Remarks on An Ethical Perspective of Antitrust Law
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“Woe unto them that join house to house, that lay field to field, till there be no place”¹

I have been asked to speak today on antitrust and the business school and more particularly to elaborate on the relationship between business ethics and antitrust. A natural connection between antitrust law and the business school should exist. After all, antitrust law deals with business behavior. Thanks in no small part to the support of the American Antitrust Institute, business and legal scholars have begun to share their insights into antitrust issues, and the fruits of this collaboration have been published in recent issues of the New York Law School Law Review and the Journal of Public Policy and Marketing.

The research to date has focused on the insights of business economics, marketing and strategic management.² These disciplines focus on the ways in which businesses actually behave rather than how a hypothetical profit maximizing firm ought to behave, and their approaches to business conduct suggest ways in which antitrust analysis can incorporate integrate psychology, organizational and consumer behavior with traditional economic models.

¹ Isaiah 5:8.
A fourth business school discipline, ethics, has yet to be explored. This is not to say there is no interest in the relationship between business ethics and antitrust. For example, Albert A. Foer, the president of the American Antitrust Institute, has suggested that business ethics should take up the topic of antitrust. Similarly, Matti Estola, a Finnish economist, has indicated that ethics should play a role in our understanding of business competition.

Despite these invitations, the literature of business ethics has largely ignored the issue of antitrust and competition except to acknowledge the need for research. So I concede at the outset that our state of knowledge and acceptance of the relationship between antitrust and business ethics is at the same point today where our knowledge and acceptance of the Chicago School approach to economics was when the Aaron Director first began to publish their research in the 1960s. Nonetheless, I believe that as we begin to explore the relationship between ethics and antitrust we will enrich our understanding of antitrust law. At the very least, business ethics provides a basis for recovering antitrust doctrines designed to prevent exclusionary harms to competition.

Antitrust Law: The Economic Model

Those who seek to enforce the state and federal antitrust laws immediately confront what Frederick Rowe called the “Faustian Bargain” of antitrust law and economics. Economics promised to provide a dispassionate and objective set of standards for judging the pro or anti competitive nature of business conduct.

The economic model proceeds on two simple, basic assumptions: people behave rationally and people seek to maximize their wealth. From this assumption, economists try to predict how businesses react to their environment by asking what a rational profit

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maximizing person would do. The logic of economic analysis is straightforward. In a competitive market, rational profit maximization causes firms to produce and market their goods and services more efficiently. Why? Because there is no other way to increase profits in a competitive market except by lowering costs. A monopolist, however, can increase profits by raising prices above competitive levels. Higher prices may mean more profits for the monopolist, but it means fewer goods and services for consumers. Worse, a dollar’s worth of goods and services lost by consumers will translate into something less than a dollar increase in profits for the monopolist. In other words, society as whole becomes poorer when a business monopolizes a market. This net loss of total wealth in society is what the economic model calls “consumer welfare loss” and “harm to consumers.”

Of course, even a monopolist is always under pressure to increase profits, and raising prices above competitive levels is a one time boost in profit levels. Once prices are set at the monopoly price level, the only way for the monopolist to increase profits is to lower costs. A rational profit maximizing monopolist will usually pass along some of the cost savings to consumers, but even if the monopolist holds on to all the cost savings, an increase in productive efficiency will result and by itself an increase in efficiency does not enable the monopolist to raise prices to consumers. Consequently, a monopolist will seek to maximize its productive efficiency just like a business would in a competitive market, and productive efficiencies created by both monopolies and competitive firms increase the total wealth in society. In this respect, all efficient conduct is procompetitive even if it is undertaken by a monopolist.

There are numerous problems with the economic model, not the least of which is distinguishing between efficiency enhancing and competition reducing conduct. In theory, you can simply check to see whether the conduct increases the net wealth in society, but in practice, this is impossible to measure. Using price increases as a proxy for welfare losses provides only limited assistance. Some types of conduct, such as
price fixing, always or almost always result in price increases, but a great deal of conduct thought to violate the antitrust laws for the first three quarters of the twentieth century (1) have an indeterminate effect on prices, e.g., vertical integration, (2) result in lower prices, e.g., predatory pricing, or (3) may have productive efficiencies large enough to offset the negative that any resulting price increases would have on consumer welfare, e.g., exclusive dealing. Thus, the economic model of antitrust can bring clarity and certainty to antitrust law only by making additional and more controversial assumptions such as the social cost of under deterrence is less than the social cost of over deterrence.

Reliance on the economic model also comes at the cost of allowing some types of competitive injury to go unremedied. As Eleanor Fox recently pointed out, antitrust law has traditionally recognized three basic types of harm to competition.6 First, competition could be harmed by the creation of an unlevel playing field. Large firms, for example, might enjoy economies of scale that smaller competitors simply could not keep up with. Wal-Mart versus the Mom and Pop grocery store presents a modern day version of this concern, and the Robinson-Patman Act’s prohibition on volume discounts is perhaps the clearest legal expression of this concern.

Second, competition could be harmed by the exclusion of competitors other than on the merits. Perhaps the clearest expression of this concern in statutory law would be the Clayton Act’s prohibition on tying.

Third, harm to competition may also mean economically inefficient conduct which reduces aggregate consumer welfare. Into this category would fall the Archer Daniels Midland case in which a group of firms conspired to raise the prices of their products. Courts have almost always condemned price-fixing agreements as naked restraints on trade under the Sherman Act.

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The rhetoric of antitrust has not changed much since the Woodrow Wilson Administration, but the exclusive reliance on the economic model during the past twenty-five years has meant the loss of protection against the first two types of harm to competition, level playing field and exclusionary conduct. During the Clinton administration the concept of harm to consumer welfare expanded to included loss of innovation, but not purely exclusionary harms. For example, the Department of Justice attacked Microsoft’s conduct not because it excluded rivals from the market, but because it entrenched Microsoft’s monopoly in the operating systems market. In other words, exclusionary conduct was attacked because it harmed economic efficiency not because exclusion of rivals was a harm in and of itself. Resurrection of antitrust law as a positive force requires some expansion of the range of cognizable harms to competition.

Despite its pretensions to “value free” objectivity, the economic model of antitrust law is not devoid of ethical content. The economic model is a form of utilitarianism where utility is measured solely in terms of dollars. The emphasis on each actor maximizing his own wealth smacks of the most hedonistic form of utilitarianism, ethical egoism, but the economic model is not that radical. The economic model promotes self-interested behavior not as an end in itself but as a means to maximizing the wealth or utility in society. The equation of the greatest wealth with the greatest good is problematic at best. As we shall see, from the standpoint of business ethics, the inability to consider non-utilitarian points of view also renders the economic model suspect.

Thus, the question is not whether antitrust law incorporates ethical values, it does. Rather, the question is whether the broader approach offered by business ethics provides a justification and the means for recovering any of the “lost” anticompetitive harms identified by Professor Fox.

**Business Ethics: A Brief Introduction**

Although the Association to Advance Collegiate Schools of Business (“AACSB”) requires accredited Business Schools to teach the ethical environment of business, the
AACSB does not require a separate course in business ethics. Many schools assume that students will learn about ethics in other courses, and most textbooks for most core courses, e.g., finance, marketing, etc., in the business curriculum do include a chapter on business ethics. Whether this chapter is actually taught remains an open question.

Whether as part of a separate course or as a chapter in some other required course, the goal of business ethics is not so much to teach students right from wrong as it is to get students to think about and discuss the ethical implications of business decisions. Business students generally learn some elementary concepts from three schools of moral philosophy, Utilitarianism, Kantianism, and Aristotle’s virtue ethics. Business students readily accept a simplistic version of Utilitarianism's cost/benefit approach to ethical dilemmas, and most of the work is getting them to broaden the costs and benefits to include more than just the revenues and expenses of their employers. Immanuel Kant’s work is as difficult as it is important, which is why most texts only present three basic Kantian principles. First, ethical rules must be universalized. For example, you cannot rightly claim that lying is unethical if you carve out an exception for the little white lies you tell to keep yourself out of trouble. Second, it is wrong to treat humans merely as means to an end. Employees are not just labor costs to be minimized, but human beings with rights that must be respected. Finally, the only truly “good” thing is a “good will,” i.e., intent matters. From Aristotle’s virtue ethics, students learn that a good community promotes the virtues of its members. Consequently, a business executive has a moral duty to manage her firm in a manner that promotes the virtues of its members or “stakeholders.” Most approaches to business ethics emphasize the need to consider all three schools of thought before making a decision.

Business ethics borrowed these extant moral philosophies and applied them to business problems, it did not create them. And whether in the classroom or in research, business ethics primarily borrows its principles and analytical frameworks from other sources, including political philosophy, religion and bioethics.
The Business Ethics Model: Stakeholder Management

Even a cursory examination of business ethics texts and scholarship would reveal that the bulk of business ethics is simply the application of preexisting ethical principles to business conduct, i.e., situational ethics where all the situations take place in business. The theory of stakeholder management is single great innovation of business ethics.

Although one could argue that stakeholder theory dates back to the debates between Means and Dodd during 1930s, the theory came into its own in the 1980s as an attempt to development a coherent response to Milton Friedman’s argument that manager’s one and only ethical duty was to maximize shareholder wealth. While Friedman conceded that individual shareholder’s may have moral values other than wealth maximization, his approach to business ethics would allow shareholders to avoid moral responsibility by employing an agent, the corporation, to perform unethical conduct.

R. Edward Freeman initially developed the concept, stating that stakeholders consist of “any group or individual who can affect or is affected by the corporation.” In contrast to Friedman’s view that a corporation exists solely to maximize the wealth of its shareholders, Freeman’s “stakeholder theory does not give primacy to one stakeholder group over another.” Instead of attempting to maximize profits, Freeman argues “management must keep the relationships among stakeholders in balance.” Freeman acknowledged that competitors were stakeholders, stating that “competitors and

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government would be the first to be included in an extension of this basic theory.”¹¹ Freeman is not alone in recognizing competitors as stakeholders. For example, Archie Carroll and Ann Buchholtz acknowledge an appropriate consideration of who is a stakeholder “might include competitors,”¹² although they relegate competitors to the status of secondary stakeholders for whom “the level of moral accountability … tends to be lower.”¹³

The key, of course, is to identify the rights of competitors. After all, the stakeholder management requires the balancing of the interests of the firm’s stakeholders. While business ethics acknowledges the status of competitors as stakeholders, it has yet to identify the legitimate interests of competitors as stakeholders. Consequently, we must do what business ethics has always done, turn to other sources. Fortunately, there is an extant body of ethical literature that deals directly with the issue of the obligations that competitors owe to each other and that can gives us some clues about what these obligations might look for purposes of antitrust law, I am speaking of the literature of sportsmanship.

**Sportsmanship and Competition**

Stakeholder management theory suggests that a firm owes its competitors ethical duties, but this theory has yet to define what those duties may be. Business and economics are not the only disciplines concerned with the nature of competition and competitors.¹⁴ Sports are all about competition, and the ethical component of sports,

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¹⁴ While the literature of business ethics has largely ignored sports ethics, the reverse is not true. At least one sports ethicist has recognized the connection, noting that “if I am not morally entitled to hit someone over the head when competing for a business contract, then I am just as ethically constrained from injuring a competitor in a sporting contest.” Oliver Leaman, *Cheating and Fair Play in Sport, in Ethics in Sport* 91, 95 (W. J. Morgan, K. V. Meier and A. J.-A. Schneider, 2001).
sportsmanship, deals directly with the issue of the ethical duty owed to competitors. Just as business ethics contends with the need of firms to make a profit, sportsmanship contends with the need of athletes to win. And just as business ethics is forced to respond to the ideology of profit maximization as the sole function of commercial enterprise, so too sportsmanship is forced to deal with a prevalent belief that, in Vince Lombardi’s immortal words, “winning isn’t everything, it’s the only thing.” More precisely, sportsmanship suggests that a player may not impede her competitors free access to the game, something analogous to “the right of market actors to enjoy access to the market on the merits.”

Sports have three types of rules: (1) constitutive rules of play that define how the game should be played, e.g., a touch down is worth six points, (2) proscriptive rules of play, e.g., the prohibition against corked bats in baseball, and (3) sportsmanship rules which refer “to the inherent quality in playing a game in which one is honor bound to follow the spirit and the letter of the rules.” Sportsmanship rules are particularly important because “these rules preclude behaviors that place winning above everything else, including opponents' welfare and competition between equitable opponents.” By equating profit with winning, it is quite easy to draw on this sportsmanship framework to analyze business conduct. The legal environment of business matches the constitutive and proscriptive rules of sports. Business ethics would fulfill the role of sportsmanship.

There are those in the sports world who advocate “elbows out” competition, analogous to the Friedman view of profit maximization. The rules are to be followed only insofar as the penalty for breaking the rules jeopardizes the goal of winning. At the very

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least, a player should disregard the letter and the spirit of the rules whenever it stands in the way of victory.

While this attitude may have become commonplace in many sports, it is universally condemned by scholars of sportsmanship. First, as Lumpkin points out, such “disregard for the rules … often leads to the objectification of the opponent as an enemy.”18 Objectification violates the Kantian categorical imperative to treat people as ends in themselves, a value also recognized in business ethics.19

Sportsmanship prohibits exclusionary conduct in athletic competition not only because it objectifies one’s opponents, but also because competition “is about placing an athlete’s skills against another athlete’s skills” in a mutual “quest for excellence.”20 In other words, excluding other players from the field prevents the players on the field from performing at their best.21

While the literature of business ethics generally rejects profit maximization as the sole purpose of business enterprise,22 the literature has not yet put forward a “quest for excellence” as an alternative purpose. Nonetheless, support for such an argument is readily within reach. Aristotle’s thinking regarding virtue has begun to attract the

19 Thomas Donaldson and Patricia Hogue Werhane, Introduction to Ethical Reasoning, in Ethical Issues in Business: A Philosophical Approach 1, 8 (6th ed. T. Donaldson and P. H. Werhane, 1999). Not all aspects of sportsmanship are based on principles held in common with business ethics. For example, sportsmanship may require one athlete to help another, for example, by loaning a competitor needed equipment. Robert Butcher and Angela Jo-Anne Schneider, Fair Play as Respect for the Game, in Ethics in Sport 21, 28-29 (W. J. Morgan, K. V. Meier and A. J.-A. Schneider, 2001). This duty is based on the principle of beneficence, id., a principle not widely recognized in business ethics.
20 Angela Lumpkin, et al., Sport Ethics: Applications for Fair Play 63, 72 (3d ed. 2003); see also Drew A. Hyland, Opponents, Contestants, and Competitors: The Dialectic of Sport, in Ethics in Sport 80, 83 (W. J. Morgan, K. V. Meier and A. J.-A. Schneider, 2001) (“the quest for excellence is one of the important teloi of sport”).
21 See Robert Butcher and Angela Jo-Anne Schneider, Fair Play as Respect for the Game, in Ethics in Sport 21, 39 (W. J. Morgan, K. V. Meier and A. J.-A. Schneider, 2001) (“For an athlete, a competition is a chance to show and test his or her skills [, and] excellent, evenly matched competitors push each other to the limits of their ability. … It is not, therefore, in your interest to have your opponent play below his or her best.”).
22 See Timothy L. Fort, Ethics and Governance: Business as Mediating Institution 56 (2001) (“economic efficiency is not the whole story of life, corporate or otherwise”).
attention of business ethicists.23 Aristotle’s argument that a society ought to encourage the virtues of its members may be interpreted to suggest that a purpose of business enterprise is to encourage the virtues of its stakeholders.24 Similarly, Catholic social thought suggests that the ultimate purpose of business enterprise is to create employment for individuals that enables “the creative exercise of their own gifts, talents and energies.”25 It is understood in business, if not formally expressed in business ethics literature, that the absence of competition diminishes the quality of work performed. Dunkin’ Donuts’ Senior Vice President of Marketing recently acknowledged that increased competition from Starbucks played an essential role in reviving Dunkin’ Donuts.26 And antitrust doctrine hints at this by exempting monopolies acquired through “superior skill, foresight and industry” from liability.27

As adherents of the economic model frequently point out, competition can be rough, and one must be careful to distinguish robust competition on the one hand and anticompetitive conduct on the other. The same is true in sports and by extension in business ethics. Within the economic model, one can make the distinction only by determining whether the conduct reduces consumer welfare. If one applied this analysis

24 At least one business ethics scholar has suggested that Aristotelian virtue ethics requires business to be organized in small units. See Timothy L. Fort, Ethics and Governance: Business as Mediating Institution 68 (2001). Such thinking could provide some support for a neo-populist antitrust policy of small business protectionism.
26 Daniel McGinn, Oh, Sweet Revenge, Newsweek, Sept. 29, 2003, at E4, E6 (Until the rise of competition from Starbucks, “there was no obvious rival, which … had led to complacency. … Stores were dingy. The menu hadn’t changed in years. Dunkin’ Donuts … was a great brand that had lost its way.”). The relationship to sports ethics is striking when you consider that “it is a virtual coach’s cliché that a team plays to the level of its opponent.” Drew A. Hyland, Opponents, Contestants, and Competitors: The Dialectic of Sport, in Ethics in Sport 80, 83 (W. J. Morgan, K. V. Meier and A. J.-A. Schneider, 2001).
27 United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).
in sports ethics, violent behavior would be unethical only if it could be shown that the violence altered who won the event.

The Tonya Harding case is instructive on this point. Tonya Harding’s friends conspired to injure her chief rival, Nancy Kerrigan, on the eve of the 1994 U.S. Figure Skating Championships. The friends included Harding’s husband and her bodyguard. Tonya Harding was not charged as a coconspirator, but her relationship to the conspirators could be considered analogous to the relationship shareholders have with a corporation. Excluding her rival “opened the door for Harding to win the title and qualify for the Olympic Games.” Both Harding and Kerrigan went to the 1994 Olympics. Ultimately, Harding finished eighth and Kerrigan won a silver medal. Was it unethical for the Harding team to use violence to exclude Kerrigan? Was competition harmed?

From the strict utilitarian point of view of the economic model, one could argue that competition was not harmed. If winning in sport equates with profit maximization in business, then conduct which produces the winner in a sporting event equates with the generation of consumer welfare the economy. The Olympic Gold Medal went to Oksana Baiul. Since the ultimate outcome was not affected by the attempted exclusion of Nancy Kerrigan, competition was not harmed if winning is everything. But winning is not everything in sport, and one is hard pressed to find anything but condemnation of the attack on Nancy Kerrigan. The use of violence and intimidation to exclude an opponent from the playing field violates the ethic of sportsmanship even if it does not affect the outcome of the game.

Similarly, application of this ethical analysis to exclusionary conduct in antitrust would justify the condemnation of such conduct. Competitors have the right to compete, and it is unethical to ignore this right in the quest for profit maximization just as it is unethical for one athlete to exclude another from participation in the game. To quote
Professor Fox, “[b]y this metric, significant unjustified exclusionary practices are anticompetitive.”

A competitor’s right to compete must have a limiting principle. Similarly, in sports such as football, physical contact is a required part of the game. Consequently, it is not possible to play the sport without risking the infliction of some injury, possibly a debilitating injury, on your competitors. By the same token, Sport ethicists, consistent with the Kantian principle of a “good will,” rely on the player’s intent.

Antitrust law, to be sure, has always been reluctant to rely on intent as a limiting principle. Initially, courts rejected the notion that good intentions could absolve a firm from liability for anticompetitive conduct. More recently, this thinking about intent has been turned on its head with the Supreme Court stating that even “an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.” But these fears are overwrought. Courts successfully use intent as a limiting principle, sometimes under the guise of evidence of “bad faith,” in a wide range commercial business law cases, including tortious interference, contract interpretation and securities fraud cases.

Sports ethics may also offers some support for the “level playing field” harm to competition. Lumpkin states that the constitutive rules of sport are designed in part to “standardize the playing environment so that each athlete has an equal opportunity to excel.” Sportsmanship rules also support a level playing field insofar as they promote

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29 Thomas Donaldson and Patricia Hogue Werhane, Introduction to Ethical Reasoning, in Ethical Issues in Business: A Philosophical Approach 1, 6-7 (6th ed. T. Donaldson and P. H. Werhane, 1999) (“the only thing that can be good without any provisos or stipulations is an action of the will freely motivated for the right reasons”).
30 Angela Lumpkin, et al., Sport Ethics: Applications for Fair Play 61 (3d ed. 2003) (“[W]e do concede that physical aggression and physical contact are part and parcel of contact sports. … However, if the athlete as moral agent intentionally tries to ‘take out an opponent,’ a moral issue is raised.”).
“competition between equitable opponents.”33 While this element of sportsmanship may provide an ethical justification for antitrust laws such as the Robinson-Patman Act, it appears difficult to integrate this branch of sports ethics into stakeholder management theory. How is a manager to trade off his firm’s competitive advantages without breaching the firm’s obligations to its non-competitor stakeholders? This is not to say that business ethics should not inquire into the level playing field values of antitrust. For law enforcement, level playing field issues in antitrust are inescapable since even when the economic model is used “antitrust’s procompetition interventions by definition affect the levelness of the playing field and an administration’s enforcement priorities will necessarily reflect general determinations as to which categories of competitors … deserve assistance.”34 The level playing field issue, however, requires a more thorough analysis than it can be given within the confines of this presentation.

Application

Application of the strategic management model may seem like a radical departure from conventional antitrust law, but it does not necessarily produce radically different results. In part, this is because much of antitrust law dealing with exclusionary harms developed without reliance on the economic model. In *Fashion Originator’s Guild of America v. FTC*,35 for example, garment makers, sellers and designers combined to deny competitors access to retailers. The competitors had legally copied the designs of the defendants. The Court held that the combination had violated the antitrust laws. This holding cannot be justified under the economic model because there was no finding that “the combination fixed or regulated prices, [or] parceled out or limited production.” However, the holding is entirely consistent with the stakeholder

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35 312 U.S. 457 (1941).
management model since the combination “has as ... its purpose ... the direct suppression of competition from unregistered textiles and copied designs.”

Similarly, in *Klor’s v. Broadway-Hale Stores*, the U.S. Supreme Court held that Broadway-Hale, a San Francisco department store chain, had violated the Sherman Act by blocking Klor’s access to well-known brand name appliances. Indeed, *Klor’s* established the rule that group boycotts are illegal *per se*. Again, this exclusionary conduct could not be condemned on the basis of the economic model because Broadway-Hale lacked monopoly power. The uncontroverted evidence “that there were hundreds of other household appliance retailers, some within a blocks of Klor’s who sold many competing brands of appliances,” including the brands sought by Klor’s. And again, the Court’s reasoning, insofar as it acknowledged Klor’s right to participate “in an open and competitive market,” is consistent with the stakeholder management model.

Of course, many would contest the continuing validity of *Fashion Originator’s Guild* and *Klor’s*, especially in light of *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* A group of office supply retailers, including Pacific, formed Northwest as a purchasing cooperative. When controlling interest of Pacific changed hands, Pacific failed to notify the directors of Northwest, a violation of the cooperatives bylaws. A year later the membership of Northwest voted to expel Pacific. Northwest claimed the expulsion was due to Pacific’s failure to disclose its change of ownership. In this case, the Court adhered to the economic model by holding that the *per se* could only be applied if “the cooperative possesses market power.” Adherence to the economic model, however, does not necessarily mean conflict with the stakeholder management model. The Court pointed out that “purchasing cooperatives must establish and enforce reasonable rules in order to function effectively,” and the disclosure rule was violated by Pacific. Furthermore, Pacific could still make purchases from Northwest, although it

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would no longer receive a share of the cooperative’s profits. The stakeholder management model does not give primacy to competitors’ interest, something which is what would have occurred if the Court had applied the per se instead of the rule of reason.

Not all antitrust doctrines can be so easily reconciled to the stakeholder management model. Traditionally, predatory pricing had been defined as “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long,” but in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Court stated that a predatory pricing claim required proof of both below cost pricing and recoupment of the predator’s lost profits by subsequent monopoly pricing. While it is possible to criticize the decision in *Brooke Group* from within the economic model, the Court went out of its way to reject the alleged predator’s intent as having any bearing on the legality of below cost pricing. Although the Court found sufficient evidence for a jury to conclude that Brown & Williamson cuts its prices below cost with the intent of disciplining Ligget, the Court stated “[e]ven an act of pure malice by one business competitor against another does not … state a claim under the federal antitrust laws.” Consequently, it is not possible to use Kantian notions of a good will to develop the duties that would be owed to a competitor under stakeholder management. Nor is it possible to develop such duties based on the purpose of competition, since the Court in *Brooke Group* took the position that the overriding purpose of competition was to lower consumer prices.

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41 509 U.S. at 224; “The most likely explanation for the Brooke Court's treatment of the recoupment issue is the notion that the antitrust laws … only prohibit conduct injurious to consumers. Below-cost pricing
Conclusion

What I have presented today is clearly a work in progress, and clearly much more work needs to be done if business ethics is to serve a role in the development of antitrust. Nonetheless, several conclusions are, I believe, possible. First, business ethics does have something to say about antitrust and the nature of business competition. Business ethics can be used to demonstrate the existence of ethical duties in competition, and, Justice Powell’s suggestion to the contrary notwithstanding,42 business ethics provides limiting principles for those duties. Second, there is already an ethical component to antitrust law, whether it is the peculiar form of utilitarianism embodied in the economic model or the broader ethics suggested by older Supreme Court decisions such as Klor’s. Third, while business ethics may be a radical departure in thinking about antitrust law, its adoption would not necessarily mean a radical departure from existing precedents and doctrines.

Business ethics cannot replace economics in antitrust analysis, but research could reveal the ethical component of antitrust in the same manner as Robert Pitofsky revealed its political content a generation ago.43 In addition to borrowing from sports ethics, business ethics will no doubt borrow from other ethical disciplines in the effort to supplement the economic model of antitrust. Certainly, religious doctrines will have to be consulted since they have much to say about the ethics of economics and competition for material wealth.44 Having opened the door to non-economic considerations via the social science disciplines of marketing and strategic

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management, we must continue to explore the ethical content of antitrust via the business school's humanities discipline, business ethics. In the end, I believe, business ethics will provide antitrust law with another tool “keeping the competitive system open and fair.”

I would like to further research what I see as the intersection of three seemingly unrelated topics, antitrust law, business ethics and sports. In other words, words what can figure skating and Immanuel Kant teach us about Microsoft?

One could argue, as a number of business ethicists have, that monopolies are inherently unethical. I disagree. It is true that competition forces firms to act on behalf of consumers. If you do not satisfy the needs of consumers, your competitors will only be to happy to take them away from you. But the fact that a business operates without the restraint of competition does not mean that the business will necessarily behave unethically. Just as importantly, whether the unethical conduct results from the difficulty of making a profit in the face of stiff competition or the rationalization that everyone else is doing it, plenty of evidence exists to show that business competition has a corrosive effect on business ethics. So I am not prepared to argue that antitrust laws promote ethical business conduct.

What I am prepared to argue, however, is that business ethics, particularly the concept of stakeholder management, can provide antitrust law with some guidance about what should and should not be illegal under the antitrust laws. To date, there is virtually no research into this topic, despite the widespread recognition in stakeholder theory that competitors are stakeholders. This is Given the near total absence of discussion about the rights and obligations of competitors as stakeholders in business ethics, I will turn to the only literature I have found, that of sportsmanship.

There is a crisis in American antitrust law which can be summed up in an experience I had in the spring of 1998. I presented a paper antitrust law developments at a Business School conference. I was quite pleased with the reception of my paper until an elderly gentleman in the back row asked me, “how does it feel to be writing about something that doesn’t exist any more.” I was a bit flustered, but I managed to say that Congress had not repealed the Sherman Act or any of the other antitrust laws. The gentleman, not at all flustered, responded with “okay, how does it feel to be studying something that is dead?”

My critic had a point. Except for a brief remission during the end of the Clinton Administration, American antitrust law has been suffering a severe chronic illness, if not a terminal illness, for the better part of the last quarter century. Since 1980, we have seen one tidal wave of merger activity after another as key industries including food, public accounting, and media become ever more concentrated. It may well be that leading antitrust enforcement agency today is not the Federal Trade Commission or the Department of Justice, but the European Union.

How did this happen? The answer is found in an almost dogmatic faith that many judges, governmental officials and antitrust scholars have placed in a simple form of neo-classical microeconomics or “price theory.”

Throughout the 20th century, courts have held that the purpose of antitrust law was to protect and promote competition. The Clayton Act enacted in 1914, for example, prohibits a certain types of conduct which “lessen or tend to lessen competition.” The famous “rule of reason” first used by the Supreme Court in 1911 seeks to determine
whether on balance conduct challenged under the Sherman Act is “procompetitive.” The trick, of course, is defining what constitutes harm to competition.

I should note that many courts, including the Supreme Court in the *Brooke Group* case,\(^4\) for example, have often focused on whether the conduct raised or lower prices rather than “consumer welfare loss.”

Even with respect to the harm to economic efficiency or consumer prices, the Chicago School’s use of its particular brand of price theory has largely rendered antitrust law all but unenforceable except in cases of naked price fixing, where two competitors agree on the price they charge will consumers. It is virtually impossible to prove whether the efficiencies of a merger, exclusive dealing or a tying arrangements are outweighed by the “consumer welfare loss,” and the burden of proof is always on the government or other party challenging the conduct. Even prosecution of price fixing remains suspect since the higher prices will attract competition from outsiders who also rationally seek to maximize their profits.

The instrumentalist or strategic school as it is called by Kenneth Goodpaster, argues that management should balance the interests of stakeholders in order to maximize the wealth of shareholders.\(^4\) I see little difference between this and Friedman’s position, although it is extremely popular with students. What little I can find about competitors as stakeholders comes from this school of thought.

Sports ethics offers another basis for condemning exclusionary conduct which does not connect so easily to stakeholder management. Notwithstanding Vince Lombardi’s famous quote that “winning is the only thing,” Lumpkin draws on the work of Robert Simon,\(^4\) among others, to argue that competition “is about placing an athlete’s skills against another athlete's skills” in a mutual “quest for excellence.”\(^4\) While it may not be easy to tie this thinking into stakeholder management, it does suggest a consistency with the economic efficiency rationale for competition. It also ties into the growing body of scholarship on the application of Aristotle’s virtue ethics to business and the business ethics component of Catholic Social Teaching. Applied to the Harding case, the attack on Kerrigan would be wrong because it could have denied Harding an opportunity to put her best against Kerrigan’s best. Similarly, exclusionary conduct harms competition in antitrust because it dulls the skills of the competitor whose product does make it into the market.

In part, the condemnation of these tactics results from application the Kantian categorical imperatives to sports such that “[i]f the intention and motivation is to … take the opponent out of the game, a moral issue arises —because the athlete is neither being just nor responsible in the action toward the opponent.”\(^5\) In other words, not only is a good intent required, it is affirmatively wrong to objectify your opponent.

Certainly, one could use criticize this hard form of utilitarianism on its own terms as a perversion of utilitarian theory using the literature of business ethics, but such a critique would ignore the central problems of American antitrust law and fail to provide a basis for fixing those problems.

While there than a recommending a strategy of defending against nonsupportive stakeholders such as “competing organizations, unions, [the] government, and the media,” Carroll and Buchholtz do not offer any guidance as to the legitimate rights of competitors. And the admonition to “defend against” competitor stakeholder could hardly serve as a basis for developing antitrust protections against unlevel playing fields and exclusionary practices.

In so doing, the Court explicitly rejected earlier tests for predatory pricing based on the alleged predator’s intent.52

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