THE INSIGHTS OF JOSEPH BRODLEY'S SCHOLARSHIP FOR THE CURRENT DEBATES OVER THE ANTITRUST TREATMENT OF SINGLE-FIRM CONDUCT

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INTRODUCTION

The mark of great scholarship is that it provides fresh insight into debates that arise many years after publication. Under this standard, Joseph Brodley is a giant in his field.

A thread that runs throughout Brodley's work is the importance of rooting antitrust policy in sound economic analysis. There is little disagreement on that principle today, but it was not as universally accepted when Brodley began his scholarly career. To use a term from the literature on the economics of innovation, Brodley was an "early adopter."

However, the wide acceptance internationally of the principle that economics lies at the heart of sound antitrust policy has not resulted in consensus on what that principle means. The embrace of a role for economics is in some ways analogous to the international enthusiasm by sports fans for "football." In different places, for example the United States and the European Union, the same word has quite different meanings.

A distinguishing characteristic of Brodley's scholarship was that he knew the economics literature well enough to realize that it did not speak with a

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single voice about antitrust issues.[1] He looked to the literature for scientific consensus that could inform a rational policy. What he found were many unsettled issues and he went about examining how to set sound policy in real time in light of a lack of a consensus.[2]

In Part I of this Essay, I will use three of Brodley's articles to illustrate this point. Two are on predatory pricing and one is on the use of decision theory in formulating antitrust standards. All three are relevant for the current debates in the international antitrust community regarding single-firm conduct. Part II describes those debates and the insights Brodley's articles provide into them. The Essay concludes with a brief homage.

I. BRODLEY'S INSIGHTS

A. *Brodley on Predatory Pricing*

Brodley wrote two important papers about predatory pricing, an area where the economics literature has had a demonstrable effect on antitrust policy.[3] A notable feature of Brodley's work in this area is that he has co-authored with eminent economists. The first of these was written with George Hay, the first chief economist at the Department of Justice.[4]

The backdrop of the article was the highly influential article by Areeda and Turner on predatory pricing.[5] They had argued that to avoid condemning competitive price cutting, the only prices that should be deemed predatory are those that were lower than would be rational under the normal workings of competition.[6] Economic theory predicted that under competition, prices could drop as low as short-run marginal cost.[7] Despite the conceptual merits of a short-run marginal cost standard for predatory pricing, however, Areeda and Turner considered the measurement problems to make it unworkable.[8] As a result, they argued for substituting average variable cost as the standard on the grounds that it was a reasonable approximation and was easy to measure.[9]

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[1] Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 738 (1981).

[2] *Id.* at 794.

[3] Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2242 (2000); Brodley & Hay, *supra* note 1, at 740.

[4] Brodley & Hay, *supra* note 1, at 740. George Hay served as the Director of Economics for the Department of Justice's Antitrust Division from 1973 to 1979 (he was on leave from 1977 to 1978).

[5] Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 700 (1975).

[6] *Id.* at 712.

[7] *Id.* at 702.

[8] *Id.* at 711.

[9] *Id.* at 716-18.

The Areeda and Turner article was followed by a series of articles by economists that were critical of using average variable cost as the appropriate cost standard.[10] The Brodley and Hay article presents a lucid exposition of the different positions staked out in those articles, and then contains a thoughtful discussion of how legal standards should evolve in the presence of substantial disagreement among professional economists over the economic principles underlying the standard.[11]

The Brodley and Hay discussion of the challenge of identifying a professional consensus and then incorporating it into legal standards is most insightful. In their conclusion, Brodley and Hay opined, "[r]egrettably, the present state of economic theory has yet to produce a test that is both comprehensive in its policy objectives (by promoting competition and economic welfare over the short- and long-run), and administratively feasible over the range of probable applications."[12] It is hard to quarrel with this assessment of the state of the economics literature at that time – or now.[13]

No matter what the response from economists was, the Areeda and Turner article was highly influential with courts. To be sure, the Supreme Court never fully embraced average variable cost as the appropriate standard in all cases. However, first in *Matsushita*[14] and subsequently in *Brooke Group*,[15] the Supreme Court established standards that were intended to minimize the risk that the law would condemn competitive price cutting.[16]

In an article with economist Patrick Bolton and our former Boston University colleague Mike Riordan, Brodley addressed whether *Brooke Group* reflected modern economic scholarship.[17] One of the enduring issues with respect to predatory pricing doctrine is whether, as the Supreme Court asserted in *Matsushita*, "predatory pricing schemes are rarely tried, and even more

[10] *See, e.g.*, William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1, 10 (1979); F.M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 890 (1976); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 285 (1977).

[11] Brodley & Hay, *supra* note 1, at 794.

[12] *Id.* at 791.

[13] Indeed, as the Brodley and Hay article makes clear, one could reasonably argue there was a professional consensus among economists *against* the Areeda and Turner standard. *Id.* at 768. Of course, such an assessment must consider the possibility of publication bias. An article criticizing the standard arguably had a better chance of being deemed novel enough to publish.

[14] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

[15] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

[16] In addition to the Areeda and Turner article, the article by Joskow and Klevorick seems to have influenced the Court's decision in *Brooke Group*. *See* Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 223 (1979).

[17] Bolton, Brodley & Riordan, *supra* note 3, at 2257.

rarely successful."[18] As Bolton, Brodley, and Riordan point out, the Supreme Court's reading of the economics literature seemed to give too much weight to the McGee analysis of *Standard Oil*.[19] As an alternative, the Bolton, Brodley and Riordan article proposed a set of standards that, while consistent with *Brooke Group*, reflected less skepticism that firms might attempt and succeed at predatory pricing.[20] There are two aspects of their suggestion that I particularly agree with.

First, one of the three components in their first prong is documentary evidence of a scheme of predation.[21] This was a problematic feature of *Brooke Group*. In his dissent in *Brooke Group*, Justice Stevens wrote:

> Assessing the pre-July 1984 evidence tending to prove that B&W was motivated by anticompetitive intent, the District Court observed that the documentary evidence was "more voluminous and detailed than any other reported case. This evidence not only indicates B&W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment."[22]

When the Court disregarded the documented intent[23] as making no economic sense,[24] it implicitly placed more faith in economics than is justified to formulate clear tests of which activities make economic sense and which do not.[25]

Second, the other feature the Bolton, Brodley, and Riordan article addressed was the cost standard that the Supreme Court has been reluctant to clarify, stipulating to the use of "average avoidable cost."[26] I agree with that suggestion and I believe it represents a consensus view among antitrust economists.[27]

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[18] *Matsushita*, 475 U.S. at 589.

[19] Standard Oil Co. v. United States, 221 U.S. 1, 80-81 (1911) (affirming the decree dissolving a holding company which owned a combination of defendants' stock because it violated the Antitrust Act); Bolton, Brodley & Riordan, *supra* note 3, at 2243 (stating that the Court's belief that predatory pricing was rare was based in part on the empirical study by John McGee). *See generally* John S. McGee, *Predatory Price Cutting: The* Standard Oil *(N.J.) Case*, 1 J.L. & ECON. 137, 168 (1958).

[20] Bolton, Brodley & Riordan, *supra* note 3, at 2263.

[21] *Id.* at 2262.

[22] *Brooke Group*, 509 U.S. at 248 (Stevens, J., dissenting) (quoting Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344, 354 (M.D.N.C. 1990)).

[23] Documents indicating Brown & Williamson's anticompetitive intent were presented at trial. *Id.* at 242 (majority opinion).

[24] *Id.* at 228.

[25] Michael A. Salinger, *The Legacy of* Masushita*: The Role of Economics in Antitrust Litigation*, 38 LOY. U. CHI. L.J. 475, 484 (2007).

[26] *Brooke Group*, 509 U.S. at 223 n.1.

[27] *E.g.*, William J. Baumol, *Predation and the Logic of the Average Variable Cost Test*, 39 J.L. & ECON. 49, 50 (1996).

B. *Brodley on Decision Theory*

As is discussed in more detail below,[28] references to "false positives" and "false negatives" have become as common in modern debates about appropriate antitrust policy as references to economic concepts.[29] These terms derive from decision theory, which is the analysis of decisions made under uncertainty. Because of uncertainty, some decisions necessarily turn out to be wrong in hindsight. Since errors are inevitable, optimal decisions minimize expected error costs net of decision costs.

In 1977, Brodley reviewed a proposal by Professor Ira Horowitz[30] that the Antitrust Division should use decision theory as the basis for its enforcement actions.[31] Professor Horowitz had argued that the Division's objective function should reflect the pursuit of general economic values.[32] Such an approach, according to Professor Horowitz, would counteract a tendency on the part of the Antitrust Division to enforce case law that was not economically sound.[33] Brodley was skeptical of the proposal. As he wrote, "[t]he responsibility of economists or anyone else who disagrees with a rule of law is *not* to base enforcement decisions on their own preferred value system but to present their differing ideas to a court or legislature to induce a change in law."[34]

As a former Director of the Bureau of Economics at the Federal Trade Commission, I sympathize with Brodley's position. The Antitrust Division in the Department of Justice and the Federal Trade Commission as well as antitrust agencies in other countries are unusual in how large a role economists play in law enforcement. On balance, this increased role for economics has improved enforcement, but economists at the agencies as well as senior agency officials must recognize (as most do) that the antitrust laws are not a general mandate to maximize economic welfare as they see it.

To be sure, it oversimplifies matters to suggest that the antitrust agencies should simply enforce the law as it is. Indeed, one might argue that the antitrust agencies have at least informally followed Professor Horowitz's advice. Under both Republican and Democratic leadership, the Antitrust

[28] *See infra* Part II.

[29] *E.g.*, U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 108 (1977) [hereinafter ROBINSON-PATMAN REPORT].

[30] Ira Horowitz, *Decision Theory and Antitrust: Quantitative Evaluation for Efficient Enforcement*, 52 IND. L.J. 713, 722-23 (1977).

[31] Joseph F. Brodley, *The Possibilities and Limits of Decision Theory in Antitrust: A Response to Professor Horowitz*, 52 IND. L.J. 735, 737 (1977) (critiquing the treatment Professor Horowitz's proposal gives antitrust values and its view of legal rules and process).

[32] Horowitz, *supra* note 30, at 718.

[33] *Id.* at 721.

[34] Brodley, *supra* note 31, at 744.

Division has made cartel enforcement a top priority.[35] In contrast, both the Antitrust Division and the FTC have for many years deemphasized enforcement of the Robinson-Patman Act[36] and the recently repealed per se ban on resale price maintenance.[37] These enforcement priorities reflect input from economists at the agencies as well as in the broader academic community that price fixing is economically harmful. In contrast, the case that price discrimination and vertical restraints lower economic welfare is much weaker. Indeed, selective price cuts can be (and often are) an important part of the competitive process and vertical restraints such as resale price maintenance can be (and often are) efficient forms of coordination between independent firms operating at different stages of the process of manufacturing goods and selling them to consumers.

No matter the proper role for economics and decision theory in the development of agency enforcement priorities, decision theory can provide the foundation for legal standards. The simple, practical legal standards that Brodley argued were necessary inevitably result in errors. As a result, a rational choice among competing standards has to be based on minimizing expected error costs net of enforcement costs. Ultimately, the courts and Congress make this judgment, although the agencies have an advisory role through amicus briefs, hearings, and reports.

The area of antitrust law where the debates about false positives and false negatives are currently most heated, both between the United States and Europe, and now, even within the United States, concern single-firm conduct. The following Part describes those debates, which raise the fundamental issue Brodley addressed in his article with George Hay: how should policy makers strive for economically sound antitrust doctrine in the presence of an uncertain and shifting consensus among economists?

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[35] For enforcement priorities under a Republican administration, see, for example, *Statement on Behalf of the United States Department of Justice, Antitrust Modernization Commission Hearing* (2006) (statement of Thomas O. Barnett, Assistant Attorney General), *available at* http://www.asashop.org/takingthehill/transcripts/barnett.pdf. As is discussed below, Assistant Attorney General Christine Varney's first speech as Assistant Attorney General signaled a break with the previous administration on enforcement of Section 2 of the Sherman Act. In that same speech, she said that vigorous enforcement of the provisions against price fixing would continue to be a priority. *See* Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era (May 12, 2009) (transcript available at http://www.justice.gov/atr/public/speeches/245777.htm).

[36] The Robinson-Patman Act was severely criticized by the Department of Justice. ROBINSON-PATMAN REPORT, *supra* note 29, at 169.

[37] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 900 (2007) ("It is also significant that both the Department of Justice and the Federal Trade Commission – the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance – have recommended that this Court replace the *per se* rule with the traditional rule of reason.").

II. THE TRANSATLANTIC AND DOMESTIC DEBATE OVER UNILATERAL CONDUCT

When Brodley began his career as an antitrust scholar, antitrust was primarily a U.S. institution. There are now over one hundred countries with antitrust authorities.[38] Many of those that are developing their antitrust regimes look to two dominant models for guidance: the United States and the European Union.[39] On many aspects of antitrust doctrine, a general consensus exists. Price fixing and its equivalents are condemned essentially everywhere.[40] Merger review occasionally generates disagreement on individual cases, but the broad framework first laid out in the 1982 Department of Justice Guidelines forms the foundation for review of horizontal mergers virtually everywhere.[41] The broad area of antitrust law where consensus remains elusive is single-firm conduct.

A. *Europe*

In 2005, the Directorate-General for Competition of the European Commission ("DG-Comp") issued a staff discussion paper on enforcement of Article 82 of the European Commission Treaty.[42] After a lengthy set of consultations, the DG-Comp issued a guidance document.[43]

A clear example of the difference between U.S. law and the enforcement philosophy expressed in the EC Guidance Document concerns predatory pricing. Under the EC Guidance Document, pricing below average avoidable cost is presumptively illegal, and pricing between average avoidable cost and long-run average incremental cost might in some circumstances be illegal if it is on balance harmful to competition.[44]

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[38] Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT'L L. 189, 189 (2009).

[39] *Id.* at 196.

[40] Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 813 (2009) ("In determining which agreements unreasonably restrain trade, courts generally condemn agreements that stabilize price-fixing conspiracies.").

[41] U.S. Dep't of Justice & Fed. Trade Comm'n, 1992 Horizontal Merger Guidelines (revised Apr. 8, 1997), 4 Fed. Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569.

[42] Eur. Comm'n, Directorate-Gen. for Competition, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, at 4 (Dec. 2005), *available at* http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

[43] *Communication from the Commission – Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7 (Feb. 24, 2009) [hereinafter *EC Guidance Document*], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF (setting forth the Commission's enforcement priorities to provide clarity and predictability).

[44] *See id.* at 11.

In contrast, proving a predatory pricing claim in the United States is much harder than it would appear to be in Europe under the EC Guidance Document. Under *Brooke Group*, pricing under the "relevant measure of cost," which can be presumed to be average avoidable cost,[45] is necessary but not sufficient for a finding of predatory pricing.[46]

In *Matsushita*, the Supreme Court acknowledged the possibility of above-cost predation[47] but declined to outlaw it so as to limit the risk of deterring aggressive competition.[48] As such, it is a legal standard with an explicit decision-theoretic basis. The Court acknowledged accepting the risk of a false negative in order to avoid false positives as well as excessive litigation costs.[49]

The enforcement approach in the EC Guidance Document reflects a reading of the literature closer to the one Brodley gave in it the Bolton, Brodley, and Riordan article. It treats predation as a plausible occurrence rather than a practice that is "rarely tried, and even more rarely successful."[50]

Had Brodley retired a year earlier, I likely would have written that his position on predatory pricing challenged a consensus in the United States on predatory pricing. Events over the past year have, however, proven me wrong.

B. *The FTC/DOJ Single-Firm Conduct Hearings and Their Fallout*

In 2006, the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") undertook an extensive set of hearings on single-firm conduct that they intended to result in a joint report.[51] However, with the Bush administration drawing to a close and the FTC and DOJ unable to reach agreement on the report, the Justice Department issued its own report in December 2008.[52] FTC Commissioners Harbour, Leibowitz, and Rosch issued a statement the same day in effect alleging that the DOJ Report would

[45] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 n.1 (1993); *EC Guidance Document*, supra note 43, at 16 n.3.

[46] *Brooke Group*, 509 U.S. at 226.

[47] Above-cost predation means that a firm lowers prices to a level that is above its own costs but nonetheless to a level designed to drive competitors out of business so that it can raise prices after they exit. *E.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

[48] *Id.* at 583.

[49] *See id.* at 593-94.

[50] *Id.* at 589.

[51] Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition from Business Conduct to Attain or Maintain a Monopoly, 71 Fed. Reg. 17,872 (Apr. 7, 2006).

[52] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT, at vii (2008) [hereinafter DOJ REPORT], *available at* http://www.usdoj.gov/atr/public/reports/236681.htm.

eviscerate Section 2 of the Sherman Act.[53] They then went through virtually every area of substantive antitrust law relevant to single-firm conduct and argued that the DOJ Report staked out an overly permissive enforcement posture.[54] Shortly after taking office, the Obama Administration's Assistant Attorney General for Antitrust, Christine Varney, rescinded the DOJ Report.[55]

The objections the FTC Commissioners raised to the DOJ Report raise the fundamental issues that Brodley wrestled with throughout his career. No one suggests that antitrust policy should not be economically sound. The sources of disagreement turn on what constitutes economically sound doctrine. These disagreements can be divided into two broad categories: general philosophy and specific practices.

1. The Search for a Unifying Principle

The antitrust literature contains various proposals for a unifying principle to underlie all areas of Section 2 enforcement. The proposals include, "(1) the effects-balancing test, (2) the profit-sacrifice test, (3) the no-economic-sense test, (4) the equally efficient competitor test, and (5) the disproportionality test."[56]

Chapter 3 of the DOJ Report discusses the advantages and disadvantages of each, ultimately reaching the conclusion that no single test applies to all areas of Section 2 enforcement.[57] It nonetheless goes on to suggest that the "disproportionality" test should be the default principle.[58] On the surface, the point might seem strange. First of all, if no single test is appropriate, one might question why the DOJ expressed a preference for one of them. Moreover, one might argue that to be economically sound, antitrust authorities should challenge actions where the harm exceeds the benefits to all.[59] The requirement that the harm be disproportionate to the benefits creates the

[53] STATEMENT OF COMMISSIONERS HARBOUR, LEIBOWITZ AND ROSCH ON THE ISSUANCE OF THE SECTION 2 REPORT BY THE DEPARTMENT OF JUSTICE 1, 5 (Sept. 8, 2008), [hereinafter STATEMENT OF COMMISSIONERS], *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf.

[54] *Id.* at 6-10.

[55] Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/May/09-at-459.html.

[56] Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413, 413 (2006); *see also* DOJ REPORT, *supra* note 52, at 35; Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 435-46 (2006).

[57] DOJ REPORT, *supra* note 52, at 36-46.

[58] *Id.* at 46.

[59] This argument would seem to require an "effects-balancing" test.

impression that the DOJ is more concerned with corporate interests rather than the interest of consumers.[60]

From the standpoint of decision theory, however, the "disproportionality" test is not necessarily inconsistent with *consumer* surplus as the ultimate objective of antitrust. The rationale for a "disproportionality" test is similar to the rationale for the "no-economic-sense" test.[61] Indeed the "disproportionality" test is a weaker version of the "no-economic-sense" test.

Under the "no-economic-sense" test, conduct is only deemed to violate Section 2 if it qualitatively makes no economic sense unless it excludes competitors. Pricing below average variable cost arguably makes no economic sense without the exclusionary effect since shutting down would yield higher profits. Such a test embodies a strong presumption that unilateral conduct is efficient and poses a high burden for proving otherwise.[62] The rationale for such a standard is that the chilling effect on competition of false positives is more costly than the harm (in the form of monopolization) of false negatives and/or that monopolization is such a rare phenomenon that a standard that is somewhat tolerant of false negatives does not do much damage.[63]

In general, two critiques have been levied against the "no-economic-sense" test. The first is that, taken literally, any pro-competitive benefit, no matter how small, could provide a defense for anticompetitive conduct that generates substantial anticompetitive harm. The second is to challenge the implicit assumptions that false positives are more costly than false negatives or that exclusionary conduct is so rare that even a tolerant standard does not generate many false negatives. The "disproportionality" test addresses the first of these two criticisms while leaving intact the judgment about relative error costs and frequency.[64]

In theory, applying economics and/or decision theory to antitrust does not dictate any particular set of judgments. Yet, there is certainly suspicion that both can be used to disguise philosophy as scientific truth. Throughout his scholarly career, Brodley searched for what economics as a science could objectively contribute to antitrust. In expressing a default preference for a disproportionate harm test, the Justice Department arguably crossed the line by dressing up philosophy in scientific terms.

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[60] STATEMENT OF COMMISSIONERS, *supra* note 53, at 1.

[61] *Compare* DOJ REPORT, *supra* note 52, at 45 ("Under the disproportionality test, conduct that potentially has both procompetitive and anticompetitive effects is anticompetitive under section 2 if its likely anticompetitive harms substantially outweigh its likely procompetitive benefits."), *with id.* at 39 ("[T]he no-economic-sense test asks whether the conduct in question contributed any profit to the firm apart from its exclusionary effect. As long as the conduct is profitable apart from its exclusionary effect, it would pass this variation of the no-economic-sense test . . . .").

[62] *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589-90 (1986).

[63] DOJ REPORT, *supra* note 52, at 40.

[64] *Id.* at 45.

2. Specific Categories of Behavior

In addition to questioning the broad philosophy that the DOJ endorsed, Commissioners Harbour, Leibowitz, and Rosch took issue with the DOJ's treatment of virtually every area of Section 2 enforcement.[65] Looking at the criticisms as a whole, they do not acknowledge a single area of Section 2 enforcement that raises a valid concern with chilling the very competitive conduct that the antitrust laws are designed to foster.[66]

The three Commissioners even questioned whether predatory pricing should be limited to cases where a plaintiff can demonstrate pricing below cost.[67] In so doing, they went well beyond objecting that the DOJ Report, if adopted, would lead to a relaxation of the antitrust laws relative to current enforcement. This area of Section 2 law is relatively settled, with the Court reiterating *Brooke Group* in its recent *Weyerhaeuser* decision.[68] Whatever one makes of the Justice Department's endorsement of the "disproportionality" test, the chapter on predatory pricing reflects largely conventional thinking. Indeed, it is unlikely that even the Bush-era Antitrust Division wanted to weaken predatory pricing doctrine. It did not bring the predatory pricing case against American Airlines, but it chose to appeal it.[69] The Department lost that case because both the trial and appeals courts rejected its arguments about the relevant notion of cost.[70] One can read the DOJ Report chapter on predatory pricing as defending its action in *American Airlines*.

CONCLUSION – A NEED FOR MORE SCHOLARS LIKE JOE BRODLEY

The disagreement between the two U.S. enforcement agencies over the DOJ Report was a low point in antitrust enforcement in the United States. With much of the rest of the world looking to the United States as one of the two major models of antitrust enforcement, the disagreement both ceded leadership to Europe and created the impression that there is no truly rational basis for antitrust doctrine.

Arguably, both sides gave in to tendencies that Brodley's scholarship was designed to prevent. In his scholarship, Brodley both took economics seriously and was aware of its limitations. To be sure, in reading his work, one may infer leanings toward a more activist antitrust agenda than has prevailed in the United States since the 1980s. That is not a criticism. All scholars have their leanings. But Brodley was always searching the frontiers of knowledge to test

[65] STATEMENT OF COMMISSIONERS, *supra* note 53, at 6-10.

[66] *See generally id.*

[67] *Id.* at 6.

[68] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 315 (2007) (holding that the test applied to claims of predatory pricing in *Brooke Group* also apply to claims of predatory bidding).

[69] United States v. AMR Corp., 335 F.3d 1109, 1111 (10th Cir. 2003).

[70] *Id.* at 1120.

and temper his predispositions. In the rift between the two agencies, one suspects that philosophical leanings won the day even among a thoughtful set of policy makers.

In preventing such episodes in the future, we need more lawyers like Joseph Brodley. We need lawyers who have Brodley's capacity, energy, and inclination to understand modern economic analysis. And we need lawyers like Brodley who are able both to see the value in economic analysis and to ask skeptical questions about both the extent of consensus and the workability of standards. As a Boston University professor, I am proud to have for a colleague a scholar who for so many years has provided precisely this kind of analysis. I congratulate him on his impressive body of work and wish him well in his retirement.