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FOREWORD: RECONSIDERATIONS OF DIRECTOR AND LEVI'S *Law and the Future*

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This Symposium marks the fortieth anniversary of Aaron Director and Edward Levi's seminal article, *Law and the Future: Trade Regulation*,[1] which articulated for the first time the essential elements of the Chicago School of antitrust analysis. We reproduce *Law and the Future*, and offer a variety of new commentary by five distinguished antitrust scholars. In addition, we present the proceedings of an electronic forum in which a wider circle of antitrust scholars discussed the principal articles. In this Foreword, I will offer a few observations on Director and Levi's article, then introduce our principal essays.

In their article, Director and Levi announce that "the conclusions of economics do not justify the application of the antitrust laws in many situations in which [they] are now being applied,"[2] and propose to "direct attention to certain problem areas for study."[3] The remainder of the article consists of sixteen pages of terse remarks, with only thirty-seven footnotes and no subheadings. On the last page, the authors predict that "in the future there may well be a recognition of the instability of the assumed foundation for some major antitrust doctrines. And this may lead to a re-evaluation of the scope and function of the antitrust laws."[4]

These predictions have proven remarkably prescient. Perhaps the article's greatest achievement is to set out (albeit in schematic form) a research program that challenged and ultimately overthrew the existing antitrust orthodoxy. The few pages of Director and Levi's article contain, in germinal form, most of the principal ideas of the Chicago School of antitrust analysis. As James May notes in his essay below,[5] all of the major antitrust scholars in the Chicago tradition have acknowledged their debt to its ideas. Although (astonishingly) no federal court has ever cited the article, its ideas have transformed antitrust law over the past forty years.[6]

Director and Levi propose to discuss three "new" problems: how the law should view large firm size that was not acquired by merger; how the law should view abusive or exclusionary practices that are said to create or extend monopoly power; and how to characterize agreements among competitors.[7] We can now

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1. Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956), *reprinted in* 17 MISS. C. L. REV. 7 (1996).

2. *Id.* at 282.

3. *Id.* at 281.

4. *Id.* at 296.

5. James May, *Redirecting the Future*: Law and the Future *and the Seeds of Change in Modern Antitrust Law*, 17 MISS. C. L. REV. 43 (1996).

6. *See generally* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989).

7. Director & Levi, *supra* note 1, at 282-83.

recognize the authors' approach to these questions as distinctively Chicagoan. In the course of their discussion, Director and Levi

- focus on various practices' effects on economic efficiency rather than on fairness or "other objectives."[8]
- measure practices' competitive effects by their likely effect on output,[9] particularly questioning the idea of unmeasurable "incipient" reductions in competition.[10]
- express special concern for the effects of antitrust rules on productive efficiency.[11]
- suggest that monopolies and cartels are usually "self-correcting" primarily because of new entry.[12]
- advocate use of the determinate, neoclassical models of monopoly, dominant firms, and cartels rather than the indeterminate models of oligopoly pricing as guides to antitrust policy.[13]
- assess a practice's likely competitive effects by asking if the practice would be a rational way of gaining monopoly profits.[14]
- reject the idea of "leverage" as an explanation for most abusive practices like tying, vertical integration, and exclusive dealing.[15]
- explain many abusive practices as means of price discrimination which exploits but does not extend monopoly power, and may even expand production.[16]

These ideas have become commonplace in Chicago scholarship and have, as the authors predicted, deeply influenced judicial decisionmaking. Director and Levi may even have predicted the form in which the transformation of antitrust law would occur. They wrote that even if the economic analysis showed the law to be ill-founded, the effect on the law might not be immediate. "The main lines of the law, then, may remain the same, but the statement of reasons for the law may change, and this in itself should have an interstitial effect in the cases."[17] This sentence describes, in capsule form, what has indeed happened in antitrust. The Supreme Court has not overruled any antitrust precedents since *Continental T.V., Inc. v. GTE Sylvania, Inc.*[18] twenty years ago. Instead, it has reconceptualized long-standing antitrust doctrine in terms of economic efficiency, and this process has markedly affected the application of those rules.[19]

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8. *Id.* at 285.
9. *Id.* at 287, 294.
10. *Id.* at 281.
11. *Id.* at 285-86.
12. *Id.* at 285 (monopoly), 294 (cartels).
13. *Id.* at 287.
14. *Id.* at 290.
15. *Id.* at 290-91.
16. *Id.* at 287.
17. *Id.* at 282.
18. 433 U.S. 36 (1977).
19. Page, *supra* note 6; *see also* William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1 (1995).

The essays in this Symposium take a wide variety of approaches in their reconsiderations of Director and Levi. Ian Ayres addresses the problem of firms that have achieved large market share without combination and without abusive practices.[20] It is a paradox in antitrust law that straightforward monopoly pricing is not unlawful monopolization. Professor Ayres shows that there is much to be gained in finding a practical policy to deter monopolists from exacting the last increment of the monopoly price. The envelope theorem shows that this last increment provides very little additional monopoly profit to the firm, but causes a disproportionate loss in social welfare. If the problems of measurement and administration could be overcome, a policy that induced monopolists to charge a lower price could produce large social benefits.

John Lopatka focuses on Director and Levi's treatment of the problem of monopolistic abuses.[21] He shows that, although Director and Levi were skeptical of the claim that firms can use monopoly power to harm competitors, they did not deny that such abuses could occur. Indeed, in a suggestive aside, Director and Levi anticipated the modern "post-Chicago" literature on raising rivals costs. Professor Lopatka shows, however, that there are important ideological differences between Chicagoans and post-Chicagoans over the frequency of successful nonprice exclusion and the ability of courts to identify it, and these differences continue to influence antitrust policy choices.

Peter Carstensen views Director and Levi's analysis from a populist perspective.[22] He recognizes the authors' insights but points out the rhetorical aspects of their presentation, as well. He suggests that in analyzing practices, Director and Levi acknowledge alternative, "noneconomic" approaches, but phrase these acknowledgments in a way that promotes a limited enforcement agenda.

James May places *Law and the Future* in the context of the developing ideas of its authors.[23] He strikingly shows how Director's antitrust ideas were continuous with his libertarian political ideology[24] and traces the evolution in Levi's thinking on the issue of monopolistic abuses. He then shows the similarities and differences between the ideas in *Law and the Future* and the economic ideas of the formative period of antitrust. Finally, he shows how the later Chicago School scholars, particularly Robert Bork, have drawn on, but significantly altered, the Director and Levi approach.

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20. Ian Ayres, *Pushing the Envelope: Antitrust Implications of the Envelope Theorem*, 17 MISS. C. L. REV. 21 (1996).

21. John E. Lopatka, *Exclusion Now and in the Future: Examining Chicago School Orthodoxy*, 17 MISS. C. L. REV. 27 (1996).

22. Peter C. Carstensen, *Director and Levi After 40 Years: The Anti-Antitrust Agenda Revisited*, 17 MISS. C. L. REV. 37 (1996).

23. May, *supra* note 5.

24. For a discussion of the role of ideology in the early shaping of antitrust, see William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1 (1991).

Fred McChesney suggests that Director and Levi's presentation is too terse to have set out a research agenda.[25] Instead, he views it as a cryptic allusion to a comprehensive research program already in progress at the University of Chicago. In the latter half of his article, Professor McChesney speculates that Director, whose probing intellect challenged everyone at Chicago, would have turned that intellect to the analysis of the interest-group dynamics of antitrust. Director and Levi sharply distinguished antitrust as an economic policy from pernicious "NRA attempts" to regulate the economy directly.[26] Some modern scholars now challenge that distinction between antitrust and regulation,[27] and at least one suggests that the NRA era was actually a golden age of economic policy, precisely because the antitrust laws were suspended.[28] Professor McChesney argues that Director would have come to approve this line of research. Interestingly, while Professor Carstensen and others in the Symposium emphasize the power of ideas in shaping antitrust law, Professor McChesney directs our attention to the power of interest group politics.

For a decade, antitrust scholars have struggled to shape a new, "post-Chicago" approach.[29] These essays allow us to revisit the first Chicago synthesis and to examine its origins. Equally important, they ask what we have learned in forty years that might alter Director and Levi's outlook. We hope they will contribute to the debate over the future of antitrust.

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25. Fred S. McChesney, *Back to* Law and the Future, 17 MISS. C. L. REV. 81 (1996).

26. Director & Levi, *supra* note 1, at 281.

27. THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shugart, II eds., 1995).

28. George Bittlingmayer, *Output and Stock Prices When Antitrust is Suspended: The Effects ot the NIRA, in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE, *supra* note 27, at 287 (suspension of antitrust caused economic boom).

29. *See, e.g.*, Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995); Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World*, 63 ANTITRUST L.J. 669 (1995); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985).