10.}
\footnote{14 1 P. AREEDA & D. TURNER, \textit{supra} note 5, \S 104, at 9.}
\footnote{15 Id. \S 104, at 11.}
could not have meant what he plainly said because he was talking "only of the case in which multiple units 'can effectively compete with each other.'" Multiple units could not so compete, they argue, if one firm enjoyed scale economies that enabled it to undercut higher-cost firms and win all the business without improper conduct. The authors to the contrary, Hand was not talking "only" of "a case" in which multiple units can effectively compete. Clearly Hand was identifying the kind of industrial organization which Congress had decided to prefer as most likely to realize the economic and political gains of competition. He certainly was not calling upon courts to determine, on a case-by-case basis, whether a particular industry could be conducted "more efficiently" in a competitive or concentrated setting. "Efficiency," moreover, is a far more ambiguous concept than is implied by its pervasive use in the Areeda and Turner treatise.

As to whether Hand meant what he said about noneconomic values in antitrust law, one has only to look at the rest of his opinion to see that he unequivocally did mean it. He talks elsewhere of "wider purposes," meaning wider than economic purposes. He rejects any distinction between "good" and "bad" monopolies, because Congress "forbad all." His exception for a monopolist who survives a competitive contest "merely" because of "superior skill, foresight and industry," was not coupled, as Areeda and Turner would have it, with a justification of monopoly on the basis of "economies of scale." The Hand exculpation involves behavior, not structure. Sensitive to the criminal provisions of the Sherman Act, Hand sought only to exculpate the firm competing

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16 Id. ¶ 104, at 10.
Consider the criticism of decision-making during the Vietnam War where American "efficiency" was measured in terms of "body counts," number of "pacified" villages and tons of bombs dropped:
The first step is to measure whatever can be easily measured. This is okay as far as it goes. The second step is to disregard that which can't be measured or give it an arbitrary quantitative value. This is artificial and misleading. The third step is to presume that what can't be measured easily really isn't very important. This is blindness. The fourth step is to say that what can't be easily measured really doesn't exist. This is suicide. [Quoted in A. Smith, The Last Days of Cowboy Capitalism, The Atlantic Monthly, Sept. 1972, at 43.]
19 Id.
20 Id. 430.
21 1 P. Areeda & D. Turner, supra note 5, ¶ 104, at 9-10.
aggressively but honestly in the race, outlawing only actions purposely designed to prevent or "fix" the race.\textsuperscript{22}

The authors note, as a clincher in their demonstration of Hand's "confusion," a conflict between his declaration, on the one hand, that courts are incapable of continuous supervision to establish that the "good" or efficient monopolists "had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement,"\textsuperscript{23} and, on the other hand, his willingness to commit the courts to a program of "preserv[ing] small inefficient competitors against the inroads of more efficient rivals."\textsuperscript{24} No such self-contradiction appears in Hand's opinion. As noted above, he calls neither for preservation of the inefficient nor for case-by-case judicial appraisal of the impact on efficiency of a concentrated industry as compared to a hypothetically deconcentrated one. It was enough for Hand that Congress had manifested its preference for a deconcentrated system. One may note without further comment the authors' unproved assumptions that the "small" are always or usually less efficient than monopolists and their substitution of "preserving inefficiency" for the real issue of preventing monopoly. Turner has not always been so intransigently opposed to Hand's famous declaration or to non-efficiency values in antitrust.\textsuperscript{25}

B. Economic Efficiency and "Populist" Values

The authors are far too careful as scholars and clever as polemics to be caught out on a political limb like anti-populism. On the contrary, they are able, having slaughtered populism, to ingest it: "[C]ompetitive policy also promotes populist goals that are commonly thought important";\textsuperscript{26} economic objectives are only "generally" paramount;\textsuperscript{27} economic efficiency is not the sole objective of public policy, but statutes other than the antitrust laws may be relied on to set the parameters within which antitrust laws may operate.\textsuperscript{28} In their moments of moderation, it seems that only


\textsuperscript{23} United States v. Alum. Co., 148 F.2d 416, 427 (2d Cir. 1945).

\textsuperscript{24} 1 P. AREEDA & D. TURNER, supra note 5, \S 104, at 10-11.

\textsuperscript{25} See Turner, Antitrust Policy and the Cellophane Case, 70 HARV. L. REV. 281, 306 (1956) (finding support in legislative history for the antitrust "bias" against concentration: "It is possible, as Judge Hand pointed out in Alcoa, to prefer an economy populated by numerous individual units even at some cost in efficiency.").

\textsuperscript{26} 1 P. AREEDA & D. TURNER, supra note 5, \S 103, at 7; \textit{cf.} \S 110 at 2, \S 401.

\textsuperscript{27} 1 P. AREEDA & D. TURNER, supra note 5, \S\S 104, 110.

\textsuperscript{28} Id., \S 107.
the "pervasive priority" of populist goals is anathema to Areeda and Turner.29 (As if anyone had argued for a "pervasive priority," rather than a sensible synthesis of multiple goals!) They protest only that pursuit of populism through antitrust is often "futile"30 and involves "unacceptable burdens on the courts," namely the need to "weigh the interests of the efficient firms, and the consumers they represent, against those of the inefficient or unneeded firms and the populist goals for which they are the alleged proxies."31 But Areeda and Turner cannot have it both ways. The "moderate" thesis that purports to take account of noneconomic goals while rejecting only their "pervasive priority" will not stand with the assertions that courts are institutionally incapable of dealing with non-efficiency issues. Courts certainly will be even farther at sea when asked to integrate these imponderables with equally imponderable considerations of "efficiency," economies of scale, and optimal allocation of resources. It becomes perfectly clear that, in the end, "populism" is rejected by Areeda and Turner without need for balancing; the caption of paragraph 112 announces: "Populist Goals Inappropriate as Antitrust Standards even if no Conflict with Efficiency."32

I attribute the affinity of some fine legal minds for the imponderables of economics to the fact that economists talk the language of numbers and depict their models, however remote from the real world, in graphs whose alluring curves intersect with gratifying precision. The aversion to the incommensurable reaches its peak in Areeda's and Turner's proposition, astounding for lawyers, that "[a]s a goal of antitrust policy, "fairness" is a vagrant claim applied to any value that one happens to favor."33 They are, of course, perfectly right in pointing out that interest groups have different views of what is fair and have sometimes successfully lobbied, in the name of fairness, for special protections and subsidies inconsistent with competition and the interests of consumers. But if imprecision and the possibility of perversion were fatal defects, the due process clause would long ago have been repealed, and the constitutional attack upon the Sherman Act for vagueness would

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29 Id. § 111a.
30 Id. § 111b.
31 Id. § 111c, at 27.
32 Id. § 112. Excellent material on the controversy over antitrust goals will be found in Symposium on Antitrust Law and Economics, 127 U. PA. L. Rev. 918 (1979); The Goals of Antitrust: A Dialogue on Policy, 65 Colum. L. Rev. 363 (1965).
33 1 P. Areeda & D. Turner, supra note 5, § 109a, at 21.
not have failed in *Nash v. United States.* It would have been better for Areeda and Turner to accept fairness as an ingredient of antitrust calculations than to proscribe it as a goal of the antitrust laws. Indeed, fairness is so deeply ingrained in the antitrust tradition, from the common law background through the protests against Rockefeller predation in the oil industry, that “choosing the economic goals” to the exclusion of fairness assumes the proportions of radical historical revisionism.

Needless to say, the perils and frailties of economics are not ignored by our two experienced and thoughtful authors. Paragraph 113 deals with “Limitations on the Achievement of Antitrust Economic Objectives,” and acknowledges that “economic science has gaps in theory and problems with empirical verification. Thus, it is not capable of telling us with confidence whether or when a particular arrangement or market situation will contribute to economic welfare or detract from it.” The authors promise an exploration of these “difficulties” in Chapter 4, “The Economic Basis for Antitrust Policy.” Alas, the promise is not fulfilled. This chapter is a remarkable and useful recapitulation of the economics of competition, monopoly, and oligopoly, with particular regard to “allocative efficiency” and “operating efficiency.” Economies of scale, entry barriers, “second best” considerations, and much more that will be helpful to judge and advocate are set forth in jargon-free prose, with occasional references to diversities of opinion from representatives of various quarters of the economic compass, including Bain, Scherer, and Posner. But for a thorough expression of the necessary caution in basing antitrust on the science of economics, one must turn to Sullivan’s *Handbook:* “The economics of antitrust is, perhaps, less a science than an applied art.”

II. Sullivan’s Humanism

Sullivan is by no means a nihilist with respect to economics. On the contrary, he starts his book with a splendid and subtle introduction devoted almost entirely to the relation between antitrust

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34 229 U.S. 373 (1913).
35 1 P. Areeda & D. Turner, supra note 5, ¶ 109, at 21.
37 1 P. Areeda & D. Turner, supra note 5, ¶ 109, at 21.
39 1 P. Areeda & D. Turner, supra note 5, ¶ 109, at 21.
40 See especially 2 P. Areeda & D. Turner, supra note 5, ¶¶ 402b-403c.
41 L. Sullivan, supra note 6, § 1, at 9.
law and economics. Along with Appendix A, Chapter 1 pays its due to the problems of scarcity, demand, supply, profit-maximization, marginal costs and revenues, and equilibrium prices. And the conclusion? That the Harvard and Chicago schools of economics err in their mutual acceptance of efficient allocation of resources as the sole, or even major, goal of antitrust. The economic model, says Sullivan,

has an enormous appeal to anyone interested in antitrust policy. It holds up the image of a comprehensive, rational way to predict the allocation effects of alternative ways in which markets are structured and alternative ways traders in the market may conduct themselves. But, like a mirage, the image fades upon a close approach to it. The gravest difficulty is that the standard demonstration about the allocative efficiency of a competitive market over a monopolized one is subject to stringent theoretical conditions which are never fulfilled in the real world. . . . Theorizing has not yet reached a degree of comprehension which warrants trying to put it to use in formulating policies . . . .

Sullivan notes also the flux of economic opinion, including the embarrassing fact that orthodox economic opinion at time of adoption of the Sherman Act doubted the significance of private monopoly.

For Sullivan, a more realistic economic goal for antitrust is to keep prices of particular products in line with input costs, and profits proportional to risk. He unabashedly orients antitrust to "justice" and social concerns, as well as to macroeconomic welfare. "Populism" for Sullivan is not a term of reproach, but the very foundation of antitrust. Economics is indeed useful to the antitrust lawyer, useful for "techniques which the law may use as tools in pursuit of its own objectives." But "economics does not comprehend enough and law . . . cannot adequately deal with all that economics does comprehend." Law must respond to other values

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42 Id. § 1, at 2-6.
43 Id. § 1, at 3, 5.
44 Id. § 1, at 9.
45 Id. § 1, at 5. Sullivan offers this narrower sense of "allocative efficiency" in place of the broad, comparative, welfare sense espoused by the Chicago and Harvard schools.
46 Id.
47 Id. § 2, at 11.
48 Id. § 1, at 9 (emphasis added).
49 Id. § 2, at 10.
and, especially, must transform economic insights into workable
generalizations and a coherent system with which alone legal insti-
tutions can function. Those pages of Sullivan dealing with the
nature of law should be required reading in any course on juris-
prudence. They are provocative and illuminating; the following
sample gives the flavor:

[L]egal analysis, if it can be likened to a social science at
all, is more humanistic both in its aspirations and its meth-
odology. It is closer, surely, to history, perhaps even to
literature, than it is to economics. In ideal form law
presupposes few easily predictable sequences in human
affairs, and aims at no form of perfection. Rather it seeks
to understand recurrent human situations in terms of mo-
tivations commonly perceived and to judge specific human
actions which occur in such situations with reference to a
cultural experience, with reference to a tradition.

III. Predatory Pricing

Nothing better illustrates the divergence of outlook between
Areeda and Turner and Sullivan than their treatments of predatory
pricing. As is well known, Areeda and Turner sponsor the rule
that price-cutting should never be impugned as predatory behavior
unless the resulting price is below reasonably anticipated short-run
marginal costs. In other words, if the price-cutter expects to break
even on his cut-price sales after disregarding his overhead, he is in
the clear. This defense will prevail over any showing that his
explicit purpose was to annihilate a smaller competitor or to in-
timidate rivals into conforming to price or other marketing norms.

In contrast, Sullivan defines "predatory practices" to include
any behavior "that has the purpose and effect of advancing the
actor's competitive position, not by improving the actor's market
performance, but by threatening to injure or injuring actual or po-
tential competitors, so as to drive or keep them out of the market, or
force them to compete less effectively." "Predatory intent" is
crucial: "price reduction or predatory expenditure is calculated to
impose losses on other firms, not to garner gains for itself"; 

50 Id. § 2, at 12.
51 Id. § 2, at 11-12.
52 3 P. AREEDA & D. TURNER, supra note 5, §§ 710-711d, especially § 711d,
at 153-54. As a concession to the difficulties in determining marginal costs, the
authors accept average variable costs as a surrogate for marginal costs. Id.
53 L. SULLIVAN, supra note 6, § 43, at 108.
or foregone profits] are accepted by the predator as the cost of freeing itself for the future from the competition it now faces." 54 In some situations, there will be difficulties in distinguishing between vigorous competition and predation; data on the relation of price to marginal cost will certainly be useful in that inquiry. But the proper roles of law and economics must be recalled:

If we are going to rely on judges and jurors to discover predatory business conduct we cannot deprive them of all traces of the juices in the situation. A firm which seeks to drive out or exclude rivals by selling at unremunerative prices will leave human traces; the very concept is one of a human animus bent, if you please, upon a course of conduct socially disapproved. If there is one task that judges and juries, informed through the adversary system, may really be good at, it is identifying the pernicious in human affairs. To contend that the conventional formulation which looks, in a sense, for evil, ought to be amended to one which looks solely to an effect validated by economic studies is to assume too much about the precision of applied economics and to assume too little about the value of more humanistic modes of inquiry. 55

Areeda and Turner are at their best and worst in arguing for maximum pricing freedom for powerful firms. Given their assumptions (based on economic modeling, not empirical data) of rational profit maximization by monopolistic sellers, of the welfare benefits to be derived from permitting full utilization of a major firm’s “excess capacity,” of potential competition ready to enter the market the moment the price-cutting monopolist moves to recoup the profits temporarily foregone, their position seems impregnable. It is tightly reasoned, comprehensive, and even eloquent. Small wonder that a number of courts have accepted this seemingly simple guide through, or bypass around, the complexities of good and evil. 56 The authors make it appear obvious that price, that great allocator of resources, should be allowed to dip low enough to squeeze excess capacity out of the supply side of the market and to discourage additional investment in excess capacity. Moreover, the argument pro-

54 Id. § 43, at 111 (footnotes omitted).
56 See notes 69 & 72 infra.
ceeds, no efficient rival of equal "staying power" (meaning one just as powerful financially) would be forced out of the market. Marginal-cost pricing

may . . . , to be sure, bankrupt an equally efficient small rival . . . and that may in turn lead to a higher price than would otherwise exist (though the price may be no higher than the assuredly lawful full-cost price). But against any such loss must be set any social gain from transferring the rival's assets to more productive use.

It would be hard to devise a formula more conducive to concentration of production in oligopolists of equal "staying power." Under such a rule of law, the oligopolists would either eliminate the smaller units or teach them convincingly the merits of never challenging price norms of market leaders. It is difficult also to imagine a more unrealistic hypothesis than the conversion of small-business assets "to more productive use" following bankruptcy precipitated by selective price-cutting by a giant competitor avowedly pursuing an exclusionary policy. In contrast to the authors' rigor in requiring sacrifice of the small enterprise for the sake of public gain from a mythically optimal allocation of resources is their solicitude for the safety of powerful firms who (unwittingly, of course, because they are profit maximizers) cut their prices below marginal costs, producing both misallocation of resources and unjustified casualties among competitors. There must be, they say, a defense of "legitimate" marginal-cost pricing for the powerful firm unless it "lacked reasonable cause to believe that the case was one in which marginal-cost pricing was permissible." This is, in practical effect, a blank check for the benefit of oligopoly: the burden of proof is on the plaintiff; marginal costs and average variable costs, however clear in concept, are enormously difficult to calculate in practice, providing a wide range of plausible solutions; and the would-be predatory pricer has only to garnish his files with a cost-justifying memorandum to free himself to embark upon a "price war," no matter how explicit his intent to drive out the target competitor. For—and it cannot be over-emphasized—Areeda and Turner are determined to make intent irrelevant, in this

57 3 P. Areeda & D. Turner, supra note 5, ¶ 715, at 164.

58 Id. ¶ 715a, at 165.

59 Id. ¶¶ 715a, at 167, & 717d.

60 But see id. ¶ 715a, at 168 n.7: "We conclude that disciplinary price cuts to levels above marginal cost should be disregarded—at least in the absence of clear direct evidence of disciplinary intent." (Emphasis in original.)
respect positioning themselves to the right of even Posner of the Chicago school.  

Finally, this house of cards must collapse when one considers Areeda's and Turner's rejection of the concept of "predatory investment." A powerful firm should be free, they argue, to create "excess capacity" without inquiry either into whether its purpose is to exclude competition or into its expectable marginal costs. Restraints on such counter-economic activity are deemed unadministerable: "legitimate cases of excess capacity" cannot by any workable rule be distinguished from predatory investment. They are very likely right about that, once intent has been barred from consideration.

But why bar intent? Sullivan, of course, would not bar intent, would not make it an absolute defense that, in predatory-pricing cases, marginal costs or average variable costs were covered:

The fact that predatory activity is costly to the predator and that there is only an uncertain prospect of adequate supra-competitive returns after others are excluded surely must reduce the frequency of predatory forays. It hardly follows that they never occur or can be safely ignored. Man's capacity for destructive conduct has never been totally inhibited merely because he stands himself in the target area along with his would-be victim. The best course, moreover, is to leave the avenues of inquiry as open as may be. Objective data, such as that stressed by Areeda and Turner, could then be used either to attack or defend, but so also could any other evidence indicative of predatory intent. Direct evidence of predatory intent will usually be difficult to uncover.

Yet there are hallmarks. Predatory conduct will usually display two identifying characteristics. First, there will be something odd, something jarring or unnatural seeming

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61 Id. Â¶ 715b, at 168 n.7.
62 Id. Â¶ 718.
63 Contrast Judge Hand's position in the Alcoa case. See text accompanying notes 12-24 supra.
64 3 P. Areeda & D. Turner, supra note 5, Â¶ 718b, at 181. But courts have in fact been able to distinguish predatory from other investment. See Photovest Corp. v. Fotomat Corp., Antitrust & Trade Reg. Rep. (BNA) (Oct. 4, 1979) (Seventh Circuit upheld as violation of Sherman Act the "saturation" of competitor's market with competing outlets for monopolistic purposes).
65 Areeda and Turner summarily reject any intent-based test: "Even a narrow prohibition, requiring clear proof of a deliberate choice to invest despite the anticipation of losses, would subject innocent firms to the threat of baseless but costly litigation. The slight possibility of predation does not outweigh the potential abuse of a rule against predatory investment. Id. Â¶ 718b, at 181.
about it. It will not strike the informed observer as normal business conduct, as honestly industrial. Second, it will be aimed at a target, at an identifiable competitor or potential competitor, or an identifiable group of them.  

Sullivan sees the difficulties of administration as manageable, and cites many cases in which the courts have in fact drawn the line between predatory behavior and aggressive competition with normal business methods and objectives. Needless to say, the Tenth Circuit’s decision in *Telex Corp. v. I.B.M.*, embraced by Areeda and Turner, is disapproved by Sullivan for its lax approach to what he labels exclusionary price discrimination. Even the Tenth Circuit has made clear that it is not committed to a “solely cost-based test,” and the National Commission for the Review of Antitrust Laws and Procedures has rejected the Areeda and Turner position.  

**IV. Price Discrimination**

Areeda and Turner apparently regard the Robinson-Patman Anti-Discrimination Act as so alien to antitrust goals and optimal resource allocation that they virtually ignore it in their treatise, although they do casually deal the *coup de grâce* to any ban on

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67 Id. § 47c, at 121.  
68 Id. § 44.  
69 510 F.2d 894 (10th Cir. 1975).  
72 See Pac. Eng’r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir. 1977) (in reversing a treble damage judgment where prices did not go below average variable costs, court undertook investigation, but could find no other indication of anticompetitive purpose). See also California Computer Products, Inc. v. Int’l Business Machines Corp., *Trade Reg. Rep.* (CCH) ¶ 62,713 (9th Cir., June 21, 1979) (“We recognize that refinement of the marginal or average variable cost test will be necessary . . . . [W]e do not foreclose the possibility that a monopolist who reduces prices to some point above marginal or average variable costs might still be held to have engaged in a predatory act because of other aspects of its conduct.”)  
75 1 P. Areeda & D. Turner, *supra* note 5, ¶ 100, at 3.
selective price-cutting. Sullivan meanwhile devotes an entire chapter to the price-discrimination law. Although the chapter is less dismissive than Areeda's and Turner's treatment, it displays on the whole a distaste for the Act on economic-allocation grounds, with less than Sullivan's usual deference to justice and fairness as ingredients of the antitrust cocktail. Utah Pie Co. v. Continental Baking Co., is condemned with a vigor not exceeded by Areeda and Turner. But then not even this reviewer supports the myopic vision of competition that pervades the majority opinion in that case. The result reached in Utah Pie, affirming a jury verdict finding price discrimination, might be justified as a vindication, against intrusive reappraisals by courts of appeal, of jury verdicts based on equivocal evidence. A more plausible holding might have been, however, that Utah Pie Co. had suffered no injury "by reason of" the alleged price-discriminations, but rather, had been harmed only by involvement in a competitive struggle. In any event, an aberrational decision, finding anticompetitive price discrimination where there existed merely sharp competition, is far more tolerable than an aberrational legal rule of non-liability that would immunize defendants not only in the equivocal competitive situation described in Utah Pie, but even in outrageous cases of planned extirpation of a competitor. Unfortunately, Areeda and Turner too often rely on the possibility of abusive suits to justify an expansive rule of non-liability. That technique, so clearly apt for justifying repeal of the Sherman Act itself, calls for a much more precise balance of trade-offs than Areeda and Turner provide.

76 3 P. AREEDA & D. TURNER, supra note 5, ¶ 720.

77 L. SULLIVAN, supra note 6, Ch. 8, §§ 217-31.

78 386 U.S. 685 (1967).

79 L. SULLIVAN, supra note 6, ¶ 221, at 687; 3 P. AREEDA & D. TURNER, supra note 5, ¶ 720c.

80 Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (bowling-center operators' loss of profits due to acquisition of failing bowling centers by bowling-equipment manufacturer not type of injury antitrust laws designed to prevent); American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963) (temporary minimal impact on competition not type of substantial injury necessary to establish violation of Robinson-Patman Act).

81 See 3 P. AREEDA & D. TURNER, supra note 5, ¶ 715b2, at 169 (price even below marginal cost approved if not below average cost; although "not justifiable 'on principle,'" this defense legitimate because "more unwarranted than well-founded suits"); id. ¶ 718b (predatory investment as, for example, expansion of facilities for express purpose of preempting potential rivals, not actionable because monopolist "probably has innocent explanations." "Even a narrow prohibition, requiring clear proof of a deliberate choice to invest despite the anticipation of losses, would subject innocent firms to the threat of baseless but costly litigation." Id. ¶ 718b, at 181.).
Areeda and Turner, as well as Sullivan, fail to consider adequately the rich legal history of predatory pricing and price discrimination in transportation and other regulated industries. That history demonstrates that Congress’s concern with selective price-cutting has expressed its concept of justice rather than a particular economic theory of allocation of resources. Sections 2 and 3 of the Interstate Commerce Act and section 404(b) of the Federal Aviation Act denominate the offense as “unjust discrimination,” not “uneconomic discrimination.” A rule of per se illegality is applicable in many instances, as, for example, under section 2 of the Interstate Commerce Act, prohibiting different charges to shippers for like and contemporaneous service with respect to any class of traffic. Complainant need not prove that the discrimination adversely affected competition, and it is no defense that the carrier discriminated to meet a competitive offer, or to fill empty cars. A hypothetical case will demonstrate the irrelevance of an “excess resources” justification for unjust discrimination. Suppose that a railroad proposed to meet passenger-car competition and to fill its empty seats by granting a fifty-percent discount to ticket buyers who owned automobiles. It evokes a “sense of injustice” to contemplate two passengers making the same trip at the same time, with one paying half fare solely because he can afford to own a car and pay OPEC prices for fuel, and so has an alternative means of transportation. We may be sure that any bill to legalize such a practice would never emerge from committee, even though environmental considerations and the desirability of full utilization of existing resources could be cited in its favor. Not even competitive necessity is accepted as a justification for discrimination between persons in rail-freight rates. In maritime commerce, the prohibition of “fighting ships” and other “unjustly discriminatory or un-

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82 The space limitations of a single-volume hornbook imposed hard choices on Sullivan; he still has managed, however, to make more use of regulatory analogies than have Areeda and Turner. See, e.g., L. SULLIVAN, supra note 6, § 48.


86 Wight v. United States, 167 U.S. 512 (1897).

87 The phrase is taken from E. CAHN, THE SENSE OF INJUSTICE (1949).

88 Wight v. United States, 167 U.S. 512 (1897). Needless to say, the principle has often been compromised with respect to categories of discrimination as to which Congress has given an administrative agency the discretion to favor specified classes of freight or passengers.
fair” practices, whereby the powerful may undermine competing carriers of lesser “staying power,” has been in effect for generations.89

In the same tradition is section 2 of the Clayton Act, amended by the Robinson-Patman Act to ban discrimination not only upon proof of adverse effect on competition generally, but also when the proof goes no further than to show adverse effect upon a competitor of the discriminator or his favored customers. That position parallels the decision in Klor’s, Inc. v. Broadway-Hale Stores, Inc.,90 that a concerted boycott of a discount distributor “is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.” 91 Justice Black’s opinion for the Court in Klor’s recognizes, as does the Robinson-Patman Act, that elimination of one entrepreneur, pursuant to an exclusionary policy, is an intimidating message to all other potential entrants or maverick rivals.

By invoking the jurisprudence of railroad-rate discrimination, I do not mean to suggest that price discrimination presents the same problem in the competitive and regulated sectors of business. It does not. The principles of justice familiar in the regulated industries must, however, be adapted for use in the unregulated sectors when effective competition breaks down, limiting the alternatives open to the disfavored customer. In the regulated sector, natural and artificial monopoly restrict the customer’s ability to choose among suppliers. As a result, the disadvantaged customer must be protected against arbitrary handicapping by his supplier. In the unregulated competitive sector, the customer is, ideally, protected against such abuse by the ability to shift to another supplier. But on closer examination the contrast between the sectors fades. A considerable degree of inter- and intramodal competition survives in the regulated sector to provide customer alternatives. On the other hand, the notable “imperfections” in today’s competitive markets often deprive a distributor or other customer of any substantial power to shift suppliers. Oligopolies proffer illusory choices.92 “Shared monopolies” preempt dealer shelf-space by an extraordinary volume of advertising and parallel marketing prac-

91 Id. 213.
92 See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 26-28 (1970), describing the swap by Ford and General Motors of their dissatisfied customers. Consider also the decades, before penetration by European producers, during which the American automobile industry denied users the small-car alternative.
tices. Few grocers can bypass Procter & Gamble, General Foods, or Kellogg’s cereals. If, then, constricted alternatives for the customer call for extra safeguards of fair treatment, those principles of justice developed in the regulated sector will be useful. An approach based on these principles would focus on the enforcement of Robinson-Patman standards against those leading firms whose advertising or marketing policies have substantially narrowed the distributor’s range of alternatives.

V. STRUCTURALISM AND ECONOMIES OF SCALE

Given their generally conservative position, it may be surprising to some that Areeda and Turner espouse the controversial concept of “no-fault” monopoly. They favor creation of a civil remedy against “mere monopoly,” that is, monopoly obtained or maintained without predatory conduct, provided that it is “persistent” and not demonstrably attributable to economies of scale, indivisibility of resources, patents, or other government license. They testified in favor of this civil remedy before the National Commission for the Review of Antitrust Laws and Procedures, which, less daring, could bring itself only to recommend that Congress study the proposal. In a most impressive analysis, Areeda and Turner demonstrate that, in passing the Sherman Act, Congress was concerned about monopoly however obtained and that monopoly is not necessarily self-correcting even if the monopolist refrains from predatory methods. Plausible objections to “no-fault” are meticulously examined: “unfairness,” “futility,” the remedies problem. Alternatives, such as Judge Wyzanski’s “presumption” of illegality, are judiciously appraised.

This essay is a triumph of structuralist logic. Structuralist economists are preoccupied with the presence or absence of firms in numbers sufficient to produce workable competition and lay great stress on entry barriers. There is little room for “subjective” factors like exclusionary intent, since idiosyncratic evil inclination

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93 See Kellogg Co. [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,898 (FTC complaint charging four largest manufacturers of ready-to-eat cereals with thirty-year monopoly of industry through control of shelf space; unfair advertising and product promotion; artificial differentiation of products; proliferation of brands and trademark advertising; and acquisition of competitors).


96 3 P. AREEDA & D. TURNER, supra note 5, ¶¶ 620, 621, 623a.

97 Id. ¶ 624c.
is as nothing compared to the omnipresent gravity-like force of profit maximization. According to other economists who emphasize management strategies, game theory, and inter-temporal dynamics rather than snapshot concentration ratios, structural economics is an insufficient basis upon which to construct an anti-monopoly policy. But no one has been more influential than Donald Turner in enthroning structuralism in academia and antitrust administration in the past generation. Kaysen's and Turner's Antitrust Policy, with its four-firm, eight-firm, and twenty-firm concentration ratios, swept all before it. It was Turner, as Assistant Attorney General in charge of the Antitrust Division, who promulgated the Department of Justice Merger Guidelines which lean so heavily on concentration ratios and even reject efficiency defenses.

I stress Areeda's and Turner's commitment to structuralism not to denigrate the great usefulness of this approach, despite its intuitive foundation and statistical vulnerability, but to stress that they were driven to no-fault monopoly by the logic of their structural stance. With a premise focusing on high levels of market concentration and its tendency toward profit maximization, and excluding subjective factors such as intent, they could conclude


100 1 TRADE REG. REP. (CCH) ¶ 4510 (May 30, 1968).

101 Id. ¶ 4510, Nos. 5, 6, 10.

Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e., improvements in efficiency) because, among other reasons, (i) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger.

Id. ¶ 4510, No. 10; cf. ¶¶ 4518(c), 4519(c).

102 If not intuitive, Kaysen and Turner were distinctly overdriving on what might be called "clinical impressions," when they opined that concentration of as little as one-third of industry sales in eight large sellers was prima facie excessive because "in the majority of markets with which we are familiar, a smaller number of firms with larger shares of the market [makes] it likely that they will recognize the interaction of their own behavior and their rivals' response in determining the values of the market variables." C. KAYSEN & D. TURNER, ANTITRUST POLICY 27 (1959). For criticism of the statistical underpinnings of structuralism, see B. BOCK, CONCENTRATION, OLIGOPOLY AND PROFIT (1972).
only that relief against "mere monopoly" was justified. On the other hand, this logic entailed for them an unbearable cost in terms of potential loss of allocative efficiency. Accordingly, they have emasculated their no-fault proposal by providing a defense of "economies of scale."\textsuperscript{103} This defense is to be available whether or not the scale economies are passed on in the form of lower prices to customers.\textsuperscript{104} It is favored without any examination of the trade-off between putative scale economies of the dominant firm and two classes of gains likely to be derived from a less centralized industrial structure: (i) the energizing effects of rivalry, and (ii) the ability of second and third firms to achieve most if not all of the available scale economies as long as they are not preempted by an overwhelming number one. Finally, the defense is approved with no regard to a consideration that the authors regularly treat as decisive: the administrative difficulties of a rule of law that requires a court to appraise costs and efficiencies, especially of hypothetical alternatives.

Scale economies present a constantly shifting benchmark in a dynamic society. A single technological advance can radically alter the picture if the new technology can be efficiently used on a much smaller scale than the old; witness the introduction of the oxygen process for producing steel, and shifts of relative advantage in the technology of power production versus power transmission. Even if it were possible to determine, as of a given date (trial? commencement of suit? accrual of cause of action?), the point at which scale economies peter out, and the extent to which they would be sacrificed, in light of countervailing gains, in a more competitive industrial structure, enormous and uncongenial problems would remain for the courts. It would be necessary, for example, to delimit the range of activities implicated in the identified economies of scale within a giant firm. Economies of scale which might characterize petroleum exploration in risky seas or countries do not also warrant unified control of multi-plant refining operations or market-foreclosing distribution systems. The desirability of an integrated electric-power or communications system only makes it more important that related manufacturing operations be pruned away from the "natural monopoly." Such responsibilities may be unavoidable in policing the "regulated industries," but they are a forbidding prospect in any proposal to justify unregulated giantism on the basis of so slippery a concept as scale economies.

\textsuperscript{103} 3 P. Areeda & D. Turner, \textit{supra} note 5, \$ 621a, at 49-50.

\textsuperscript{104} Id. \$ 621a, at 50.
It is quite indefensible for Areeda and Turner to characterize an effective program to break up the colossi of industry as "enforced small-scale production" and "mandated inefficiency." No one has proposed "small-scale production." 105 Posing the alternative as if it were industrial organization along Maoist "cottage industry" lines is even less helpful to rational discourse than the comparable attack on "populism." The positive correlation between size and productive efficiency, assumed here sub silentio, is belied by numerous studies, 106 by financial catastrophies such as that of Penn Central, and by the straits of General Dynamics, Lockheed, and Chrysler. Finally, it is worth noting that the authors themselves take a much more moderate position on scale economies when they review the economic literature in paragraph 408:

Aggregate scale economies do not explain the levels of concentration actually existing in American markets. The actual size of leading firms often seems far greater than needed for efficiency. 107

It is almost as if the contrasting passages were written by different members of the author team.

One more illustration of Areeda's and Turner's centrist tendency to adopt a pro-antitrust principle and to emasculate it in practice is provided by their position on vertical integration. Unlike the "Chicago" economists, Areeda and Turner admit that a vertical merger has an anticompetitive potential where it forecloses competitors from a significant market. But they defend vertical integration by pointing to "production flexibility," 108 the doctrine that a producer locked out of one market has not been significantly injured if he can readily turn to production of some other product for which unconstrained buyers can be found. The five-to-four decision of the Supreme Court in United States v. Columbia Steel Co., 109 countenanced consideration of production flexibility when

105 See text accompanying notes 9 & 10 supra.

106 J. BAIN, BARRIERS TO NEW COMPETITION (1956); J. BLAIR, ECONOMIC CONCENTRATION (1972); F. SCHEerer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970); TEMPORARY NATIONAL ECONOMIC COMMITTEE, RELATIVE EFFICIENCY OF LARGE, MEDIUMSIZED, AND SMALL BUSINESS, Mono. No. 13 (1941); Adams & Dirlam, Big Steel, Invention, and Innovation, 80 Q.J. Econ. 167 (1966); Rice, Consolidated Rail Corporation: Phoenix or Albatross?, 42 I.C.C. PRACT. J. 533 (1975) (demonstrating rise in unit costs of merged carriers). That the results of these studies have been rejected by some is no justification for question-begging assumptions.

107 2 P. AREEDA & D. TURNER, supra note 5, ¶ 408, at 298.

108 Id. ¶¶ 527c, 536.

Review of the Antitrust Treatises

1979]

Appraising mergers under the Sherman Act. The decision was widely criticized and soon overruled in effect by the Cellar-Kefauver Anti-Merger Act of 1950; 110 but Areeda and Turner call the decision "clearly correct." 111 Meanwhile, District Judge Weinfeld's finding on the record in the Bethlehem Steel case, 112 that "continuing relationships between buyers and sellers in the steel industry make [flexible production] shifts unlikely," 113 is declared "implausible." 114 One cannot help noting the correspondence between Areeda's and Turner's position on production flexibility and their view on predatory pricing. That view, criticized above, tolerates bankruptcy of smaller firms by giant competitors pricing at marginal costs in order to utilize their "excess capacity," because small-firm assets will then be transferred "to more productive use." 115

One of the most thunderously unpersuasive dicta in the Areeda and Turner treatise is the assertion that "Sherman and Clayton Act Standards Coalesce." 116 One can, of course, point to an occasional decision in which Sherman is given nearly the bite of Clayton. Indeed, as to practices found per se illegal under Sherman, Sherman bites harder; one need no longer ask, as under Clayton, whether the effect "may be" to substantially lessen competition. But the sweeping coalescence which the authors regard as demanded by "rationality" 117 can only be achieved by disregarding legislative

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111 2 P. Areeda & D. Turner, supra note 5, ¶ 536a, at 426.
114 2 P. Areeda & D. Turner, supra note 5, ¶ 536b, at 427. As subsequent events demonstrated, the principal implausibility in the Bethlehem case was the defendants' contention that Bethlehem's acquisition of Youngstown Steel was the only way to expand steel-producing capacity in the mid-continent area.

Neither Bethlehem nor Youngstown, alone, will be able to provide the expansion that is envisioned as a result of the merger. . . . [T]o build a new integrated steel plant in the Mid-Continent Area . . . would involve prohibitive costs per ton of new capacity and vastly greater capital resources than are available to Bethlehem and would delay almost indefinitely the provision of certain important new facilities.


115 See text accompanying notes 57 & 58 supra.
117 Id.
history and decisions of the Supreme Court,\textsuperscript{118} by glossing over the critical difference between criminal statutes such as the Sherman Act and the purely civil Clayton Act, and by a willingness to believe that the criteria of illegality of price discrimination are "fundamentally the same" under Sherman Act § 2 and Clayton Act § 2, as amended by the Robinson-Patman Anti-Discrimination Act.\textsuperscript{119} That last requirement of the "coalescence" theory should strike fear in the hearts of thousands of corporate counsel dedicated to the proposition that the Robinson-Patman Act is \textit{in conflict with Sherman} and should be repealed. Repeal is not going to do much good, if we accept the Areeda and Turner thesis that it's all in the Sherman Act!

\textbf{VI. CONCLUSION}

To what conclusion does our discourse tend? What are the proper uses of economics? First, it seems clear that lawyers, judges, and legislatures should not delegate decisionmaking to economists. Their dogmas are no better than ours.\textsuperscript{120} Their counsel is divided, and even their consensus, shifting from time to time, cannot provide a firm basis for policy decisions. The insights of their dissidents may be as valid as those of their professional establishment. There is too little empirical basis for economic doctrine, too little correspondence between its models and real life, and virtually no

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\textsuperscript{119} 2 P. AREEDA & D. TURNER, \textit{supra} note 5, ¶ 304c, at 9.


Richard Posner's hero is also eponymous. He is Economic Analysis. In the book we watch him ride out into the world of law, encountering one after another almost all of the ambiguous villians of legal thought, from the fire-spewing choo-choo dragon to the multi-headed ogre who imprisons fair Efficiency in his castle keep for stupid and selfish reasons. In each case Economic (I suppose we can be so familiar) brings to bear his single-minded self, and the Evil Ones (who like most in the literature are in reality mere chimerae of some mad or wrong-headed magician) dissolve, one after another.

Leff, \textit{supra} at 452.
\end{footnotesize}
possibility of confirmation by experiment. Its record on predictions is abysmal. The unworldliness of this discipline is manifested in its avowed disinclination, or inability, to make or take account of moral, psychological, political, or other "value" judgments; it is essentially a matter of indifference for most of the profession what proportions of the "gross national product" consist of cigarettes, bread, pornography, advertising, low-cost housing, or weaponry.

But the radical skepticism expressed in the preceding paragraph is appropriate only as a preachment to those who have been oversold. That sort of destructive barrage could be levelled at any who espouse so dogmatically the theories of philosophy, history, political science, anthropology, sociology, psychiatry, religion, or other branches of learning with which we do and must seek to illuminate the human condition. All these disciplines help, or seem to help, us comprehend or order the infinite chaos that would otherwise confront us. One may view them like sets of instruments and techniques available to physicians: microscopes, stethoscopes, X-rays, thermometers, spectrometers, electrocardiograph machines, and sphygmographs. Similarly, physicists use an immense variety of information-gathering devices as they supplement our primitive senses by probing into the nature of matter and the universe. The elusive "truth" requires a synthesis of information from all these sources. We should be as dubious about guidance from one who used only one or two of the available instruments, as we would be distrusting of the description of the elephant by any one of the seven blind men who respectively examined by touch the trunk, the tusk, the ear, the leg, the eye, the tongue, and the back of the legendary pachyderm. Thus our ideal legislator, judge, or lawyer must look at the world through all available lenses, including those of the economist.

Surely these "lenses" ought not be limited to those provided by a single school of economists. One of the dangers of attempting to educate lawyers and judges in economics (or psychiatry, for that matter) is that the exposure will be to a single teacher or school, with understatement of conflicting views. Another danger is that limited training in an esoteric art will induce, in some of the trainees, illusions of being an artist.121 Moreover, gratified to be admitted

121 Compare the concern expressed in Beckwith, Judges Study Free Market Economics (At Corporate, Foundation Expense), in Legal Times of Washington, Feb. 5, 1979, at 1. The article deals with seminars for judges conducted by the Law and Economics Center of the University of Miami, a well-known focus of "Chicago School" economics. One-fifth of the federal judges have already had
to the society of the cognoscenti, judges will become too receptive to the notion that the laity, the jury, is an obstruction to decision-making in "complex cases." A third danger is that a person who has taken a course or even several courses in economics as an undergraduate or in law school will, twenty years later, be spouting or relying on obsolete, but firmly entrenched, economic dogmas. There is still much to be said for using expert testimony or counsel's extraction from and interpretation of current economic literature to "educate" judges and juries in adversary proceedings. Counsel will need advice from economists to perform this role well, just as they need expert psychiatrists, engineers, accountants, chemists, statisticians, or art critics in litigation involving these other mysteries.

This is not to say that there is no place in a law school curriculum for courses like economics for lawyers or law and psychiatry. The social sciences must make their presence felt in every relevant course on "law." But, beyond that, law as the most comprehensive of the humanities must encourage the pursuit of particular intellectual interests of its students. One can only hope that the teachers are not ideologues and that students find their curiosity aroused rather than satisfied by introduction to the subject.

As a result of my better understanding of the concept of marginal cost, I have recently set aside a $15 million dollar antitrust verdict," one unnamed U.S. District Judge wrote.

*Id.* 28.