

AAI Zoom Conference re Lifetime Award to Albert A. Foer

October 28, 2020

1. Gratitude

Receiving the **Alfred Kahn Award** is the capstone of my professional life. I am deeply grateful to **Diana Moss**, my policy partner of 14 years for carrying on so effectively as the leader after my retirement in 2014. I am grateful to the AAI Board and its chair, **Pam Gilbert**, for including me in the prestigious list of AAI's previous special honorees. I am grateful to **Randy Stutz** and **Sarah Frey** for their long and distinguished service to AAI and to **Laura Alexander** for more recently bringing her legal luster to the AAI. And I am eternally thankful to **Jon Cuneo**, **Bob Lande**, **Rick Brunell**, **Bob Skitol**, and an impressively long parade of others too numerous to name, upon whose efforts the precious reputation of AAI was built.

I also want to thank **Nicolas Charbit and Sonia Ahmad** of **Concurrences** for imagining and producing the *liber amicorum*, and my friends who wrote chapters, which I look forward to reading--for pleasure. But let's be clear: This volume is in reality a tribute to AAI, the institution. There's also another publisher to thank for contributing so much to our institutional success, **Bill Curran**, the Editor-in-Chief of the **Antitrust Bulletin**. In this regard, special thanks to **Greg Gundlach**, so often my principal collaborator on projects ending up in the Antitrust Bulletin. And not least, I am bowled over by the words of my old friend, the always inspiring **Eleanor Fox**.

2. Optimism and Pessimism

The foreword to the **Concurrence** volume by **Bob Lande and Randy Stutz** struck me for its emphasis on what they described as my optimism. That frankly jarred me a little, because my wife, **Esther**, has accused me of being a pessimist. Of course, without her optimism and the optimistic support of our three sons, **Frank, Jonathan, and Josh**, from the beginning, I could never have taken the personal or family risks involved in starting the AAI back in 1998.

Our oldest son, **Frank**, once asked me, many years ago, if I am really a *curmudgeon*--because I always seemed to be complaining. I responded that in fact I have always been one of the happiest people he is likely to meet, but because I see so much that can and should be improved, it is impossible *not* to complain about our failures to become a better society.

The **Lande/Stutz** foreword got me thinking about the relation between pessimism and optimism. Pessimism is the expectation that the worst *will* happen, but it should be based on a *reasoned* assessment of realities. It should be distinguished from cynicism, which conflates the worst possibilities with an inevitably *necessary* reality. And Optimism, the *hope* for the best, should be distinguished from delusion, which assumes the best will necessarily prevail in spite of all obstacles.

To be an optimist about the future requires one to identify and weigh the realities, including the challenges and possibilities of failure, in other words to be able to view things with some of the perspective of a pessimist. Or as **Antonio Gramsci**, the Italian philosopher, put it, “My own state of mind synthesizes these two feelings and transcends them: my mind is pessimistic, but my will is optimistic.”

3. Early History and AMC Example

Now, when AAI was born, it was greeted with a combination of optimism and pessimism. Some of my first meetings were with **Joel Klein and Bob Pitofsky**, then the heads of the Antitrust Division and the FTC. As I explained the mission of the AAI, they each expressed their optimistic hope that AAI would succeed, saying we’d be doing God’s work. But each immediately followed with a pessimistic expression of doubt that the necessary funding would ever materialize. I like to report that certain people think both **Klein and Pitofsky** were wrong on both counts: that is, AAI did *not* represent God’s work, yet it nevertheless succeeded in finding funding. I guess that’s life in Washington.

Anyway, back in 1998, the Chicago School had already become paramount and it was unclear how far it would go in undermining a broader vision of competition policy.

The landmark Microsoft case was at the time of AAI’s birth just bringing salience and better prospects to the field. Unfortunately, this optimistic mood was soon deflated when my friend and former colleague Judge Jackson was taken off the case and we effectively lost the remedy following a change in administrations. A new level of media expertise in antitrust had been developed during that famous case, a time when antitrust could suddenly help sell newspapers; but as popular interest in antitrust waned after Microsoft’s escape, many of the experts eventually moved behind a paywall or were assigned to other topics. The need for an AAI to explain antitrust to the larger world accordingly grew.

A good example of why AAI was needed can be found in the history of the Antitrust Modernization Commission, from 2004 to 2007. The AMC was established, almost in secret, by a Republican Congress, and we worried that it would be a vehicle for legislative changes that would bring additional conservative constraints on the future evolution of antitrust. We created a bevy of ad hoc working groups within the Advisory Board that were able to respond to every idea put forward during the course of the AMC’s deliberations. We didn’t pick the topics that the AMC took up, but we were the first, long before the lumbering defense-oriented American Bar Association, to present formal commentaries on the issues the AMC itself raised, with our own proposed positions for the AMC to take. Rather than playing defense, our rapid-fire volunteers were subtly but effectively helping to set the agenda that the commissioners had to address.

We attended every session of the AMC, had quiet meetings with the Republican chair, **Deb Garza**, and the Democratic vice chair, **Jon Yarowski**, and insisted, with much success, on

transparency and fairness. During the period of the AMC we provided the public with the three most detailed commentaries on the AMC. The third and most important: a post-AMC review of the final report from the AAI's perspective.

The overall AMC report, it turned out, was actually quite satisfactory from our strategic perspective. By blessing the status quo in an intelligently written, albeit status quo, report that has served as a useful resource for newly formed foreign antitrust agencies, the AMC report had the primary domestic effect of inoculating the antitrust laws (a vaccination!) against a further drift to the right. It basically changed nothing. The final report specially thanked the AAI for our input. From our perspective, the AMC report was a major defensive victory that probably would not have occurred *but for* the AAI. Perhaps offense and defense are another category of polar models that are typically found blended in reality.

4. From Defense to Offense

As with the example of the AMC, so much of our first twenty years were similarly spent on defensively keeping the flame of competition policy burning.

Today the environment has turned and it appears that pro-enforcement forces are likely to be moving to the offensive. Ideas that were barely mentionable are now being taken seriously and are openly debated. If the Democrats win next month's trifecta of House, White House, and Senate, there will be an opportunity for *actually* modernizing competition policy. Too big to fail, the widening equality gap in income and wealth, anticompetitive abuses of labor, widespread recognition of a power problem inherent in our most productive tech-driven industries, the emergence of buyer power as a politically as well as economically important factor, and the interplay of privacy, liberty and centralized economic power all cry out loudly for reform, as exemplified by the recent House staff report, so heavily influenced by AAI and its advisors and friends. We've seen the rise of antitrust-oriented politicians like **David Cicillene** in the House and **Amy Klobuchar** in the Senate, which carries a promise of future activism on the Hill.

At the same time, under the Trump regime we have witnessed the potential for abusing the *public* power of law enforcement in what has traditionally tended to be a corruption-free zone. This forces us to consider the political side of reform. Whether Biden wins or Trump wins, reforms in competition policy and its enforcement will almost certainly take place and they will take place within a politically charged environment that cannot be ignored. This brings me back to optimism and pessimism and the role of balance more generally.

5. Getting the Right Balance in Competition Policy

As a critic of the Chicago School from its birth, the AAI has consistently denied that efficiency should be the *single-minded* goal of antitrust. We've stressed the incorporation of

other values in addition to competitive prices-- such as quality, service, and innovation. We've also called attention in various ways to the negative aspects of **concentration itself**. We've drawn attention to the revolutionary explosion of buyer power and vertical problems that the Chicago School had made magically "disappear"—sort of like a certain president's prescription for coronavirus.

We've also focused on preventing monopolies and cartels from stealing from consumers and have raised awareness of anticompetitive behavior arising within platform industries, extreme efforts to promote intellectual property above competition, and strategic forms of predation. We spoke, even in front of the U.S. Supreme Court, against exclusionary practices and discrimination harmful to small and mid-sized businesses. As a result of our efforts and of others who have learned from our work, there is today a growing recognition that the system has dramatically underperformed. Today people are finally thinking seriously about serious reform.

The AAI has the collective expertise and prestige to play an influential role in the coming reformation. We can identify, shape and prioritize various proposals for action, praising their positives and calling attention to their flaws, from a perspective that is both theoretical and pragmatic, with due regard for consequences in both the economic and political realms. Why political?

As **Bob Pitofsky** and many others have stressed, Competition policy is a form of **political economy**, not merely the haven for self-standing economic theory. It lives in the realm of the possible, not the ideal. We need to keep in mind, for example, that although concentrated power may be reasonably necessary and appropriate in some circumstances, both in the private sector and in the government, nevertheless and always: *power is power*, and it is always subject to abuse, so that its availability for abuse needs to be checked, wherever it is found.

In my retirement years, I have been thinking a lot about several relationships in which seeming opposites are mixed and balanced, not just optimism and pessimism or offense and defense. Competition and cooperation, for instance, do not in practice survive as pure opposed models. Rather we find them blended, whether in antitrust, education, recreation or otherwise, with the exact relationship between the two extremes changing from time to time and place to place. The same can be said for individualism and collectivism and for what is deemed private or public.

These polar models are related and often overlap. That is, individuality, competition and the private sector are closely related at one end of a spectrum; and collectivism, cooperation, and the public sector are closely related at the other end. The key to competition policy, I've come to believe, is finding the right blend, the right balance of these related models for the right circumstances.

A "right" balance is set not only by institutions such as constitutions, legislatures, antitrust agencies, sectoral agencies, commanders-in-chief and judges, but also by

corporations, non-profit organizations, customary practices, and-- in an ultimate sense-- by a particular society's history, political forces, culture, understanding of economic theory, technology, and particular economic circumstance. In short, the realm of competition policy is dynamic and multidisciplinary. Adjustments in the blending of the seeming opposites are always going on, for better or for worse. As former AAI Advisor the late Larry Sullivan argued, the relevant wisdom for antitrust must be drawn from multiple repositories.

AAI is beautifully situated at what may be a pivot point in the next major adjustment as the world faces simultaneous multiple crises which will affect the roles played by competition. The chief foe is no longer simply the power to raise prices in narrowly defined markets but the concentration of economic power that can be used coercively. Seen this way, what is required is a new version of the kinds of institutional constraints on the abuse of power that **James Madison** and his colleagues long ago planted at the heart of our national heritage.

I encourage you to go forward employing your incredible collective resources to speak for the **public interest**, not merely as consumer advocates or producer advocates or as ideologues of one sort or another, but as citizens in a democracy that yearns to remain a democracy, advocating what you believe is in the public interest.

We work with a wonderful tool, competition policy that brings together competition and cooperation, the individual spirit and the collective spirit, the private realm and the realm of government. Shout confidently to the denizens of Public Choice theory and the apologists for monopoly, that yes, there is something authentic and essential about the concept of a public interest. Like **Dr. Suess'** fictional environmentalist, the **Lorax** who proudly speaks for the trees, I implore you to continue to seek out and speak proudly for the right balance that is the public's interest in the way we use this wonderful tool of competition policy.

Thank you for taking your time today to share in this great honor with me.