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Book Reviews: "Antitrust Law and Economics": Responding to an Ivory Tower Critique

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"ANTITRUST LAW AND ECONOMICS": Responding to an Ivory Tower Critique

*By Robert H. Lande**

Professor Arthur Austin** recently reviewed the Nutshell, *Antitrust Law and Economics* by Ernest Gellhorn.[1] Austin makes several valid and significant points.[2] But I disagree sharply with his overall assessment of the book and believe that even most of his valid criticisms are right for the wrong reasons. In the interest of full and open debate I respectfully offer a very different opinion for public consideration.

I believe the Nutshell is a magnificent volume that is a great asset to antitrust students and practitioners. It is a particularly valuable guide to antitrust theory, practice, and decision making in the Reagan Administration.[3] As Austin concedes, the Nutshell's economic material is especially superb.[4] This alone is worth the price of the book. The Nutshell would be a useful addition to any antitrust library and a superb complement to most antitrust casebooks. Antitrust teachers should recommend or assign it to their students (as I do).[5]

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* Assistant Professor, University of Baltimore School of Law. I am grateful to Winston S. Moore who, in 1982-84, incisively instructed me about the virtues of an earlier edition of this Nutshell. I also appreciate the useful ideas I received from Dennis R. Hornbach.

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1. Austin, Book Review, 56 U. CIN. L. REV. 193 (1987) (reviewing E. GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL (3rd ed. 1986)) [hereinafter Austin].

2. Austin and I agree that the Nutshell's economic material is superb. We also agree that the book suffers from an inadequate number of citations to non-Chicagoist economic and policy sources and that the author could have devoted more attention to mergers. In addition, we each have a past association with Mr. Gellhorn at, respectively, the Case Western Reserve University School of Law, and Jones, Day, Reavis & Pogue. We both also appear to be more enforcement oriented than Gellhorn.

3. If our next president is a Republican this volume will in all likelihood retain its present utility. If not, this edition may need to be revised to remain as valuable to students and practioners.

4. *See* Austin, *supra* note 1, at 194. The basic introductory coverage of economics is almost exactly what a beginning antitrust student or practitioner needs to know. The economic commentary throughout the rest of the volume is also a first class way to teach students to "think like an antitrust lawyer." Although one always could wish for more economics — each reader will have his or her own areas they wish Gellhorn had covered in more detail — it is difficult to fault this section. Gellhorn's accomplishment here should not be underrated; so many of today's antitrust casebooks have either too little economics, outdated economics, or economics that is too difficult to understand. Gellhorn strikes close to the perfect balance, an extraordinarily difficult task.

5. Among its many strengths are its succinct and accurate summaries of numerous areas of the law. An antitrust teacher who wants to cover a marginal topic briefly often

Austin appears to have three major criticisms: (1) lack of attention to the historical, populist underpinnings of antitrust; (2) confused explanation of the distinction between the rule of reason and *per se* standards; and (3) inadequate attention to mergers and tying. He also has a damning complaint, that the Nutshell deceptively attempts to promote conservative ideology. Let me discuss these in order.

Although Gellhorn presents an introductory discussion of the historical underpinnings of antitrust law,[6] Austin complains that Gellhorn's subsequent case law and subject matter discussions ignore the populist influence in favor of strictly economic analysis.[7] While I do not embrace Gellhorn's particular brand of economics,[8] I would not want my students who begin practicing antitrust law in 1988 to argue cases in populist terms. Whether the litigation involves mergers, monopolization or vertical restraints, arguments today should not be framed in terms of the hostility towards big business and the "robber barons" that Austin reminds us had so much influence on the passage of the antitrust laws.[9] I shudder to think of the reception this approach would receive from the current federal antitrust enforcers or from most federal judges, approximately half of whom were appointed by President Reagan.[10] Gellhorn's emphasis on economics, market power, and efficiency is especially valuable since so many Warren Court antitrust cases, which students read in their casebooks, are of dubious or no validity even though they have never been explicitly overruled. As a result, most students acquire a distorted belief as to the importance of populism in deciding current antitrust cases. A dose of Gellhorn is a

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cannot in good conscience assign students to read half a dozen cases totaling more than 100 pages. For these situations the 10-20 page treatment in the Nutshell, consisting of cogent 2-3 page case summaries and analysis, is perfect.

6. E. GELLHORN, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 1-3 (3rd ed. 1986).

7. *See* Austin, *supra* note 1, at 197.

8. For example, Gellhorn stresses economic efficiency throughout the Nutshell. I strongly would have preferred that he also emphasize the wealth transfer effects of market power — how market power can be used by firms with market power to acquire wealth from consumers. *See generally* Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (asserting that the antitrust laws were enacted primarily for the purpose of preventing firms with market power from extracting wealth from consumers).

9. *See* Austin, *supra* note 1, at 195.

10. The same can be said for Austin's curious belief that the common law principles of restraint of trade are "indispensable guides" to understanding the current antitrust laws. *Id.* at 194. I would be surprised if any astute antitrust practitioners, academics, or enforcers agreed with him.

perfect counterweight for this problem. His decision to analyze most cases solely in terms of economics is correct.[11]

Austin also complains that Gellhorn has confused the *per se*/rule of reason distinction. He then attempts through a substantial portion of his review to straighten it out.[12] This area of antitrust law is, however, impossibly complex. I do not believe that Austin, in his treatment of the subject, or anyone else, has yet untangled this area clearly and satisfactorily.[13] Because Gellhorn recognizes the importance of this distinction and handles it well,[14] it seems unfair to berate the Nutshell for not clarifying the confusion, a task that neither Austin nor anyone else has yet accomplished.

Given the importance of mergers in today's world, Austin might be right in saying that Gellhorn has given insufficient attention to this subject.[15] However, Austin's criticism is right for the wrong reasons.[16] He complains that the Nutshell gives inadequate attention to the intricacies of *United States v. Von's Grocery* and other such trivialties.[17] But any astute antitrust practitioner knows that a thorough knowledge of *Von's Grocery* is of virtually no benefit. The case is so dead and misguided that it is an embarrassment even to most enforcement-minded members of the antitrust community. An overly lengthy treatment in the Nutshell would only distort students' views as to the status of merger enforcement and case law today (and after the 1988 election). Antitrust will not return to the *Von's Grocery* standard in the foreseeable future and I certainly do not want my students to spend their time mulling its nuances. Gellhorn's treatment of the case is fine, while Austin's prescription would do more harm than good.

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11. The volume would have been even better if his economics had been more balanced. For further discussion of the Nutshell's ideological bias, see *infra* notes 26-29 and accompanying text.

12. *See* Austin, *supra* note 1, at 197-99.

13. For perhaps the best attempt to explain this distinction, see 7 P. AREEDA, ANTITRUST LAW ¶ 1511 (1986), *cited with approval in* E. GELLHORN, *supra* note 6 at 187.

14. *See* E. GELLHORN, *supra* note 6, at 169-202; *see also* Gellhorn & Tatham, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. 155 (1985).

15. Austin, *supra* note 1, at 202.

16. Moreover, Austin's count of 49 pages (attempting to show how few pages the Nutshell devoted to mergers) is unfair since it omits highly relevant material in other sections of the book. *See id.* For example, Gellhorn discusses the approach to market definition taken by the Department of Justice in their 1984 Merger Guidelines and other material on market definition on pages 96 through 115. *See* E. GELLHORN, *supra* note 6, at 96-115. Although market definition principles are integral to merger analysis, these pages are not counted in Austin's merger total.

17. *See* Austin, *supra* note 1, at 202-03 (discussing United States v. Von's Grocery, 384 U.S. 270 (1966)).

If I were adding merger material to the Nutshell I would instead add to its discussion of the Department of Justice Merger Guidelines,[18] an especially important practitioner's concern. Regardless whether Austin likes them, the Guidelines dominate current merger analysis and day-to-day practice. Even a future enforcement-oriented administration will likely use a similar analytical approach to mergers. It is, therefore, crucial for students to learn the Guidelines well.[19]

Austin also complains that Gellhorn failed to unravel tying analysis, a "mysterious phenomenon which is not wholly understood by anyone."[20] As Austin correctly observes, this area has never been satisfactorily analyzed or explained. While I agree that Gellhorn has not advanced the field, I strongly disagree that the Nutshell is the appropriate forum for this kind of achievement. A law review, not a Nutshell, is the place for revolutionary thinking about tying analysis. A Nutshell should concentrate on explanation, not innovation. This Nutshell explains the existing situation as well as can be expected given that tying has never been properly analyzed.[21] Again, Austin evaluates the Nutshell by the wrong criteria and expects it to accomplish what the antitrust profession has so far been unable to do.

The above criticisms pale compared to Austin's chief complaint: that the Nutshell deceptively attempts to promote Chicago School ideology. Austin is correct only in that the Nutshell does cite predominantly to conservative literature. In the predatory pricing section, for example, I would have preferred that Gellhorn cite more extensively to articles and theories explaining why predatory pricing can harm consumer welfare,[22] or why true predatory pricing may be more common than some believe.[23] I would also have liked

18. *See* E. GELLHORN, *supra* note 6, at 367.

19. I agree with Austin's apparent belief that the Reagan Administration has been too lax on mergers. One of my biggest complaints is that the Administration has not enforced the Guidelines as they were written.

20. Austin, *supra* note 1, at 199 (quoting G. HALE & R. HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 53 (1958).

21. The author is working on his own attempt to analyze tying correctly. *See* Lande, Untangling Tying, (1988 draft) (unpublished manuscript).

22. For excellent analysis and more extensive citations, see Ordover & Wall, *Proving Predation after Monfort and Matsushita: What the "New Learning" Has to Offer*, in 1 ANTITRUST No. 3, at 5 (1987) and Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982).

23. For example, I believe Koller's empirical "proof" that predatory pricing is so rare that it does not merit antitrust attention has effectively been rebutted by one of the best antitrust articles ever published, Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655 (1982). Since the Nutshell cited Koller, I fervently wish it had cited Zerbe & Cooper as well. *See* E. GELLHORN, *supra* note 6, at 92 n.1.

to see more references to the important new "raising rivals' costs" literature.[24] Even if Gellhorn is right and Section 2 of the Sherman Act should be repealed the Nutshell should be written for today's reality, as an aid to plaintiffs as well as defendants. This is especially true if its purpose is to survive the current conservative antitrust era. However, because the predation sources Gellhorn cites are more balanced than those recently cited by the Supreme Court in *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*,[25] one must be careful in accusing the Nutshell's economics of being out of touch with today's antitrust center.

More importantly, even on the issue of the Nutshell's lack of ideological balance Austin is right for the wrong reasons. Austin's sharpest criticism is not that the Nutshell lacks ideological balance, but that it deceptively attempts to portray itself as neutral while actually pushing a conservative agenda. Austin writes: "Without a declaration or warning, Gellhorn evangelizes the gospel of the Chicago School."[26] Austin accuses Gellhorn of selling the Chicago School approach through "subtle but nevertheless effective" methods that "subliminally condition the user to accept their system of economics and antitrust as the final authority."[27]

Nonsense. There is nothing subtle, subliminal, or disguised about the Nutshell's ideology. The first sentence of its preface uncritically quotes Justice Holmes' belief that the Sherman Act is "humbug based on economic ignorance and incompetence."[28] The first paragraph of its chapter on Monopoly opines: "[T]he growth of monopoly power except for desirable reasons (such as economies of scale limiting the number of firms) remains without theoretical

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24. The only reference I can find in the Nutshell to this path-breaking literature is E. GELLHORN, *supra* note 6, at 246. For a more thorough discussion and citations to the literature, see Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

25. 475 U.S. 574 (1986). *Compare* E. GELLHORN, *supra* note 6, at 144-46 (citing in order: Areeda & Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977); F. FISHER, J. MCGOWAN & J. GREENWOOD, FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND U.S. V. IBM (1983); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981)) *with Zenith*, 475 U.S. at 589 (citing in order: R. BORK, THE ANTITRUST PARADOX (1978); Areeda & Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Koller, *The Myth of Predatory Pricing — An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); McGee, *Predatory Pricing Revisted*, 23 J. L. & ECON. 289 (1980)).

26. Austin, *supra* note 1, at 204.

27. *Id.* (footnote omitted).

28. E. GELLHORN, *supra* note 6, at XVII.

support."[29] Gellhorn makes no attempt to hide his ideology — it is bold and unashamed. Antitrust students should have little trouble recognizing Gellhorn's brand of antitrust, and I would expect any teacher assigning or recommending the Nutshell to call it to students' attention. Gellhorn says, in effect, "Here is one side of the argument — the one that currently is winning — and since you know my slant you can discount it if you wish." This is not as valuable as a more evenhanded presentation, but it is unfair and incorrect to accuse the Nutshell of deception.

My suggestions as to how the Nutshell could have been even better should not detract from my overall strongly held conclusions. The Nutshell fairly must be considered a masterful source of wisdom, especially in explaining antitrust economics and the antitrust analysis currently taking place in Washington, D.C. and the vast majority of recent antitrust decisions. It provides a valuable perspective and superb training in thinking like an antitrust lawyer and understanding complex areas of antitrust law. Its other chief virtues are its clarity of exposition and comprehensiveness. It is a valuable resource for any law student or practitioner, and I strongly encourage its use.

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29. *Id.* at 91.