Openness and Integrity in Antitrust

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'Most problems people face cannot be specified with such exactness. And often people do not face given problems; their task is to make a problem, to find one in the inchoate situation they face'.
R. Nozick, The Nature of Rationality 165

'Economics is an ideological science and antitrust is an ideological and highly political area of law'
H. Hovenkamp

Abstract

Reasonable disagreements are pervasive in both antitrust, yet the leading antitrust systems manage to function in a lato sensu effective and consistent manner. How can we explain this paradox? The tentative reply to this question is that the two main antitrust jurisdictions have managed to deal with the problem of reasonable disagreement by adopting the features of 'responsive law'. Therefore, antitrust institutions could further benefit if they adopt the responsive law framework to understand and deal with reasonable disagreements.
To support this argument, I contend that reasonably disagreements are endogenous in antitrust systems as they derive from antitrust's fuzzy mandate; conceptually elastic vocabulary; rules and standards mode of analysis. These elements can support the conclusion that reasonable disagreements are the by-product of two complementary yet antithetical forces of antitrust: openness and integrity. Yet, conventional wisdom has it that reasonable disagreements are temporary indeterminacies that will eventually be eradicated. This view stems from a conceptualization of antitrust as a form of 'autonomous law'. However, this model of law does not take reasonable disagreements seriously and as a result offers an inadequate modus operandi for dealing with them. The 'responsive law' model, on the contrary, recognizes the endogeneity of reasonable disagreements and the underlying forces that generate them. Instead of attempting to eliminate them, therefore, the responsive law model suggests that antitrust institutions should seek to tame and exploit them. For this purpose, this model proposes a legal-institutional modus operandi for calibrating the eliciting forces of reasonable disagreements, i.e. openness and integrity. The hallmarks of this approach are: constructive teleological interpretation, experimentalist network-based enforcement by post-bureaucratic enforcers and courts operating as catalysts.

JEL: A11; A12; A13; B04; B21; B41; K00; K21; K40; K41; K42

Introduction

Reasonable disagreements are pervasive in antitrust. Rational, well-informed and benevolent members of the antitrust community may 'reasonably disagree' about the content of competition norms, the direction of competition policy or the appropriate remedial response.[2] Such disagreements give rise to 'hard cases'.[3] Hard cases are not cases where the stakes are high or cases that raise complex empirical questions. Hard cases are all the instances where law's indeterminacy, semantic vagueness or normative uncertainty and complexity obstruct a consensus. This lack of consensus could concern the goals of the law, the content of key antitrust concepts, or the way antitrust intervention should be organized and carried out. The history of both leading antitrust jurisdictions, the EU and the US, is full of disagreements of that kind. One might think that the triumph of economics, the sharpening of antitrust doctrines and the emergence of compliance and institutional theories would eradicate such disagreements. Yet, this is not the case. Such disagreements still infuse indeterminacy and torment antitrust systems by raising concerns about the clarity, the predictability and the effectiveness of the law.

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[2] Reasonable disagreements involve not only occasions of syntactic or semantic ambiguity, but also cases of conflicting claims about what the grounds of law are. The grounds of law refer to what must take place in their legal system *before* a proposition of law can be said to be true or false. Propositions of law, namely statements about the content of the law are true or false in virtue of grounds of law. These disagreements should be distinguished by empirical disagreements about the law (i.e. disagreements about whether certain the grounds of law have in fact obtained). The prevalence of reasonable disagreements indicates that the law is an 'argumentative' social practice where different players seek to convince their interlocutors about what the law demands and defend such claims by offering reasons for them. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14-46, 81-130 (Cambridge, MA: Harvard University Press 1977); RONALD DWORKIN, LAW'S EMPIRE 4-7, 13, 37 (Cambridge, MA: Harvard University Press 1986).

[3] Ronald Dworkin, *Judicial Discretion* 60 JOURNAL OF PHILOSOPHY 624–638 (1963); H.L.A. HART, CONCEPT OF LAW 128–136 (OUP 1961); Kent Greenawalt, *Discretion and Judicial Discretion: The Elusive Quest for the Fetters that Bind Judges* 75 COLUM. L. R. 359, 391 (1975); Charles Larmore, *Pluralism and reasonable disagreement* 11 (1) SPP 61-79 (1994).

So far two strategies have been employed to deal with the problem of reasonable disagreement in antitrust. A top-down strategy assumes that discovering and refining a single comprehensive goal could bring about the 'end of antitrust history'.[4] In 1978 Bork famously wrote 'antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give . . . Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules'.[5] After this stage the task of the antitrust community and institutions would be only to refine their legal reasoning, employ superior economic analysis and use the optimal enforcement standards and procedures. The alternative is a bottom-up strategy, which assumes that the problem of reasonable disagreement will disappear once the courts - organically or in a common-law fashion - develop an optimal analytical framework through canons of interpretation and input from economics.[6] The common thread of both approaches is that reasonable disagreements are temporary sources of tension that will eventually be eradicated through the traditional legal methods of interpretation and developments in positive economics. After their eradication, no ambiguity or indeterminacy will remain in the law.

Yet, I argue here that the historical evolution of the goals debate as well as its analytical structure showcase that reasonable disagreements are inherent in antitrust. Three key elements make antitrust an inherently open system. Both EU and US competition rules: have a fuzzy mandate (i.e. the protection and promotion of competition in the market); are written in conceptually elastic language constantly; and, thirdly, are interpreted by using a mixture of rules and standards. On this I submit here that reasonable disagreements cannot be fully eradicated because they are ignited by two opposing yet complementary *endogenous* forces of antitrust: openness and integrity. To avoid any confusion, the term 'openness' refers to conceptual elasticity or factual sensitivity, while 'integrity' refers to principled, value-laden consistency. Integrity includes the fundamental rule-of-law principles such as clarity, certainty and coherence, but also the core substantive value of the specific legal field it refers to.[7] A careful look at antitrust systems shows that openness is not only inevitable but also desirable. Without openness, antitrust could become a formulaic and ineffective field of law unable to attain its core objective, the protection and promotion of competition. Yet, excessive openness can destabilize the Rule of Law or incite the instrumentalization of antirust. In other words, integrity requires openness, but the latter, if excessive, can undermine the integrity of the law.

If reasonable disagreements are endogenous in antitrust, then the two aforementioned strategies for dealing with them rely on a false assumption that such disagreements can be eliminated. Such a point of view derives from a conceptualization of antitrust as 'autonomous law'(AL).[8] This term refers to a rule-centered model of law that emphasizes law's independence from any non-legal domain and identifies the 'Rule of Law' as the core mission of legal institutions.[9] Under this approach, antitrust should only seek to remove any undue restraints on trade.[10] From an AL perspective, competition rules are perceived simply as prohibitions, as binary switches that approve or condemn a practice as legal or illegal respectively.[11] In this context, the task of antitrust institutions[12] is to eliminate antitrust injuries that occurred in the past and compensate the victims of antitrust violations.[13] By conceptualizing antitrust in this way, the AL model concludes that reasonable disagreements are temporary and thus proposes a two-fold modus operandi: enforcers should apply the rule in a crime-tort fashion[14] by emphasizing individual cases, being fact-driven and backward-looking, while adjudicators should operate only as norm elaborators and uphold the Rule of Law.[15] The Rule of Law is the ultimate constraint of enforcers' discretion and the central mission of adjudicators.

Yet, the AL model does not take reasonable disagreements seriously and, therefore, proposes an inadequate modus operandi. On the contrary, conceptualizing antitrust as a form of 'responsive law' (RL)[16] infers that disagreements are endogenous in antitrust. If openness and integrity have a complementary and antithetical relationship, the key issue becomes to ensure an optimal mix of openness and integrity. From this perspective, antitrust becomes *responsive* when it disposes the appropriate mechanisms for finding equilibria between openness and integrity. On this basis, I argue here that the RL model not only offers an analytical framing for understanding reasonable disagreements in antitrust, but can also suggest a modus operandi for dealing with them; a legal-institutional approach for finding the said equilibria. Three

[4] FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 58, 60, 66, 138, 289 (Free Press 1992).
[5] ROBERT BORK, THE ANTITRUST PARADOX 50 (New York: Free Press 1993)
[6] Pablo Ibañez Colomo, *Editorial: The divide between restrictions by object and restrictions by effect: why we discuss it, why it matters* 11 (2) COMPETITION LAW REVIEW 176 (2016).
[7] DWORKIN, LAW'S EMPIRE, *supra* note 2, at 4-11, 31-44.
[8] PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARDS RESPONSIVE LAW 53-55 (London: Harper and Row 1978).
[9] For a thorough review of the concept see Jeremy Waldron, *The Concept and the Rule of Law*, 43 1 GEORGIA LAW REVIEW 1 (2008).
[10] DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (OUP 1998).
[11] Prohibitions are distinguished from commands on the basis of their analytical form. They have the form of rules of just conduct, which merely limit the range of choice of the individuals; they do not tell them what to do. 2 FRIEDRICH VON HAYEK, LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 128 (University of Chicago Press 1976).
[12] By this term, I refer to both competition authorities or courts when they apply antitrust law.
[13] Harry First, *Is Antitrust Law?* 10 ANTITRUST 9 (1995).
[14] I follow here Crane's terminology even though various authors have made this distinction without using uniform terminology. For instance, First disinguishes between 'legalistic regulatory' culture and 'bureaucratic regulatory' culture, while Melamed contrasts the law enforcment model to the regulatory model. See First, *supra* note 13 at 10; A. Douglas Melamed, *Antitrust as the New Regulation* 10 ANTITRUST 13 (1995); Daniel Crane, *Antitrust Antifederalism*, 96 (1) CALIFORNIA LAW REVIEW 1, 32 (2008).
[15] C.W.A. Timmermans, *Judicial activism and judicial restraint* in THE ROLE OF INTERNATIONAL COURTS 243, 245 (C. Baudenbacher & E. Busek eds., Stuttgart, German Law Publishers 2008).
[16] NONET & SELZNICK, *supra* note 8, at 73-78.

are the hallmarks of this modus operandi: first, antitrust institutions that engage in constructive, teleological interpretation when dealing with indeterminacy and uncertainty in law; second, enforcers that remain responsive to law's underlying value(s) and open to new learning and the context of law;[17] third, adjudicators that go beyond the strict legality review, and take into consideration the purposes and effects of law, and institutional dynamics when grappling with legal questions.[18] These features that already exist to a certain extent in modern antitrust systems cannot be justified under AL, while conceptualizing antitrust as AL deprives our systems from utilizing the RL benefits.

On this basis, I argue here that antitrust systems can properly deal with reasonable disagreements by further adopting the features of responsive instead of autonomous law. Constructive teleological interpretation is sensitive to the law's core mission and normative complexity. It does not pretend that objectivity in law can be achieved simply via cannons of interpretation or positive economics. Instead it focuses on argumentation and interpretive theories. Responsive enforcers invest in their learning and self-correcting capacities and are interested not only in punishing deviant firms, but also in maximizing compliance and solving problems. Such enforcers utilize different techniques and strategies, put forward participatory, learning-based proceedings and coordinate with each other through regulatory conversations in network-based structures. Lastly, courts as catalysts function as platforms for argumentative competitions and as responsiveness motivators, namely as the nodes of a broader institutional framework that care to adjust their depth of review appropriately to keep enforcers responsive.[19] Conscious use of these features will arguably make antitrust more capable of dealing with indeterminacies in a coherent and effective manner.

In section I, I provide a typology of reasonable disagreements in antitrust and I focus on the debate around the goals of antitrust to illustrate, from a historical (external) and analytical (internal) point of view, the evolution (i) and the analytical shape (ii) of such disagreements. The upshot of the analysis is that reasonable disagreements are endogenous in antitrust. In section II, I discuss three key elements of antirust that could explain the endogeneity of such disagreements: its fuzzy mandate; its conceptually elastic vocabulary; and its rules and standards internal structure. Section III provides a brief sketch and a refinement of AL and RL as two distinct conceptual models of legal ordering. Against this backdrop, I argue in section IV that even though conventional thinking in antitrust views disagreements through the lenses of AL, the RL model offers a better framework for understanding and dealing with them. In section IV, I provide some indicative examples suggesting that US and EU antitrust have already adopted certain features of RL to deal with such disagreements. Finally, in section V, I develop the RL prescription for taming and exploiting reasonable disagreements by calibrating openness and integrity. The main argument of this paper is that we can use the RL model to properly diagnose the phenomenon of reasonable disagreement in antitrust; discern certain developments that allow US and EU antitrust systems to operate in a coherent and effective way despite reasonable disagreements; and get inspiration for dealing with reasonable disagreements in the future.

I. Reasonable Disagreement in Antitrust

A. The Persistence of Disagreement

Even a quick look at the modern antitrust literature leads to the following trite inference: the members of the antitrust community, be they scholars, practitioners, enforcers or judges still disagree about the purpose, the function, and the reasons for having antitrust.[20] Such disagreements revolve around the goals and the conceptual and economic foundations of antitrust (type-a). Nonetheless, reasonable disagreements can take two other forms. Antitrust scholars and institutions may disagree about the content of key concepts; about the legal standard that could be derived from the existing case law or about the application of existing case law to new facts (type-b disagreements).[21] The members of the antitrust community may engage in such disagreements even when they have settled the type-a ones. Indicatively, AG Wahl has recently admitted that the precise content of the 'restriction by object' concept is not clear, and that the line between

[17] IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 3-18, 158-159 (OUP 1992).
[18] NONET & SELZNICK, *supra* note 8 at 104-114.
[19] Scott and Sturm note that 'courts' gate-keeping function places the judiciary in a position to shape a practice of legitimacy and accountability within new governance institutions'. Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 3 COLUMBIA JOURNAL OF EUROPEAN LAW 1, 2 (2007).
[20] Indicatively, Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 44 MCGREGOR LAW REVIEW 823 (2013); Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law*, JOURNAL OF BUSINESS LAW (2019) [forthcoming]; Albert Allen Foer & Arthur Durst, *The Multiple Goals of Antitrust*, 63(4) The Antitrust Bulletin 494 (2018); Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. F. 960 (2018); Joshua Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51(1) ARIZONA STATE LAW JOURNAL 293 (2019); Ioannis Lianos, *Polycentric Competition Law*, 71(1) CURRENT LEGAL PROBLEMS 161 (2018); Ariel Ezrachi, *Sponge* 5(1) JOURNAL OF ANTITRUST ENFORCEMENT 49 (2017).
[21] RENATTO NAZZINI, THE FOUNDATIONS OF EUROPEAN UNION COMPETITION LAW: THE OBJECTIVE AND PRINCIPLES OF ARTICLE 102 191-288 (OUP 2011); Pablo Ibañez Colomo, *Beyond the More Economic Approach: A Legal Perspective on Article 102 TFEU Case Law*, 53(3) COMMON MARKET LAW REVIEW 709, 713-720 (2016).

restrictions by object and restrictions by effect is blurry.[22] Similarly, in the field of Art. 102 TFEU it is unclear whether the as efficient competitor test is and should be the only legal test.[23]

Beyond doubt, type-a and type-b disagreements can challenge antitrust enforcement. However, antitrust enforcement faces its own distinct disagreements: should we apply antitrust via a centralized or a decentralized structure? What kind of mixture of infringement decisions, commitments, market investigations, and advocacy can realize antitrust goal(s)? Was the remedy adopted say in *Google Shopping* successful or not? When should an antitrust enforcer use behavioral or structural remedies? Such disputes relate to the appropriate enforcement design, strategies and techniques (type-c disagreements).[24] One could reasonably presume that such disagreements will continue to exist even if we settle type-a and type-b.[25] Yet, the two leading antitrust systems operate consistently and effectively. The modern antitrust paradox, thus, is how these systems manage to function in such a way *despite* the existence of such pervasive and multi-leveled reasonable disagreements.

Before proceeding further, a caveat is in order. In what follows I focus on type-(a) disagreements. Mapping out all possible disagreements in antitrust, even if it were feasible, is not necessary for the argument presented here. *A majore ad minus* it suffices to show that type-(a) disagreements are pervasive and endogenous. Such a finding would entail that antitrust would remain essentially contestable even if type-(b) and (c) disagreements evaporate. If there is disagreement about the purpose of the law then necessarily there will be disagreement associated with the appropriate legal standards and its antitrust enforcement.

The type-(a) disagreement pertains to the age-old questions on what are and what should be the goal(s) of competition law. A brief expedition to US antitrust history can illustrate - from an external point of view - how the goals debate unfolded. In the late 19th century a wave of new monopolists like John D. Rockefeller and J.P. Morgan triggered the 'Trust Movement' which sought to re-organize the American economy around industry-spanning monopolies.[26] Social resistance against this tendency led organized labour and farmers to formulate the 'Granger movement' and emulated to an Anti-Monopoly Party.[27] Hence, the driver behind the passage of the Sherman Act in 1890 was the realization that even though free markets were essential for the US economy, they could also produce market failures and lead to concentration of economic power.[28] The preservation of deconcentrated industry structures, the dispersion of economic power, and the protection of freedom of trade of *inter alia* small enterprises were the main motivations behind the Sherman Act.[29] During the 1920s and 1930s antitrust was a faded passion.[30] Yet, during these decades it was not clear whether antitrust can or should be used as an instrument for achieving non-economic or non-competition goals.[31]

To be sure, the protection of health, environment, privacy or the goal of reducing the political power of large businesses (if not translatable into economics) constitute non-economic goals, while the protection of small or medium enterprises, the reduction of unemployment, the raising of wages or the redistribution of wealth could be considered as economic but non-competition goals (if not associated with one of the aspects of competition). From this perspective, the scope of the goals debate and, therefore, the ambit of reasonable disagreement was wide during these early years. As a

[22] "It is clear that the case-law of the Court and of the General Court, while pointing out the distinction between the two types of restrictions envisaged by Article 81(1) EC, could, to a certain extent, be a source of differing interpretations and even of confusion. Certain rulings seem to have made it difficult to draw the necessary distinction between the examination of the anti-competitive object and the analysis of the effects on competition of agreements between undertakings". Opinion of AG Wahl, Case C-67/13 P, *Groupement des cartes bancaires* EU:C:2014:2204. This conceptual conundrum is not new. See Saskia King, *The Object Box: Law, Policy or Myth?*, 7(2) EUROPEAN COMPETITION JOURNAL 269 (2011).

[23] See NAZZINI, *supra* note 21, at 224-256.

[24] DANIEL CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT (OUP 2011); KAREN YANG, SECURING COMPLIANCE (Hart Publishing 2004); Christine Parker, *The Compliance Trap: the Moral Message in Responsive Regulatory Enforcement*, 40(3) Law & Society Review 591 (2006).

[25] In reality, the issue is even more complicated since there is a dialectic relationship between competition norms and their enforcement, substance and procedure, between rules and institutional apparatuses. Thus, there are interconnections between all types of disagreements.

[26] Rockefeller noted 'growth of a large business is merely survival of the fittest…the working out of a law of nature and a law of God'. ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE [1982] 70-100 (Hill and Wang 2007).

[27] The 'Granger Movement' was established in 1867, by Oliver Hudson Kelley. What drew most farmers to the Granger movement was the need for unified action against the monopolistic railroads and grain elevators that charged exorbitant rates for handling and transporting farmers' crops and other agricultural products. The movement also hoped to bring farmers together for educational discussions SOLON J. BUCK, THE GRANGER MOVEMENT – A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC, AND SOCIAL MANIFESTATIONS 1870-1880 3-39(Harvard University Press 1913).

[28] Senator Sherman (a conservative congressman) saw a need for the federal government to respond to widespread popular demands for reforms and protection against the abuses of big businesses. He suggested that if the government failed to do so the country will be facing a more dreadful and radical uprising. In a speech before the US Senate, Sherman warned 'you must heed their appeal or be ready for the socialist, the communist, the nihilist. Society is now disturbed by forces never felt before'. Senator Sherman was not only concerned about the evils of monopoly pricing but also about 'the inequality of condition, of wealth, and opportunity'. Furthermore, he also saw competitive markets as an institution guaranteeing the dispersal of power: 'a nation that would not submit to an emperor…should not submit to an autocrat of trade' 178 21 Cong. Rec. 2,456-7. See also HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 626 [1980] (Harper Perennial Modern Classics 2005).

[29] Hovenkamp shows that a major original purpose of the law was to protection smaller rivals, such as the small oil companies attacked and then acquired by Standard Oil. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88(1) MICHIGAN LAW REVIEW 1, 24-30 (1989). Robert Pitofsky, 'The Political Content of Antitrust' 127 UNIVERSITY OF PENSILVANIA LAW RIVIEW 1051, 1060-1065 (1979).

[30] Robert Pitofsky, *Introduction: Setting the Stage* in THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST 4 (Robert Pitofsky ed., OUP 2009).

[31] Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUMBIA LAW REVIEW 377 (1965); Louis Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 UNIVERSTIY OF PENSILVANIA LAW REVIEW 1076 (1979); Gordon Spivack, The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response, 52 ANTITRUST LJ 651, 653 (1983).

result, reasonable disagreement about the goals of antitrust incentivized the Warren Court during the 1950s and 1960s to apply the law in a maximalist fashion seeking to protect a specific way of economic life.[32] As a result claims of business efficiency were disregarded, mergers between undertakings with very small market shares were blocked and the *per se* analysis was expanded to condemn behavior that could rarely produce anticompetitive effects.[33] The openness of antitrust brought about a contradictory and on many occasions hard-to-justify or inadministrable form of intervention.[34]

The antitrust community tamed this openness by invoking the integrity of law. Specifically, scholars like Robert Bork and Richard Posner - the main representatives of the influential Chicago School - argued that such openness makes antitrust a scattered incoherent and often contradictory legal field.[35] Their criticism of the antitrust of the 1950s and 1960s gained momentum especially because several US courts used the law to pursue various often contradictory objectives without using objective criteria and solid economic theory.[36] The core argument of the Chicago School was that antitrust law should discard objectives other than the promotion of market competition leading to superior market performance.[37] Otherwise, if the motivations behind the Sherman Act were taken as its goals, contradictions in enforcement would be inevitable.

Chicago's suspicion of excessive openness made a lot of sense at the time. A price-fixing agreement, for instance, may increase prices and harm the consumers, but help its parties compete. It might even give them a 'fair' advantage in their economic fight with much stronger corporations. Should enforcers seek to protect the consumers that are harmed by the higher prices or the rivals that decided to pool together their forces to avoid 'ruinous competition' or to organize their resistance against a much stronger upstream corporation? If so, a maximalist understanding of antitrust's goal(s) would easily generate contradictory outcomes: different courts could predictably decide same cases differently. Seeking to preserve antitrust's integrity in the face of excessive openness, the Chicago School reconstructed the goal of the law, defined anticompetitive behavior as behavior that restricts output or increases prices,[38] and used price theory to offer powerful efficiency explanations to many practices.

This 'antitrust revolution' created numerous friends and foes, but in general provided adjudicators with a more coherent and administrable analytical framework for decision-making than before.[39] The vast majority of the US antitrust community eventually recognized that because of the Chicago School, antitrust became better (the inherent logic of the system increased) than it had been during the Warren years.[40] In 2008 Crane wrote '[t]here is widespread agreement today among courts, antitrust enforcement agencies, and antitrust practitioners and scholars about the goals of the antitrust enterprise…[M]ost contentious issues in antitrust are nonideological and no longer require appealing to endogenous preferences or foundational views about the legitimacy of the capitalist order.'[41] Hence the rise of the Chicago School of antitrust significantly reduced, at least temporarily, the scope of disagreements.

Despite Chicago's ascendency during the 1970s and 1980s, and the overlapping consensus around consumer welfare in the 1990s and 2000s, disagreement did not end.[42] Some scholars found that approach - limiting antitrust to

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[32] The Supreme Court in *Brown Shoe* notes 'we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses.' See Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962). In a similar vein the Supreme Court invalidated a merger between grocery store chains that would have produced post-merger a firm with 7.5% of the relevant market following the incipiency doctrine. See United States v. Von's Grocery Co., 384 U.S. 270, 277(1966). Yet, even before the era of the Warren Court it was recognized that 'throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other' See also United States v. Aluminum Co. of America, 148 F. 2d 416, 429 (C. A. 2d Cir., per Learned Hand, J.). Notably in *Trans-Missouri* the Court talked about the protection of 'small dealers and worthy men'. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

[33] There is an overlapping consensus today that this type of aggressive antitrust enforcement was misguided. Thomas E. *Kauper, Influence of Conservative Economic Analysis on the Development of the Law of Antitrust* in THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST 40, 41-43 (Robert Pitofsky ed., OUP 2009).

[34] BORK, ANTITRUST PARADOX, *supra* note 5 at 16, 49, 84, 86, 318, 408- 410, 413, 416, 423-24.

[35] Bork referred to the alternative of the economic approach as a set of 'nebulous values' that lead to an 'intellectual mush' or nebulous ideas. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 9 (1966); E. William Barnett et al., *Panel Discussion: Merger Enforcement and Practice*, 50 ANTITRUST LJ. 233, 238 (1981).

[36] Williamson observes that during the 1960s, '[t]he standards for judging an antitrust offense fell so low that respondents not only made no affirmative case for economies as an antitrust defence but even disclaimed economies that were ascribed to a merger by the government'). Oliver Williamson, *Delimiting Antitrust* 76 GEO. L.J 271, 272 (1987).

[37] As Crane notes one could agree with Chicago School's claim on antitrust goals without fully accepting the conception of efficiency or the economic theories these scholars used to define when competition is restricted. Daniel Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust*, 79 3 ANTITRUST L.J. 835, 853 (2014).

[38] In the words of Bork antitrust policy 'requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output'. Bork, *supra* note 35 at 7. Unless business conduct raises prices or reduces output it should be left alone, regardless of the political or distributive consequences. Jonathan B. Baker, *Recent Developments in Economics That Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 646 (1989).

[39] Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICHIGAN LAW REVIEW 214, 217-18 (1985); William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TULANE LAW RREVIEW 1, 30-36 (1991). Others maintained that Chicago School gained momentum due to an intellectual and political backlash to the perceived 'inhospitablity tradition' of the Warren Court or because of the Reagan administration's favouring of big businesses. Thomas J. Campbell, *The Antitrust Record of the First Reagan Administration*, 64 TEX. L. REV. 353, 354-55 (1985); William V. Kovacic, *Public Choice and the Public Interest: Federal Trade Commission Antitrust Enforcement During the Reagan Administration*, 33 (1988) ANTITRUST BULLETIN 467, 500.

[40] Pitofsky argues that 'Chicago School made antitrust more rigorous, more reasonable, more sophisticated in terms of economics' in PITOFSKY, *supra* note 30 at 5.

[41] Daniel Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211-12 (2008).

[42] By the late 1980s, several opinions of the United States Supreme Court, along with revisions to the Department of Justice Merger Guidelines, strongly suggested that antitrust authorities had adopted Chicago's exclusive focus on allocative efficiency. See for instance, Matsushita Elec. Indus. Co. v.

structured microeconomic analysis - too narrow or the subsequent enforcement style too light-weighed.[43] After the first decade of the 21st century the competitiveness of American economy declined, and as a result 'a growing number of industries in the U.S. are dominated by a shrinking number of companies'.[44] Rising concentration, higher profits for a few big firms, lowing rates of start-up activity, and widening inequality gaps characterize current American economy. There is a growing consensus that a Chicago-led, hands-off antitrust enforcement has contributed to the decline of competition and the rise of inequality in the US.[45] In addition, the rise of digital markets and ecosystems have led several scholars in the realization that the Chicagoan price-centric model of understanding antitrust might be too short-sighted.[46] An increasing awareness of the relevance of non-price dimensions of competition, such as innovation, quality and privacy has sparked an opposite tendency away from minimalist antitrust.[47] Several members of the antitrust community seek nowadays for ways to reinvigorate antitrust.[48] It seems that Chicago's attempt to avoid disintegrating openness led to a type of 'thin' antitrust. As a result, the integrity of law motivated an opposite tendency towards more openness.

However, this oscillation between openness and integrity did not bring US antitrust back to the first strand of the goals debate. A fragile consensus has arisen today according to which the goal of US antitrust is to protect 'the competitive process so that consumers receive the full benefits of vigorous competition.'[49] This consensus implies that the first strand of the goals debate has been virtually abandoned: nobody denies today that the application of this law requires some degree of economic analysis and nobody seriously argues that antitrust should be used to promote values or goals completely detached from competition.[50] Scholars or enforcers concerned about what appear to be non-economic or non-competition values such as healthcare, environment and privacy seek for ways to incorporate these values to competition analysis. Rarely do they submit that these values could or should be independent goals of the law.[51] Hence, through reasonable disagreements the boundaries of antitrust have been defined more precisely and the goals debate took a 'more technocratic turn' in the 1980s and the decades that followed.

Yet, antitrust did not become technocracy. The technocratic turn did not lead to an ironclad consensus that US antitrust does and should only protect consumer welfare or that it should be applied only after full-fledged economic

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Zenith Radio Corp., 475 U.S. 574,588-89 (1986) (accepting implicitly Chicago's view of predatory pricing); Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284,296 (1985) (adding market power requirement to prohibition against group boycotts); National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104-07 (1984) ('Restrictions on price and output are the paradigmatic examples of restraints of trade....'); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 n.21 (1977) (indicating that antitrust jurisprudence should primarily deal with 'market considerations,' and not with 'restrictions on the autonomy of independent businessmen'). Williamson also notes that 'the differences between the 1968 and the 1982 merger guidelines... evidence some of the changes that resulted from the paradigm shift away from market power (monopolizing) in favour of efficiency (economizing).' See Williamson, *supra* note 36 at 273-274.

[43] Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66(6) CORNELL LAW REVIEW 1140, 1154 (1981) ('In sum, the claim that efficiency has been the goal and the fulcrum of antitrust is weak at best'); Lawrence A. Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CAL. L. REV. 1, 3 (1980) (stating that 'free access to markets and dealer independence have been rejected as antitrust goals,' as antitrust courts have become 'expositors of applied microeconomic policy'); Robert Pitofsky, *Does Antitrust Have a Future?*, 76 GEO. LJ. 321,321-22 (1987) (describing the Reagan administration's antitrust policy as 'the most lenient antitrust enforcement program in fifty years'; stating that with the exception of horizontal cartels, large horizontal mergers, and predation, 'antitrust has been consigned to a non-enforcement oblivion'; and claiming that 'the basis for this extraordinary turnaround in enforcement' is Chicago School theory.

[44] Economist, *Too Much of a Good Thing*, March 26 2016 available at https://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competitiontoo-much-good-thing; Economist, *The Rise of Superstars*, September 17 2016, available at https://www.economist.com/news/special-report/21707048-smallgroup-giant-companiessome-old-some-neware-once-again-dominating-global; Economist, *The super economy: a giant problem*, September 17 2016, available at https://www.economist.com/news/leaders/21707210-rise-corporatecolossus-threatens-both-competition-and-legitimacy-business. Business Week, *Here is how the play monopoly in America, and who wins*, April 5 2017, available at https://www.bloomberg.com/news/articles/2017-04-05/here-s-how-they-play-monopoly-in-america-and-who-wins; Barry Lynn, *America's Monopolies are Holding Back the Economy*, THE ATLANTIC, 22 February 2017, available at https://www.theatlantic.com/business/archive/2017/02/antimonopoly-big-business/514358/ .

[45] AMERICAN ANTITRUST INSTITUTE, REPORT, *A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward*, at 7 (June 2016); CENTER FOR AMERICA PROGRESS, REPORT, *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy* at 18 (June 2016) (stating 'there is systematic evidence - ranging from the disconnect of corporate profits and corporate investment to evidence of persistent supra-normal profitability - that points to an increase in rent extraction in the U.S. economy.' ROOSEVELT INSTITUTE, REPORT, *Untamed: How to Check Corporate, Financial and Monopoly Power*, at 18 (June 2016) (finding that in several industries e.g. healthcare, airlines, agriculture, markets are now more concentrated and less competitive than at any point since the Gilded Age). THE ROOSEVELT INSTITUTE, REPORT, *Towards a Broader View of Competition Policy* (2017).

[46] Tim Wu, *The Blind Spot: The Attention Economy and the Law*, ANTITRUST L.J. [forthcoming] 4-10, 27 (2017); Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE LAW JOURNAL 710, 717-722 (2017).

[47] OECD, *Considering non-price effects in merger control – Background note by the Secretariat*, DAF/COMP(2018)2 (June 6, 2018) at 5-32.

[48] Jonathan Baker, *Market Power in the U.S. Economy Today* (2017) available at https://equitablegrowth.org/market-power-in-the-u-s-economy-today/; Maurice E. Stucke, *Occupy Wall Street and Antitrust* 85 SOUTHERN CALIFORNIA LAW REVIEW 33 (2012); Jonathan Baker & Steven Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEORGETOWN LAW JOURNAL 1 (2015); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARVARD LAW & POLICY REVIEW 235 (2017); Joseph Stiglitz, *Towards a Broader View of Competition Policy* in COMPETITION POLICY FOR THE NEW ERA – INSIGHTS FROM THE BRICS COUNTRIES (T. Bonakele, E. Fox & L. McNube eds., OUP 2017) 4; Ioannis Lianos, *The Poverty of Competition Law*, 2 CLES RESEARCH PAPER SERIES (2018), available at SSRN: https://ssrn.com/abstract=3160054.

[49] As will be shown below this claim brings together the consumer welfare advocates and the competitive process supporters. Carl Schapiro, *Antitrust in a Time of Populism*, 61 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 714, 745 (2018).

[50] Senator Elizabeth Warren, *Reigniting Competition in the American Economy*, June 29 2016, available at https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf .

[51] In 1996, Jacobs noted that 'though populist criticism of Chicago has not disappeared altogether from academic journals, the debate about the organizing values of antitrust has lost its drama.' In 2017, Shapiro makes a similar observation. Proposing that antitrust should pursue non-economic or non-competition goals has been today discredited. See Michael Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N. C. L. Rev. 219, 238 (1996); Shapiro, *supra* note 49 at 714, 745-746.

analysis proving actual consumer harm. Nowadays it is becoming increasingly clear that consumer welfare and price-output analysis are and should not be the sole drivers of US antitrust. As Crane recently noted,

> 'antitrust law now stands at its most fluid and negotiable moment in a generation. The bipartisan consensus that antitrust should focus solely on economic efficiency and consumer welfare has quite suddenly come under attack from prominent voices calling for a dramatically enhanced role for antitrust law in mediating a variety of social, economic, and political friction points.'[52]

In other words, the technocratic turn did not eradicate reasonable disagreements. The law was further developed, its boundaries were further clarified and its coherency increased due to the technocratic turn. Nevertheless, US antitrust did not lose its openness. Reasonable disagreements continue to exist and especially today they often trigger to heated debates and polarization.[53]

B. The Analytical Structure of type-(a) Reasonable Disagreements

So far, we have adopted an external point of view and observed that despite the technocratic turn, type-(a) disagreements still torment US antitrust. Similar disagreements mark the evolution of EU antitrust too. To get a complete picture, though, it is worth analyzing how and why scholars, enforcers and courts continue to debate whether total or consumer welfare, fairness or the protection of the competitive process is and should be the goal of the law. The aim of this section, thus, is to show that the different stakeholders *can* reasonably disagree about what the goals of the law are and should be and to hint that the line between 'what the law is' and 'what the law should be' is actually blurry in antitrust.[54] For this purpose I assess here whether the claim 'X *is* or *should* be the goal of the law' can be (or is) reasonably contested. Here X equals total welfare, consumer welfare, fairness and rivalry - the four more likely candidates for X.[55] As a result, eight hypotheses are assessed: the positive and the normative total welfare (TW) hypothesis; the positive and the normative consumer welfare (CW) hypothesis, the positive and the normative fairness (F) hypothesis; the positive and the normative competitive process (CP) hypothesis.

Antitrust economists, usually, favor total welfare defined as Pareto[56] or Kaldor-Hicks efficiency[57] as the ultimate objective of the law.[58] Total welfare 'refers to the aggregate value that an economy produces, without regard for ways that gains or losses are distributed.'[59] For Posner, 'efficiency is the ultimate goal of antitrust, but competition a mediate goal that will often be close enough to the ultimate goal to allow the courts to look no further'.[60] To support this argument Posner maintained that the social cost of monopoly is the reason we need antitrust. Monopoly is condemned on the basis that it is inefficient as it misallocates resources and generates a deadweight loss.[61] In a similar vein for Bork '[t]he whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare'.[62]

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[52] Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 VIRGINIA LAW REVIEW ONLINE 118 (2018).

[53] Due to the technocratic turn disagreement became intramural but it was not eradicated. As Jacobs notes 'In the contemporary debate, by contrast, the normative questions do not announce themselves. Instead they lie embedded in technical disagreements over the means most conducive to the agreed-upon goal of consumer welfare'. Jacobs, *supra* note 51 at 261.

[54] As Austin argued the existence of law is independent from its merits or as Raz puts it 'the conditions of legal validity are purely a matter of social facts' JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DEFINED 157 [1832] (W.E. Rumble ed, CUP 1995); JOSEPH RAZ, THE AUTHORITY OF LAW 37-52 (OUP 1979). The goals debate in antitrust indicates antitrust practitioners and legal institutions often have theoretical disagreements, namely disagreements about the grounds of law (the requirements that make a particular proposition of law true. DWORKIN, LAW'S EMPIRE, *supra* note 2 at 4-11, 31-44; Dale Smith, *Theoretical Disagreement and the Semantic Sting*, 30 OXFORD J LEGAL STUDIES 635, 638 (2010).

[55] Other values can also play the role of the X but it is less likely to succeed. Consumer choice does not imply that every market should allow for a specified number of options, nor does it forbid all reductions in choice, but focuses on 'conduct that artificially limits the natural range of choices in the marketplace.' Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. Pitt. L. REV. 503, 503 (2001); Neil Averitt & Robert Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 (1) LOYOLA CONSUMER LAW REVIEW 44 (1998). However, economic theory and empirical evidence show many instances where business conduct simultaneously reduces choice and increases welfare in the form of lower prices, increased innovation, or higher quality products and services. Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2411 (2012).

[56] An allocation of resources is Pareto optimal if no individual can be made better off without making someone worse off. Anything enlarging the metaphorical pie offers a potential Pareto improvement because it is possible to make at least one individual better off while no one is worse off. Allan M. Feldman, *Welfare Economics*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 721, 722–23 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

[57] Kaldor-Hicks efficient is an allocation that results in some persons being better off and some worse off, and the winners could compensate the losers in such a way that, on balance, everybody is better off. At such a state of affairs social welfare is greater even if no actual compensation has been made DAVID WINCH, ANALYTICAL WELFARE ECONOMICS 143 (Penguin 1971).

[58] Roger D. Blair & D. Daniel Sokol, *The Goals of Antitrust: Welfare Standards in U.S. and E.U. Antitrust Enforcement* (2013) 81 FORDHAM L. REV. 2497; Kenneth Heyer, *Welfare Standards & Merger Analysis: Why Not the Best?*, EAG DISCUSSION PAPER 06-8 5 (2006); Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 NYULR 659, 690–98 (2010); Charles F. Rule & David L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, 33 ANTITRUST BULL. 677 (1988); Joseph Farrell and Michael Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMPETITION POLICY INTERNATIONAL 3 (2006).

[59] PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW at 114a (4th ed. 2014).

[60] *Id.* at 29.

[61] RICHARD POSNER, ANTITRUST LAW 41-96 (The University of Chicago Press 2001).

[62] BORK, *supra* note 5 at 91.

Yet, the normative TW hypothesis is not uncontested. A serious conceptual weakness of this approach is that it cannot give any independent value to competition: if any anticompetitive conduct can be justified as long as its efficiency gains outweigh its distortive impact on competition then a centrally planned economy or a monopolistic market structure could be justified as long as the welfare gains outweigh the losses.[63] In addition, a total welfare analysis may be unable to account for dynamic efficiency.[64] As already mentioned one of the greatest challenges of modern antitrust is to address forms of competition that do not revolve around providing the cheaper product, and forms of competition harm that derive from something else than raising prices to consumers.[65] Innovation or other non-price related parameters of competition, such as data or attention, that cannot be easily quantified could become the blind spot of antitrust if enforcers are monolithically focused on static total welfare analysis.[66] Furthermore, a total welfare analysis that centres around only immediate price effects would ignore welfare losses arising from output effects that occur over time.

Another example of the inadequacy of the normative TW hypothesis could be a merger that lowers prices to consumers but drives some rivals out of the market. Such a merger would be condemned, if the harm to rivals results in a loss in aggregate producer surplus that outweighs the gain to consumers. Similarly, a vertical restraint that lowers prices, but excludes rivals would be condemned, if rivals' loss exceeds consumers' gain. In such cases antitrust would protect competitors instead of promoting consumer welfare and competition.[67] On this basis, it has been argued that total welfare is normatively unappealing because it does not necessarily maximize long-run consumer welfare and it can lead to inefficient economic conduct which harms the consumers.[68] It should be added that total welfare requires a complex economic analysis similar to the one required from a central planner and thereby is inadministrable.[69] Even Bork and Posner recognized that if total welfare were perceived as requiring a full-fledged welfare analysis to prove competition harm, courts would simply lack the capabilities to apply antitrust.[70] Hovenkamp also notes that 'general welfare standard requires that all consumer losses be quantified and compared with producer efficiency gains. (…) is impossible to apply in any but the most obvious cases'.[71] More than this, if taken to its extreme, the normative TW could diminish law's integrity: antitrust would stop being law if it were simply a branch of applied microeconomics totally dependent on empirical analysis.[72]

The positive TW hypothesis is even more contestable. In fact, it is widely recognized that antitrust institutions do not run a full-fledged welfarist analysis to condemn a practice as anticompetitive.[73] In cases where some factors indicate competitive harm, while others suggest benefits, the courts on most occasions do not measure gains and losses but use economically-informed burden-shifting to make inferences on whether or not the law has been violated.[74] Furthermore, in both the US and the EU price-fixing arrangements are considered per se illegal or restrictions by object. The main rationale is that such conduct could distort the nerve system of the economy or reduces the strategic uncertainty that is required for decentralized decision-making.[75] Such arrangements can never be justified under US antitrust, while in the EU even though the defendants can invoke Art. 101(3) TFEU such defense is not simply a total welfare one. Hence,

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[63] Walter Eucken and T. W Hutchison, *On the Theory of the Centrally Administered Economy: An Analysis of the German Experiment. Part II*, 15(59) Economica 173, 182 (1948); Franz Böhm, *Democracy and Economic Power in Cartel and Monopoly in Modern Law* in THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES 273 (Daniel A Crane and Herbert Hovenkamp eds., OUP 2013).

[64] Scherer argues that while it is difficult to measure, the effects of 'X-efficiency' (the efficiency of production) and of long-run technological efficiency (the rate of useful invention) probably outweigh those of allocative efficiency. F.M. Scherer, *Antitrust Efficiency and Progress*, 62 N.Y.U. L. REV. 998, 1002(1987). Solow shows that while static efficiency may increase consumer welfare in the short run, economics teaches that dynamic efficiency is an even greater driver of consumer welfare. Robert Solow won the Nobel Prize in economics for demonstrating that gains in wealth are due primarily to innovation—not to marginal improvements in the efficiency of what already exists. *See* Press Release, Royal Swedish Academy of Sciences (Oct. 21, 1987), http://www. nobelprize.org/nobel_prizes/economic-sciences/laureates/1987/press. html.

[65] Several scholars criticize modern antitrust for becoming too price-centric or price fixated. MAURICE STUCKE & ALLEN GRUNES, BIG DATA AND COMPETITION POLICY 107-118 (OUP 2016); John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 UPLREV 149 (2015); Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 328 (2012).

[66] Wu, *supra* note 46 at 4-10; Hovenkamp, *supra* note 39 at 256; Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 523-5 (1985).

[67] The proponents of the total welfare approach commit this error because they disregard the relationship between goals and means. Scalia noted in *Newport New* that '[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means.' Thus, antitrust should not be understood as a legal device for maximizing output, but as an 'output-maximizing device through the protection and promotion of competition'. Dir., Office of Workers' Comp. Programs v. Newport News Shipbldg. & Dry Dock Co., 514 U.S. 122, 136 (1995). Similarly, in *Nynex*, the Court refrained from sanctioning a practice that harmed consumers but not by hampering the competitive process. The defendant managed to raise prices by gaming the regulatory system not from a less competitive market. NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

[68] Steven A. Salop, *Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOYOLA CONSUMER L. REV. 336, 348-353 (2010).

[69] Herbert Hovenkamp, *Progressive Antitrust*, 1 UNIVERSITY OF ILLINOIS LAW REVIEW 71, 92 (2018).

[70] Bork noticed that 'weighing effects in any direct sense will usually be beyond judicial capabilities' Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 387–90 (1966). Posner observed that antitrust analysis should search 'for ways of avoiding prohibiting efficient, albeit non-competitive, practices without having to compare directly the gains and losses from a challenged practice'. POSNER, *supra* note 61at 87.

[71] Herbert Hovenkamp, *The Rule of Reason*, 70 FLORIDA LAW REVIEW 81, 83 (2018).

[72] For a similar argument see Oles Andriychuck, *Dialectical antitrust: an alternative insight into the methodology of EC competition law analysis in a period of economic downturn* 31 (4) ECLR 155, 163 (2010).

[73] Hovenkamp, *supra* note 71 at 25.

[74] Herbert Hovenkamp, *Antitrust Balancing* 12 2 N.Y.U. JOURNAL OF LAW AND BUSINESS 369 (2016).

[75] Case C-8/08, *T-Mobile* ECLI:EU:C:2009:343, para 35; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-222 (1940) ('Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces').

no TW defense is allowed for such a behavior and it is highly unlikely that any cartelists would be able to avoid sanctions if they prove before an authority or a court that their conduct were welfare enhancing or that the existing competition were 'ruinous'.[76]

Another example that illustrates why the positive TW hypothesis does not hold is merger control. Both in the US and the EU the prospective analysis of merger control examines how a concentration can affect competition by comparing the competitive conditions that would result from the notified merger with the conditions that would have prevailed in absence of the merger. Even though the authorities regularly examine whether the downward pricing pressure resulting from merger-induced efficiencies is sufficient to offset the upward pricing pressure induced by the merger itself, this analysis is not limited to price effects.[77] Competition authorities often assess also the impact of a merger on innovation quality or privacy.[78] Moreover, if the positive TW hypothesis were true then merger analysis would be solely focused on output: a merger that reduces the volume of sales would reduce total welfare, while one that increases output increases welfare.[79] Yet, competition authorities examine many other factors and especially the effect of mergers on consumer prices.[80] In addition, the existing practice strongly indicates that a merger-to-monopoly would be cleared if the merging parties could convincingly show that the transaction will not lead to price increases or output reductions. However, such a merger is not likely to fly. A similar result could be presumed for a merger that is likely to increase prices, even if the parties demonstrate offsetting cost efficiencies.[81] Thus, the positive TW hypothesis does not hold.

To assess the normative CW hypothesis a semantic ambiguity needs to be clarified first. Bork, among the first to use this term[82] argued that it is 'a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternate state of affairs through judicial decree.'[83] Many scholars criticized him for using consumer welfare as a synonym for allocative efficiency or Pareto optimality and argued that consumer welfare simply means consumer surplus.[84] Bork's consumer welfare includes only the deadweight loss, which captures the social costs of monopoly, and ignores the wealth transfer from consumers to monopolies.[85] However, a 'true consumer welfare standard', as Salop notes, requires antitrust to condemn a conduct only if it reduces the welfare of buyers, irrespective of its impact on sellers.[86] For example, a merger that both reduces rivals costs and leads to price increases, would be considered benign under a Borkean CW standard, if the cost reduction is greater than the price increase, but not under a 'true CW' standard.[87] Let us assume then that the normative CW hypothesis refers only to consumer surplus since the objections raised to the normative TW hypothesis could also be raised to the Borkean CW.

Consumer welfare is much easier to measure empirically - i.e. via statistical or econometric analysis - and leads to more administrable rules and standards.[88] One could argue though that consumer welfare is too static: it may lead enforcers to condemn a practice that reduces prices by 5 per cent at the expense of reducing by 1 per cent the annual rate at which innovation lowers the cost of production.[89] Alternatively, it could be reasonably argued that consumer welfare is too narrow: if consumer welfare is meant to capture only short-term effects on price and output it is incapable of capturing the architecture of market power the twenty-first century market place.[90] Yet, it is clear today that consumer welfare could (at least in theory) be interpreted broadly and dynamically so as to incorporate non-price dimensions of competition such as privacy, innovation and quality and allow enforcers to identify non-price related manifestations of

[76] Persistently, the US Courts have deemed the ruinous competition defence as 'nothing less than a frontal assault on the basic policy of the Sherman Act.' United States v. National Society of Professional Engineers, 435 U.S. 679, 695 (1978). 'Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned.' United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940). Given that excessive competition is unlikely to be a winning defense of price fixing implies that 'either we don't trust those models, or we don't believe in a purely welfarist total surplus standard'. Farrel and Katz, *supra* note 58 at 6-7.

[77] Case M.8084 – Bayer/Monsanto, European Commission Decision C(2018), April 11, 2018; Case M.7932 – Dow/Dupont, European Commission Decision C(2017), March 27, 2017 at 2001-9, 2043-48, 3017-22.

[78] US Department of Justice (DOJ) and Federal Trade Commission (FTC), *Horizontal Merger Guidelines* (19 August 2010) [hereinafter US HMG] 2, 10, 20, 23, 26, 31; European Commission, *Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings* [2004] OJ C 31/ 03 paras 8, 15, 38, 45, 71 [hereinafter EU HMG].

[79] Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Trade-offs*, (1968) 58 AMER. ECON. REV. 18 (1968).

[80] US HMG, *supra* note 78 at 2, 4,7, 24, 29 31 and EU HMG, *supra* note 78 at para 8.

[81] Hovenkamp, *supra* note 69 at 18-21.

[82] The American Economic Association's Econonmic Literature database contains fewer than 50 entries published before publication of 'The Antitrust Paradox' using the term but over 3000 since.

[83] BORK, *supra* note 5 at 61. See also Robert H. Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242 245 (1967) (stating that 'the preference for competitive rather than monopolistic resource allocation is most clearly explained and firmly based upon a desire to maximize output as consumers value it').

[84] Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HLR 397, 437 (2009). Werden argues that most of these criticisms are misleading because Bork referred to allocative efficiency to the extent it does not interfere significantly with productive efficiency. Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 723 (2014).

[85] Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?* 79 ANTITRUST 881, 885-887 (2014).

[86] If consumers lose from a practice then it is counted as inefficient, or anticompetitive, even if producers gain more than consumers lose. Hovenkamp, *supra* note 69, at 89.

[87] Salop convincingly argues that under a true consumer welfare standard the gains to the merging producers do not count; only the effect on consumer prices is relevant. Salop, *supra* note 68 at 339-340.

[88] Hovenkamp, *supra* note 69 at 93.

[89] Frank H. Easterbrook, *Ignorance and Antitrust* in ANTITRUST, INNOVATION AND COMPETITIVENESS (T.M. Jorde & D.J. Teece eds., 1992), 119.

[90] Digital ecosystems or critical intermediaries may be able affect competition upstream or foreclose the market without having any short-term price effects. Khan, *supra* note 46, at 716.

market power.[91] Nonetheless, there is more forceful objection against the normative CW hypothesis. One could reasonably claim that there is no convincing substantive reason for evaluating the welfare of consumers as bearing greater weight than the welfare of producers.[92] From this angle, total welfare, despite its shortcomings, seems to provide a superior conceptual framework and a better normative justification of antitrust for it relies on formal equality of all economic agents and values all economic agents the same.[93] Another formidable objection against this hypothesis is that it would result in antitrust allowing efficiency-enhancing monopsony.[94] As a result the normative CW hypothesis may lead to scenarios where competition is totally eliminated from the market.

The positive CW hypothesis seems to describe to a significant extent the decision practice of US authorities and courts.[95] Yet, if only consumers matter, then a buying cartel or a horizontal merger that increases buyer power would be perfectly legal as long as it does not inflict any consumer harm. Regularly though competition authorities pursue such practices or block such mergers.[96] In Europe even though consumer welfare is a key motivators of Commission's policy,[97] the European Court of Justice (ECJ) has explicitly rejected the claim that consumer welfare is the sole goal of the law in *GlaxoSmithKline*: 'there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anticompetitive object (…) Article [101(1) TFEU] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.' Consequently, Zimmer is correct in noting that an analysis of American and European law reveals that competition law is not limited to consumer welfare as both jurisdictions 'interpret competition as a concept that not only protect competition among sellers but also among buyers.'[98]

The normative F hypothesis has few supporters and many challengers. This is mainly because the word 'fairness' can be extremely elusive and rarely leads to clear-cut legal standards.[99] The persistence of this hypothesis, however, indicates that total or consumer welfare cannot ostracize questions of justice from antitrust.[100] Fairness could refer to the unfair wealth transfer from consumers to sellers due to substantial market power.[101] For Kirkwood and Lande such wealth transfer is unfair because it is a taking of property without consent and compensation. If understood in this way the F hypothesis corresponds to a broad consumer welfare notion that includes the deadweight loss and the wealth transfer incurred by substantial market power. The CW conception is also refined under this approach because it shielded against the purchaser's bias since the unfair transfer is not unidimensional. Thus, the F hypothesis interpreted in this manner can address the problem of monopsonistic power. Yet, such an approach could be too price-centric or too static. For instance, a total welfare proponent could reasonably argue that a merger may lead to an unfair wealth transfer but it substantially increases innovation incentives and output and therefore should be allowed. In addition, the objection against the normative and the positive CW hypothesis could be raised here as well.

Alternatively, the normative F hypothesis could imply that suppliers and purchasers should be protected against 'exploitation'.[102] However, traditionally concerns about excessive prices are perceived as going beyond the scope of antitrust and the capacity of antirust institutions. The main reason behind this attitude is that price floors are likely to lead to excessive producer surplus at the expense of the consumers, while price ceilings are likely to lead to prices below the market mark-up and are usually at protecting the consumers at the expense of the producers. In other words, such policies block the interplay between supply and demand - the gravitational forces of competition - and require a special public policy justification due to the inefficiencies they generate. Therefore, sectoral regulators or some other public body is more legitimate in making such decisions. Excessive prices though could be a competition problem when they are the by-product of barriers to entry, or market foreclosure by a monopolist.[103] It thus becomes clear that if interpreted in this way the F hypothesis can hardly offer a normative justification to antirust. In addition, even though there are some antitrust

[91] OECD, *supra* note 47, at 5-32; Bayer/Monsanto, *supra* note 77, at ; Dow/Dupont *supra* note 77, at 2001-8, 3240-56.
[92] Note that consumer welfare usually refers to the buyer size of the market regardless of the size of the buyers.
[93] NAZZINI, *supra* note 21, at 49-50.
[94] Alan J. Meese, *Debunking the Purchaser Welfare Account of §2 of the Sherman Act: How Harvard Brought us a Total Welfare Standard and Why We Should keep it*, 85 NYU L. REV. 649, 673-685 (2010); Heyer, *supra* note 58, at 28.
[95] Hovenkamp, *supra* note 69, at 88.
[96] Dennis W. Carlton, *Does Antitrust Need to be Modernized?*, 21 JOURNAL OF ECONOMIC PERSPECTIVE 155, 158 (2007); Louis Kaplow & Card Shapiro, *Antitrust* in HANDBOOK OF LAW AND ECONOMICS (Mitchel Polinsky & Steven Shavell eds., North Holland 2007) 1168.
[97] European Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45, 24.2.2009, para 19: 'The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by fore closing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare.'
[98] Daniel Zimmer, *The basic goal of competition law: to protect the opposite side of the market*, in THE GOALS OF COMPETITION LAW 486, 491-492 (Daniel Zimmer ed., Edward Elgar 2012).
[99] Ahlborn J. Padilla and Christian Ahlborn, *From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law* in EUROPEAN COMPETITION LAW ANNUAL 2007: A REFORMED APPROACH TO ARTICLE 82 EC 55, 61, 63-64, 75-83 (Claus-Dieter Ehlermann and Mel Marquis eds., Hart 2008). For an interesting conceptualization of fairness see Horton, *supra* note 20 at 835-852.
[100] As Rawls insightfully notes 'Justice is the first virtue of social institutions as truth of systems of thought'. From this angle, all normative hypotheses examined here could be viewed as attempts to address a question of justice that lies at the heart of antitrust: under what condition is antitrust fair? JOHN RAWLS, A THEORY OF JUSTICE 3 (Harvard University Press 1971).
[101] John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME LAW REVIEW 191, 198 (2008).
[102] Zimmer, supra note 98, at 491.
[103] Mario Motta & Alexander De Streel, *Excessive Pricing in Competition Law: Never say Never?*, 14, 22-26 KALMAR: SWEDISH COMPETITION AUTHORITY (2007).

provisions that link up to the problem of excessive prices, only very few decisions deal with such issues.[104] Thus, also a positive F hypothesis with this content is hardly verifiable.

Exploitation could refer to the protection of trading partners and to the problem of unequal bargaining power.[105] However, if antitrust had such a goal it would have to continuously interfere in a maximalist and aggressively egalitarian way to level the playing field.[106] Such a policy seems justified when pursued by a sectoral legislator with an explicit mandate but it is hard to justify as a competition authority's task. Unequal bargaining power raises competition concerns when it is associated with substantial market power and when it leads to market foreclosure or consumer harm in the form of higher prices, lower quality or innovation suppressing. Otherwise, the exploitation of economic dependence seems to be more of a tort than an antitrust problem. Again, if this is the content of the positive F hypothesis then the decisional practice of both US and EU antitrust institutions suggests that such concerns can be only marginal and context dependent.[107]

Lastly, the normative CP hypothesis consists in the thesis that 'competition as process' is the overarching idea that unifies antitrust's main concerns: distrust of power, concern for consumers and commitment to opportunity for entrepreneurs.[108] This hypothesis could be also grounded on the ordoliberal school of thought that views competition as decentralized decision-making that counteracts concentrations of public and private power. In this sense, antitrust is the core of an 'economic constitution' that imposes a degree of popular control over concentrated economic power, and thus the equivalent of the separation of powers, checks-and-balances, and federalism.[109] From this perspective the purpose of antitrust is to maximize freedom or guarantee 'equal freedom for all' and to this end it imposes limitations 'upon the freedom of each and every one and to this extent implies a kind of coercion for each and every person concerned.'[110] Antitrust is the 'Magna Charta of free enterprise' for it enables freedom and levels the playing field.[111] Hence, according to the CP hypothesis antitrust is legitimized to the extent that it ensures that consumers can make meaningful choices and producers have opportunities to participate in the market. The purpose then of this area of law is to guarantee open and competitive markets.

A powerful argument developed by Hayek offers additional support to this hypothesis: competition is a process of discovery; 'a procedure for discovering facts, which if the procedure did not exist, would remain unknown or at least would not be used.'[112] Competition is a sensible procedure to employ only if we do not know beforehand who will perform best. If we knew then, competition would be nothing but a highly wasteful method of achieving the respective goal. This approach captures a key element of competition: competition cannot be simply reduced to an outcome-based value that ought to be maximized; it has also a procedural dimension. This dimension is inherent in the concept of competition and is captured nicely by MacCallum:[113]

> X competes with Y where there are actions Ax and Ay and goals Gx and Gy such that:
> (1) X does Ax with the intention of achieving Gx;
> (2) Y does Ay with the intention of achieving Gy; and
> (3) X achieves Gx only if Y does not achieve Gy.[114]

The normative CP hypothesis focuses on preserving a competitive process and an open market structure. On this basis, the proponents of this approach argue that if a practice impedes competition as a process and has a negative economic effect it should be prohibited, since antitrust is and should promote consumer welfare - in any sense of the term - by protecting the competitive process.[115] This approach can offer a convincing normative justification for antitrust but it cannot fully guide its interpretation.[116] For instance the competitive process should be further defined: is it effective, workable, perfect or complete competition the state of affairs that ought to be maintained. In addition distortions of

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[104] Art. 102 TFEU; Indian Competition Act 2002 Art. 4(2)a. Case 27/76 *United Brands v. European Commission*, OJ L 95 of April 1976.

[105] Masako Wakui and Thomas K. Cheng, *Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity*, 3(2) JOURNAL OF ANTITRUST ENFORCEMENT 302, 305-311 (2015); ICN, Report on Abuse of a superior bargaining position (2008); French Code of Commercial Conduct L442-6.

[106] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 161-163 [1974] (Basic Books, Inc. 2001).

[107] Refusal to deal cases could be seen as supporting this hypothesis even though such cases are equally compatible with the other three hypotheses.

[108] According to this approach the competitive process is valued because it disperses power, creates economic opportunities and increases consumers' welfare. Eleanor Fox, 'the Modernization of Antitrust: A New Equilibrium'; Eleanor Fox, 'The Efficiency Paradox' Law and Economics Research Paper Series Working Paper No 09-26; Tim Wu, *The "Protection of the Competitive Process" Standard*, COLUMBIA PUBLIC LAW RESEARCH PAPER NO. 14-612 (2018).

[109] TIM WU, THE MASTER SWITCH 299 (2010) (comparing the separation of powers principles in the U.S. constitution to antitrust principles).

[110] Franz Böhm, *Rule of Law in a Market Economy*, [1966] in GERMANY'S SOCIAL MARKET ECONOMY: ORIGINS AND EVOLUTION 54 (Alan T. Peacock and Hans Willgerodt eds., Macmillan 1989).

[111] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). This statement has been interpreted in a libertarian way in *Trinko* 'The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.' See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). Yet, the ordoliberal understanding of competition (reflected also in *Topco*) should not be confused with the libertarian or laissez faire approach.

[112] F.A. Hayek, 'Competition as a Discovery Procedure'; F.A Hayek, Law, Legislation and Liberty. London: Routledge & Kegan Paul, 1982.

[113] Gerald MacCallum, *Competition and Moral Philosophy* in LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY (Marcus Singer & Rex Martin eds., University of Wisconsin Press 1993).

[114] For an interesting discussion of this idea of competition see OLIVER BLACK, THE CONCEPTUAL FOUNDATIONS OF ANTITRUST 8-16 (CUP 2005).

[115] Werden, *supra* note 84, at 36. Wu, *supra* note 108, at 1-3; Khan, *supra* note 46, at 737-35.

[116] JEAN TIROLE, ECONOMICS FOR THE COMMON GOOD 487 (Princeton University Press 2017) (noting competition is rarely perfect; markets have flaws, and market power (…) has to be checked. Advocates of competition, as well as its detractors, sometimes forget that competition is not an end in itself.').

competition are usually identified by tracing prices increases or output restrictions, the primary metrics of the TW and the CW approach. Hence, the rivalry approach can be invaluable in providing some rules of thumb and in helping antitrust authorities avoid the pitfalls of the TW and the CW approaches, but alone cannot serve as the sole goal of the law.

The positive CP hypothesis is equally powerful. For instance, the Assistant Attorney General of the Antitrust Division of the US Department of Justice has said: 'Although we believe competition maximizes consumer welfare, the ultimate standard by which we judge practices is their effect on competition, not on consumer welfare. (…) We are just as concerned with lost competition among upstream input suppliers as we are with lost competition among sellers of finished goods downstream.(…) Rather than focusing on measuring consumer welfare in an academic fashion we are looking more broadly at the effects of business practices on competition'.[117] In a similar vein Werden argues that US courts and enforcers focus solely on how a challenged restraint affects the competitive process.[118] Furthermore, the ECJ in several Art. 102 TFEU cases has defined abuse as conduct that deviates from 'normal competition' or 'competition on the merits', which the dominant company has a special responsibility to maintain. Yet, nobody can deny that in many instances the courts have used the as efficient competitor test that derives from the TW or CW approach – to determine whether a specific conduct constitutes a violation of antitrust norms.[119]

More than thirty years after Bork's remark that coherency in antitrust will naturally follow after settling the goals debate,[120] there is still reasonable disagreement about what antitrust institutions do and should do.[121] The pervasiveness and the analytical structure of reasonable disagreements indicate that antitrust is a normatively open system of norms bounded only by its integrity. This is why, various hypotheses could be proposed as per the best interpretation of the norms (even though none seems to prevail), as long as they are compatible with the Rule of Law and the core mission of antitrust, namely the protection and promotion of competition in the market. But then, why is it the case that antitrust is normatively open in this way?

II. An Explanans for an Explanandum

One might wonder whether reasonable disagreements, despite their pervasiveness, are not simply the by-product of ignorance and limited interpretative efforts or whether they are embedded in the law. Is it the fact that we have not yet discovered an ultimate, all-encompassing value, a bullet proof legal standard and an optimal theory of compliance what triggers the abovementioned disagreements, or are these disagreements somehow inevitable? Can we assume that at some point we will find the optimal substantive and procedural standards that will not raise any reasonable critique, and therefore the only problem of the law would be one of implementation?[122]

To this point, the antitrust community has adopted either a top-down or a bottom-up strategy to deal with the problem of reasonable disagreement. The former assumes that discovering and refining a single comprehensive goal could announce the 'end of antitrust history'.[123] What would remain for judges, enforcers, scholars, and practitioner at this stage would be only to refine their legal reasoning, employ superior economic analysis and use the optimal enforcement standards and procedures.[124] Starting from such a premise the members of the antitrust community has embarked in an endless quest for 'the soul of antitrust', proposed single lodestars, such total or consumer welfare, and formed intellectual camps and alliances, friends and foes. Yet, as we show despite all efforts no single goal has appeared capable of giving end to all reasonable disagreements. The alternative strategy recognizes that there is not clear winner in the goals debated and follows a bottom-up and more legalistic way of proceeding. According to this strategy the problem of reasonable disagreement will disappear once the courts develop in a common-law fashion an optimal analytical framework through canons of interpretation and input from positive economics.[125] It is sufficient thus that antitrust disputes are litigated, economists conduct empirical studies and provide evidence to sustain or debunk lawyers' arguments, judges decide cases in a transparent and well-justified manner, and experts criticize or applause these decisions.[126] The common thread of both strategies is that reasonable disagreements are exasperating, but temporary, sources of tension that will be eventually eradicated. After their eradication, no ambiguity or indeterminacy will remain in the law.

Contrary to this approach I argue here that there are four key features of antitrust that indicate that reasonable disagreements are endogenous. This field of law relies on a fuzzy mandate; uses a conceptually elastic vocabulary; is

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[117] Renata Hesse, *And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement*, Speech to 2016 Global Antitrust Enforcement Symposium, Washington DC, September 20, 2016, available at https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening.

[118] Werden convincingly argues that the competitive process standard is the one standard that is truly consistent with both the Supreme Court's case law over many years and the economic underpinnings of modern antitrust. Werden, *supra* note 84, at 16-22. See also Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); Interface Group v. Mass. Port Authority, 816 F.2d 9, 10 (1st Cir. 1987).

[119] NAZZINI, *supra* note 21, at 224-258.

[120] BORK, *supra* note 5, at 50.

[121] Jonathan Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, THE ANTITRUST SOURCE 1 (2015).

[122] For the distinction between 'content disputes' and 'application disputes' see also Jules Coleman, *Negative and Positive Positivism*, 11 JOURNAL OF LEGAL STUDIES (1982).

[123] FUKUYAMA, *supra* note 4 at 58, 60, 66, 138.

[124] BORK, *supra* note 5 at 50.

[125] PABLO IBAÑEZ COLOMO, THE SHAPING OF EU COMPETITION LAW 3-22 (Cambridge University Press 2018).

[126] Foer & Durst, *supra* note 20, at 507 (calling this approach 'the black box strategy' and highlighting that its main strength is that it does not require a clear-cut answer to the goals debate or theoretical justification of its results. They recognize though that this approach alone cannot ensure predictability).

developed as a blend of rules and standards due to the complexity and changing nature of its subject matter; and is not accompanied by an ideal institutional or enforcement theory. I analyse these four features in turn and I conclude that they indicate that reasonable disagreements are the by-product of the oscillation between openness and integrity.

First, antitrust laws in both sides of the Atlantic are grounded on a fuzzy mandate.[127] For instance, the history of Sherman Act has been told in significantly divergent ways.[128] Relying on the legislative debates at the time of the Sherman Act's enactment Bork argues that the intent of Congress was mainly to protect consumers from harm done by cartels while not undermining efficiency.[129] In the same line Posner argued that the framers of the Sherman Act 'appear to have been concerned mainly with the price and output consequences of monopolies and cartels'.[130] On the other hand, Lande maintains that Sherman Act intended to give consumers a property right to competitive outcomes.[131] In other words, Sherman Act according to Lande aimed to prevent unfair acquisitions of consumers' wealth by firms with market power.[132] Hovenkamp argues that Sherman Act drafters conceived competition in terms of individual liberty and freedom of choice.[133] Others suggest that the legislative history of antitrust laws - including Clayton Act and Robinson-Patman Act - tells a more complicated story about original intent involving the protection of small and medium enterprises.[134] In addition, other seminal antitrust scholars maintain that antitrust 'is rooted in a preference for pluralism, freedom of trade, access to markets, and freedom of choice'.[135] Given that a definitive reading of Sherman Act's legislative history has proven impossible so far,[136] it has been proposed that courts should regard the original intent as tabula rasa and follow the most appealing policy within the textual range of Sherman Act.[137]

In Europe, the mandate behind the competition norms is even more fuzzy. Many scholars disagree about what is exactly the content of the original intent behind the antitrust provisions incorporated in the Treaty. Gerber argues that this intent includes removing distortions of competition. Schweitzer maintains that this intent revolves around protecting the competitive process, while Behrens supports the view that ordoliberal ideas have accompanied the drafting as well as the interpretation and application of EU competition law since its inception.[138] On the contrary Akman, contends that the historical purpose of EU competition law was to increase efficiency.[139] Even though it seems plausible to argue that the protection of effective competition that enhances consumer welfare and innovation is the primary goal of EU competition law, it is equally, if not more, credible to contend that the normative foundation of the law lies in the protection of competition 'as an institution of freedom' that seeks to ensure a 'plebiscitary' coordination process for the allocation of resources resting upon the guarantee of freedom and equality of opportunity.[140] Thus, the mandate of EU antitrust remains

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[127] ROBERT BALDWIN AT AL., UNDERSTANDING REGULATION 27-28 (OUP 2012).

[128] Philip Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536 (1983) (stating 'consumer welfare embraces what individual consumers are entitled to expect from a competitive economy. If the efficiency extremists insist that only their definition of consumer welfare is recognized by economists, we would answer that ours is clearly recognized by the statutes. The legislative history of the Sherman Act is not clear on much but it is clear on this').

[129] Robert Bork, 'Legislative Intent and the Policy of Sherman Act' (1966) 9 The Journal of Law & Economics 21–31. Bork was heavily criticized for this argument as adjusting historical facts to fit a preordained model or for disregarding the broader theoretical context of the time. See John J. Flynn, 'The Misuse of Economic Analysis in Antitrust Litigation' (1981) 12 S.U.L.Rev. 335, 339-40; James May, 'Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918' (1989) 50 Ohio St LJ 257, 260; Rudolph J. Peritz, A Counter-History of Antitrust Law, 1990 DuKE L.J. 263, 272-74. It seems that later Bork revised his position recognizing that the legislative history of the antitrust laws reflects a concern not only for efficiency but for 'a potpourri of other values' Robert Bork, 'The Role of the Courts in Applying Economics' (1985) 54 Antitrust LJ 21, 25.

[130] POSNER, *supra* note 61, at 23.

[131] Antitrust's primary purpose is 'to prevent consumers from paying prices that exceed competitive levels. Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 ANTITRUST L.J. 631, 632, 634-9 (1989).

[132] Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, (1982) 34 HASTINGS L.J. 65, 74-77 (arguing that US Congress intended had a distributive concern in mind, namely to ensure that consumers purchase competitively priced goods. Thus, monopolies by charging supra-competitive prices unfairly take property from consumers).

[133] Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA LAW REVIEW 1019, 1025 (1989).

[134] Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harvard Law Review 226, 233-38 (1960); Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1114-17 (1983).

[135] Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 936 (1987) (stating that the antitrust laws' 'summarizing norm' is a 'commitment to the maintenance of competitive process').

[136] THOMAS SULLIVAN ET. AL., *ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS PROBLEMS* 1-22 (7th ed., LexisNexis 2014).

[137] Easterbrook makes a qualified statement about the original intent antitrust ('the dominant theme is the protection of consumers from overcharges'), and he argues that the choice Congress saw was between leaving consumers at the mercy of trusts and authorizing the judges to protect consumers. On this basis, he argues that even efficiency defined by price theory was not in the original intent it makes best sense of antitrust. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICHIGAN LAW REVIEW 1696, 1702-03 (1986).

[138] Peter Behrens, *The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU* in ABUSE REGULATION IN COMPETITION LAW (Nihoul & Takahashi eds., forthcoming) available at https://ssrn.com/abstract=2658045. For additional literature supporting the view that the philosophical foundations of EU competition law were influenced, to a large extent, by the German ordo-liberal school, which reflects humanist values protecting individual freedom from governmental and private power see Hannah L. Buxbaum, *German Legal Culture and the Globalisation of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23 BERKLEY JOURNAL OF INTERNATIONAL LAW 101, 106 (2005); Katalin J Cseres, COMPETITION LAW AND CONSUMER PROTECTION 92-92 (Kluwer Law International 2005); David J. Gerber, *Constitutionalising the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AMERICAN JOURNAL OF COMPARATIVE LAW 25, 64 (1994).

[139] Pinar Akman, *Searching for the Long-Lost Soul of Article 82 EC*, 29 OXFORD JOURNAL OF LEGAL STUDIES 267 (2009) (arguing that the travaux preparatoires demonstrate clearly that the motivation for building a common market was to expand Europe's economy and improve business efficiency).

[140] Elias Deutscher and Stavros Makris, *Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus*, 11(2) COMPETITION LAW REVIEW 181, 192 (2016).

sufficiently fuzzy to allow for various legal standards, enforcement strategies and institutional structures. Consequently, neither US nor EU legislative history of antitrust laws can extrapolate a single objective to the attainment of which should enforcers and courts look for.

The second reason behind reasonable disagreements lies on the conceptually elastic language of most of antitrust terms.[141] All core competition rules contain open-textured concepts.[142] For instance, some of the key concepts of EU antitrust such as 'undertaking', 'restriction by object or effect', 'effect on trade', 'abuse of dominant position' do not have clear-cut meaning and have been defined by EU courts in a functional or teleological way. Likewise, US antitrust uses equally elusive terms such as 'restraint on trade', monopolization' or 'attempt to monopolize' and 'adverse competitive effects'. Judicial definitions of even the word competition have gone through an evolution both in US and EU antitrust.[143] Therefore, applying such 'essentially contested concepts' always require significant interpretative efforts; it involves defining the semantic core and the penumbra of the concept as well as articulating and evaluating different conceptions of the concept at stake.[144] Naturally, different conceptions of the key antitrust concepts lead to disagreements about the appropriated legal standards and enforcement techniques.[145]

The conceptual elasticity of antitrust vocabulary and its fuzzy mandate are not only a source of indeterminacy. Simultaneously are the key elements that allow antitrust to remain open and able to incorporate new knowledge. For example, the antitrust treatment of vertical restraints changed when positive economic analysis of markets showed that vertical integration is likely to result in lower consumer prices.[146] In the same line as our understanding of dominant position evolved from a static and structural conception to a more dynamic and behavioral due to a focus on market power, the law easily adapted accordingly.[147] Dominant position is no longer inferred from the undertaking's market share alone, and detailed market power analysis is required to characterize a firm as dominant.[148]

In a similar vein, the Commission without contravening EUMR or departing from the Horizontal Merger Guidelines (HMG) managed to go beyond a price/output analysis and develop a robust innovation-based theory of harm in *Dow/Dupont* and *Bayer/Monsanto*.[149] Even though some criticize the Commission as engaging in a 'quantum leap'[150] the Commission's analysis is anchored on the HMG's explicit statement that 'increased market power' is defined not only as the ability to profitably increase prices, but also as the ability to profitably diminish innovation or affect negatively other parameters of competition.[151] Based on such a brief statement and its previous practice the Commission considered that the merging of two close competitors with significant overlaps in a number of innovation spaces[152] in a structurally oligopolistic, innovation-driven industry leads to significant impediment of innovation competition. To reach such a conclusion the Commission relied on a rather rich conception of innovation that includes innovation incentives and innovation output, and has a behavioral and a structural dimension.[153] These decisions are a good example of how the Commission can produce a comprehensive framework of analysis and forceful theories of harm even when it can only rely on relatively succinct legislative and policy documents.

The above examples indicate that antitrust has an enormous capacity for refinement without a legislative reform through legal interpretation due to its conceptual elasticity and fuzzy mandate. These examples, additionally, show that antitrust has the tendency to transcend the artificial separation between positive and normative economics due to the

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[141] Most key antitrust terms could be perceived as 'essentially contested concepts'. This term refers to concepts 'the proper use of which inevitably involves endless disputes about their proper uses on the part of their users' due to their internal complexity, contestability, modifiability and multi-purpose use. Such concepts are appraisive, signifying some kind of value judgement that is internally complex and there are characterized by several rival conceptions about their meaning and value. As a result, there can be no judicial 'knock-out' or general principle in determining their meaning and application. The nature of the argumentation about essentially contested concepts depends on showing or explaining why *one* conception of the concept 'revives and realizes, as it were in fuller relief, some already recognized feature of an already valued style of performance.' W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (1955).

[142] As Hart notes 'in all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will be plain cases constantly recurring in similar contexts to which general expressions were clearly applicable, (…) but there will also be cases where it is not clear whether they apply or not.' HART, *supra* note 3, at 123.

[143] Bork identified five distinct meaning of competition. BORK, THE ANTITRUST PARADOX, *supra* note 5, at 58-61. In the EU Lorenz argues that effective competition means workable competition, whereas Whish is more in line with a consumer welfare approach. MORITZ LORENZ, AN INTRODUCTION TO EU COMPETITION LAW 21-22 (Cambridge University Press 2013); RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW 1, 19-24 (7th ed., OUP 2012).

[144] W.B. Gallie, *Essentially Contested Concepts* (1955-1956) 56 Proceedings of the Aristotelian Society, 179, 189, 191.

[145] TIM WU, THE CURSE OF BIGNESS 31 (Columbia Global Reports 2018) (noting 'the language is so strong –its literal text bans so much- that the scholarly debate over the Sherman Act's meaning and history may never end').

[146] William Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, (98) Harvard Law Review 983 (1985).

[147] ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, May 2007

[148] ANNE WITT, THE MORE ECONOMIC APPROACH 181-190 (Hart Publishing 2016).

[149] *Bayer/Monsanto*, *supra* note 77, at 69; *Dow/Dupont*, *supra* note 77 at 279, 1995.

[150] Nicholas Petit, *Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?* available at https://ssrn.com/abstract=2911597.

[151] EU HMG, *supra* note 78 at para 8.

[152] By using the notion of innovation spaces the Commission overcame the problems that innovation competition raises to market definition in *Dow/Dupont*, *supra* note 77, at 283, 342-402, 1956-8, 2008-34.

[153] The Commission argued that the cannibalization effect of the merger will reduce innovation incentives. It also analysed the patent portfolio and the number of new active ingredients launched by the parties to assess the innovation output. It discerned a behavioural aspect when discussing merging parties development efforts for product innovation and discovery efforts for new products, and a structural dimension when it relied on a 'parallel paths' theory to infer that a reduction in the number of independent firms could slow down the overall innovation due to the loss of an independent innovator. *Bayer/Monsanto*, *supra* note 77, at 103, 1025-29, 1036; *Dow/Dupont*, *supra* note 77, at 2122.

openness of its core mission, the protection and promotion of competition.[154] Deciding what should be the antitrust response on the basis of an empirical inquiry of the economic consequences of a practice is a task of positive economic analysis.[155] Deciding whether a practice that reduces consumer welfare while increasing total welfare should be allowed or condemned involves a normative inquiry or dialectical reasoning.[156] The openness of antitrust invites both types of decisions. As a result, legal interpretation in antitrust inevitably invokes both positive and normative economic reasoning. This kind of openness naturally triggers disagreements, yet it also enables the law to adjust in new knowledge and changing circumstances.

The third reason behind reasonable disagreements could be traced to the fact that antitrust regulates a complex and constantly changing subject matter: markets. To effectively do so, antitrust has to use both rules and standards.[157] Rules 'establish legal boundaries based on the presence or absence of well-specified triggering facts', have formal realizability and, thus, maximize clarity by constraining discretion.[158] Rules also give concrete guides for decision-making geared to narrow categories of behavior and prescribe narrow patterns of conduct.[159] An example of a rule could be: a dominant position cannot be found if an undertaking has market share below 40%. However, an undertaking with 60% market share may not be able to exercise significant market power due to a maverick or an equally economically strong buyer, while on the other hand an undertaking market share as low as 35% could be dominant in an oligopolistic market with high barriers to entry. Hence, even though rules can maximize legal clarity and certainty by eliminating discretion they generate false positives or false negatives.[160]

The above explain why antitrust institutions use standards. Standards require the decision-maker to engage in a wide-ranging inquiry and exercise discretion.[161] Their advantage is that they can make decisions more accurate. Yet, they cannot fully eliminate error costs and usually bear higher administrative costs compared to rules.[162] It is not surprising, therefore, that antitrust institutions always seek to identify an optimal balance between rules and standards.[163] They opt for rules whenever the error costs can be tolerated, and they set out standards when the cost of implementing the standard is less than the error cost of a rule.[164]

Since their early history, EU and US antitrust laws have been applied also by recourse to standards.[165] For instance, the American debate on per se rules and the rule of reason,[166] or the European debates on 'restrictions by object versus restrictions by effect,' or 'forms v. effects' show that antitrust analysis necessarily operates with rules and standards.[167] Notably, the difference between rules and standards lies in how much we need to know before reaching a conclusion about a specific practice.[168] In fact, antitrust analysis has never been entirely effects-based or utterly formalistic. It has always relied - in varied degree - on economically informed and outcome-sensitive legal forms.[169] In this respect, the abovementioned American and European debates, regardless of their differences, are essentially disputes about how far should we take account of the effects of a practice to sustain a legal inference.[170]

These observations explain why in antitrust legal reasoning on most occasions follows defeasible and not propositional logic and boils down to probabilistic argumentation.[171] The 'nature' of markets and the mission of antitrust

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[154] Positive economic analysis intends to describe the economic consequences of a phenomenon, whereas normative economic analysis is a subgenre of ethics; it is concerned about the normative appeal of a certain economic value. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 44-45 (West Group 1985).

[155] *Id.* at 44-45; RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 17-19 (2nd ed., Little Brown Company 1977).

[156] Sartor.

[157] Dworkin defines a rule as 'applicable in all or nothing fashion' in contrast to a principle, which 'states a reason that argues in one direction but does not necessitate a particular decision'. R Dworkin, The Model of Rules, 35 UNIVERSITY OF CHICAGO LAW REVIEW 14-18 (1967). For a much broader definition that collapses the distinction between rules and standards see H.M. HART AND ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 155 (University Casebook Series 1995).

[158] GIORGIO MONTI, EC COMPETITION LAW 16-18 (Cambridge University Press 2007).

[159] By this definition, Hughes distinguishes rules from principles, namely from vaguer signals which aler us to general considerations that should be kept in mind in deciding disputes under rules. GRAHAM HUGHES, LAW, REASON AND JUSTICE; ESSAYS IN LEGAL PHILOSOPHY 111 (NY University Press 1969).

[160] Arndt Christiansen & Wolfang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of ''per se'' vs Rule of Reason*, 2(2) JCLE 215 (2006).

[161] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42 -53 (Harvard University Press 1993) (noting that the difference between a per se rule and a rule of reason standard lies in how much we need to know before we make a decision).

[162] Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 505, 515-520 (2012).

[163] Christiansen & Kerber, *supra* note 160, at 219-220, 233-6.

[164] Trade-offs must often be made between cheap-to-enforce, rigid rules that risk producing error, and costly-to-enforce standards that can yield more precise results according to the goals of competition law.

[165] Cyril Ritter, *Presumptions in EU Competition Law*, 1-5 available at https://ssrn.com/abstract=2999638.

[166] Richard Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEXAS LAW REVIEW (1984); Frank Easterbrook, *The Limits of Antitrust*, 63(1) TEXAS LAW REVIEW 1, 14-39 (1984); Hovenkamp, *supra* note 71, at 5-12.

[167] Barak Orbach, *The Durability of Formalism in Antitrust*, 100 Iowa Law Review 2197, 2203-2206 (2015).

[168] Areeda's insight that 'appraising reasonableness' involves 'something of a sliding scale' in which 'the quality of proof required should vary with the circumstances' has been repeated in several cases FTC v. Actavis, Inc., 133 S. Ct. 2223, 2237–38 (2013); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780 (1999).

[169] Orbach, *supra* note 167, at 2206-14, 2221-2.

[170] Posner writes 'in fact, all legal analysis operates under per se rules' Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on Sylvania Decision*, 45(1) UCLR 1, 14-15 (1977).

[171] JOHN POLLOCK, LOGIC: AN INTRODUCTION TO THE FORMAL STUDY OF REASONING, 9-24 available at https://johnpollock.us/ftp/LogicIntroduction/Logic%20text.html.

necessitate the use of rebuttable presumptions, burden-shifting mechanisms, rules and standards and probabilistic reasoning. This is why antitrust, wherever it exists, is also written in a conceptually elastic language. Without these elements antitrust would undeniably become more determinate but it would lose its openness, and subsequently its integrity. Even though the elements discussed here make antitrust intrinsically vulnerable to reasonable disagreements, they also enable it to be precise and open to new learning, and capable of contextual application. In one word, reasonable disagreements despite the legal anxiety they trigger, allow antitrust to be responsive. [172]

III. Models of Law

So far, we have seen that certain elements make antitrust an open system of norms and as a result trigger reasonable disagreements. Such disagreements are ordinarily perceived as temporary sources of indeterminacy and uncertainty that must or will be eventually eradicated. In this section, I will show that such a point of view derives from a conceptualization of antitrust as 'autonomous law'. On the contrary, conceptualizing antitrust as a form of 'responsive law' allows the conclusion that reasonable disagreements are the by-product of the oscillation between openness and integrity, and thus are inevitable and possibly invaluable in antitrust.

A. Autonomous Law

In 1978 Nonet and Selznick came up with a typology of three legal systems: they distinguished between repressive, autonomous and responsive law.[173] This work is considered relevant here for two reasons. First, it offers certain key concepts which could be particularly useful for understanding certain phenomena and features of antitrust, and for refining the antitrust enterprise. The second reason has to do with the methodological approach endorsed by these scholars. Nonet and Selznick adopted a socio-legal, 'integrative' approach that sought to unite different legal theories and disciplinary fields.[174] This broader social-science perspective aims to bring together the 'external' and the 'internal' point of view to capture the functioning of different legal orderings.[175] This method makes their typology robust and has inspired the RL modus operandi proposed in section VI below.[176] One qualification should be made here: in what follows I use the Nonet and Selznick's framework as an inspiring starting point. Yet, the book 'is more a prolegomenon to a theory of law rather than a finished and full-blown theory of law.'[177] Thus, I propose certain refinements that could develop the basic framework further make it more relevant for antitrust today.

Nonet and Selznick's typology intended to grasp the key features and functions of three distinct forms of legal ordering in reference to the sociological, jurisprudential and institutional aspects of law. For this purpose they developed three ideal-types that bring together and conceptualize different elements of various legal and institutional realities. These three models are not mutually exclusive, but describe a continuum and purport to shed light to different aspects of legal reality. In the same actual legal system, for instance elements of autonomous and repressive law can survive and coexist. Furthermore, the appearance, say, of responsive law elements does not require a radical break with an autonomous law legal ordering, and does not entail that the transition is full or irreversible.

The AL model refers to a rule-centred model of law that claims law's independency from politics or any other non-legal domain.[178] Nonet and Selznick describe the distinctive institutional arrangement that characterizes this model as resting upon a core feature: law-making categorically differs from law-application.[179] Besides, the Rule of Law defines

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[172] This point is explained in section III below.

[173] NONET & SELZNICK, *supra* note 8, at 18-28. This work fleshes out the bare tenets of the 'Berkley Perspective'. Never intending to form a settled school of thought in the traditional sense, certain writers, such as Jerome Carlin, Philip Selznick, Jerome H. Skolnick, and Philippe Nonet, sought to make jurisprudence more relevant and alive by reintegrating legal, political and social theory. For this purpose, they re-casted jurisprudential issues in a social-science perspective and examined the social foundation of the ideal of legality to provide a critical evaluation of existing law. Philippe Nonet, *For Jurisprudential Sociology*, 10 LAW & SOC. REV. 525 (1976); Jerome Skolnick, *The Sociology of Law in America: Overview and Trends*,12 SOC. PROB . 4 (1965); Jerome Carlin and Philip Nonet, *The Legal Profession*, 9 ENCYCLOPEDIA OF SOCIAL SCIENCES 66 (1968); Philip Selznick, *Sociology and Natural Law*, 6 NAT. L. FORUM 84 (1961). For a critique see Donald J. Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086 (1972).

[174] Jerome Hall, *From Legal Theory to Integrative Jurisprudence*, 33 CIN. L. REV. 153 (1964).

[175] Hart famously deployed the distinction between *external* and *internal* perspectives on a legal system. The internal point of view is the perspective of participants in the system and refers to doctrinal analysis. The external point of view is the perspective of outsiders. For example, when we seek to predict the economic effects of a legal decision we adopt an external perspective. The external point of view can describe the behaviour of legal actors, while the internal point of view is required to understand the meaning of legal actions. HART, *supra* note 3, at 89-91, 242-243, 254. Scott Shapiro, *What is the Internal Point of View?*, 75 FORDHAM LAW REVIEW 1157 (2006).

[176] This prescriptive component is not developed in the original but hopefully remains loyal to its key tenets.

[177] Allan C. Hutchison, *Book Review: Law and Society in Transition*, 24 AMERICAN JOURNAL OF JURISPRUDENCE 207, 212 (1979).

[178] I do not discuss here the notion of 'repressive legal ordering' since it is not relevant for the purposes of the present argument. It suffices to say that repressive law refers to a situation where the state has the monopoly of legitimate violence but is not constrained by the Rule of Law. Under this model, the main function of law is to legitimatize power and secure hierarchies of privilege and dependency. Consequently, the legal institutions are concerned only about achieving conformity and they heavily rely on coercion and social apathy. Law and politics are integrated, and law is subordinate to political power. No matter how appalling this legal system may seem, it contains the 'germ of justice' and sets by itself the conditions for its transformation. This means that even though repressive law protects the rulers by legitimizing their privileges, it simultaneously provides opportunities for criticizing the authority and, therefore, creates the preconditions for AL. See NONET & SELZNICK, *supra* note 8, at 29-52.

[179] For an elaborate discussion on why this distinction is artificial see Ingo Venzke, *The Role of International Courts as Interpreters and Developers of Law: Working Out the Jurisgenerative Practice of Interpretation*, 34 LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW REVIEW 99-131 (2011).

the *reason d' etre* of the legal system and sets its boundaries. While Nonet and Selznick do not fully explain what they mean by Rule of Law, for the purposes of the present study I understand Rule of Law on formal and procedural terms.[180] The formal aspect implies that for rules to qualify as law, they must be sufficiently general; publicly promulgated; prospective; at least minimally clear and intelligible; free of contradictions, relatively constant; possible to obey; and administered in a way that does not wildly diverge from their obvious or apparent meaning.[181] The procedural aspect refers to certain procedural principles such as the right to a hearing by an impartial and independent tribunal; the right to representation by counsel at such a hearing; the right to make legal argument; or the right to hear reasons from the tribunal when it reaches its decision.[182]

In this regard, the AL model understands the law as a set of rules, and considers the Rule of Law as its essential mission.[183] Fidelity to the law - i.e. strict adherence to rules - is the primary virtue of this model. Under this model, openness is a source of subjective value-judgments and of arbitrary policy-making in the disguise of law which should be rejected. Legal institutions must simply apply the law and for this purpose they need to engage solely in 'pure' legal reasoning. Enforcers and administrators can have some discretion, which however remains unchecked as long as they meet the rule-of-law requirements. Adjudicators, on the other hand, have no discretion and must under any cost refrain from policy-making. They should only employ canons of interpretation to determine 'what the law is'.[184] As the president of the ECJ, Koen Lenaerts puts it, the mission of the judiciary is to 'uphold the Rule of Law'.[185] Hence, under AL, political power is exercised within the confines of the law and the application of the law is a neutral, value-free, essentially non-political exercise.[186]

The Rule of Law concept plays a two-fold, external and internal, role in this model. First, it functions as a strategy of legitimacy (external function).[187] Policy-makers are legitimate and unconstrained to make their decisions as long as they accept the supremacy of the law, while the law remains the supreme authority, as long as it does not interfere in the political domain.[188] Simultaneously, if the judge steps in the political process by going beyond her duty to state 'what the law is', she will lose her legitimacy and will be discredited as 'doing politics' or engaging in judicial activism.[189]

The second function of the Rule of Law under the AL model consists in determining the functioning of legal interpretation (internal function). From this internal point of view, the AL model plays out in two ways: according to the first version, legal interpretation is insulated from political, moral or any other type of non-legal reasoning (AL 1.0).[190] According to an updated version of AL (AL 2.0) legal institutions can use knowledge from non-legal domains, e.g. economic analysis, when a legal provision explicitly authorizes them to do so.[191] This variant supposedly saves law's

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[180] For some scholars Rule of Law can include some additional substantive requirements/components such as the protection of property (RICHARD EPSTEIN, PROPERTY RIGHTS AND THE RULE OF LAW: CLASSICAL LIBERALISM CONFRONTS THE MODERN ADMINISTRATIVE STATE 10 (Harvard University Press 2011)), human rights (TONY BINGHAM, THE RULE OF LAW 67 (London: Allen Lane, 2010)) or a substantive dimension of democracy (WORLD JUSTICE PROJECT, *RULE OF LAW INDEX* (2011 edition) available at https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2011-report). However, Raz cautions that we should not try to read into Rule of Law other considerations about democracy, human rights, and social justice (RAZ, *supra* note 54, at 211). Following his advice I define the Rule of Law on formal-procedural terms to avoid this never-ending debate.

[181] In this sense, the Rule of Law could be broken down to eight principles: generality, publicity, prospectivity, intelligibility, consistency, stability, practicability and congruence. LON FULLER, THE MORALITY OF LAW 33-38, 63-81 (Yale University Press 1964). See also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270-1 (Oxford: Clarendon Press,1980); RAZ, *supra* note 54, at 214-18; RAWLS, *supra* note 100, at 208-210.

[182] A.W. Tashima, *The War on Terror and the Rule of Law*, 15 ASIAN AMERICAN LAW JOURNAL 245, 262-5 (2008).

[183] To be sure I do not identify AL with legal positivism. The AL corresponds to certain forms of legal positivism but not all of them. For instance, Hart's sophisticated version of legal positivism is closer to the RL model than to the AL. HART, *supra* note 3 at 132, 141-7, 252-9, 272-6 254-259.

[184] John Austin, The Province of Jurisprudence Defined (first published 1832, W.E. Rumble ed, CUP 1995) 157; HANS KELSEN, THE GENERAL THEORY OF LAW AND STATE 113 (A. Wedberg trans., New York: Russel and Russel 1961).

[185] In particular, Lenaerts argues that judicial legitimacy is external and internal. External legitimacy is ensured as long as the courts do not intrude in the political process and respect the principle of separation of powers. Internal legitimacy refers to the quality of the judicial process. Koen Lenaerts, *The Court's Outer and Inner Shelves: Exploring the External and Internal Legitimacy of the European Court of Justice*, in JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 1-5 (Maurice Adams et al. eds., Hart 2013).

[186] To be sure the AL model does not argue that the law itself is neutral or value free, it mainly claims that its application and interpretation could be an autonomous enterprise, meaning an enterprise insulated from non-legal domains. For instance, Kelsen defined law solely in terms of itself and eschewed any element of justice, which was rather to be considered within the discipline of political science. Politics, sociology and history were all excised from the purse theory which sought to construct a logical unified structure based on a formal appraisal. HANS KELSEN, PURE THEORY OF LAW 474, 477-85, 517-22 [1934, 1960] (M. Knight trans., University of California Press 1967). The AL 2.0 is merely a refinement of this approach: non-legal knowledge is used but only to the extent that it is incorporated.

[187] NONET & SELZNICK, *supra* note 8, at 55-56.

[188] Insightfully, Nonet and Selznick note that AL is the by-product of a historical bargain where 'legal institutions purchased procedural autonomy at the price of substantive subordination'. NONET & SELZNICK, *supra* note 8, at 39.

[189] John Temple Lang, *Has the European Court of Justice been involved in "judicial legislation"?*, 96 SVENSK JURISTTIDNING 299 (2011); T.C. Hartley, *The ECJ, Judicial Objectivity and the Constitution of the EU*, 112 LAW QUARTERLY REVIEW 95 (1996); Anthony Arnull, *The European Court of Justice and Judicial Objectivity: a reply to Professor Hartley*, 112 LAW QUARTERLY REVIEW 411 (1996).

[190] This is a direct consequence of the external function of the Rule of Law. From an AL perspective if adjudicators attempted to determine the content of law by supplementing legal with moral or economic reasoning, they would stop being objective dispensers of a received impersonal justice, and they would be transformed into partial spokesmen of some substantive and subjective idea of justice. NONET & SELZNICK, *supra* note 8, at 57-59, 66-67.

[191] By making such a claim, the AL model adopts an exclusive legal positivism strategy. The latter argues that the test of legality must always distinguish law from non-law based exclusively on their sources and law must be implemented without recourse to moral reasoning. Moral reasoning as any other substantive knowledge could be incorporated in law when this is provided by a legally valid norm. RAZ, *supra* note 54, at 16; JOSEPH RAZ THE CONCEPT OF A LEGAL SYSTEM 211-12 (2nd ed., Clarendon Press 1980). See also KELSEN, *supra* note186, at 161 (noting 'just as everything King Midas touched turned into gold, everything to which law refers becomes law').

autonomy - it insulates legal hermeneutics from value-judgments, e.g. normative economics -, while it allows the use of scientific (value-neutral) knowledge, e.g. positive economics. This strategy allows non-legal knowledge to be used by legal institutions not in a law-creating, but in an *applicative* manner. In this way, the AL model updates its internal function so as to maintain its core understanding and assumptions about the law.

At this point, it becomes clear that the AL model conceives the law as rule-based and court-centered enterprise. The relationship between the courts and administrative bodies is static and one-directional: administrators apply the law or exercise discretion within the boundaries of the law, while the courts either accept or annul their output. In this constellation, the Rule of Law sets the boundaries and defines the core mission of both legal institutions. Adjudication is perceived as the paradigmatic function of law, relies on canons of interpretation and is either uncontaminated by other types of reasoning or knowledge (AL 1.0) or is contaminated by non-legal input but this input remains neutral and value-free (AL 2.0).[192] In both variants courts receive input (factual and legal claims) and generate output, i.e. they elaborate the norms, impose sanctions to infringers and determine victims' compensation. The courts look inwards, in the legal texts and case-law, and use their own processes and standards to determine what the law is.[193] Conceptual reasoning, legal formalism, and expert opinions are the main components of their hermeneutics.[194]

B. The Emergence of Responsive Law

RL may emerge from the inherent tensions of law when it operates in AL manner. The very effort to develop an autonomous legal order can make law incapable of effectively regulating emerging realities or materializing its core values.[195] When the application of the rules is (or pretends to be) not informed by purposes, consequences and value-judgments, frictions between formal-procedural and substantive justice may arise.[196] Focusing solely on the formal and procedural ideal of the Rule of Law may deprive legal institutions from developing their problem-solving capacity, and as a result thwart law's integrity.[197] These endogenous contradictions may push AL to its limits and trigger an existential crisis. To survive and regain its legitimacy, the autonomous legal order may abandon some of its essential features, and at least implicitly recognize the limitations of AL's modus operandi. This internal process may incentivize a legal system to adopt a responsive attitude. In other words, the tensions between formal-procedural and substantive rationality, and the inability of even AL to eradicate reasonable disagreements pose a dilemma to the legal institutions: they should either maintain the AL modus operandi or tend to the RL model.[198]

A brief contour of the key elements of the RL model is due at this point. According to this conceptual model there is an interdependence between the legal and other spheres, and thus law should be perceived in a more inclusive way as a value-laded system of rules, principles and practices aimed at problem-solving.[199] For RL, law is a normatively and cognitively open system of norms where rival argumentative practices emerge and compete with each other in order to provide solutions to problems of human praxis. Contrary to AL 1.0, RL suggests that the application of law cannot solely rely on solely formal legal reasoning, but should incorporate knowledge from other domains and focus problem solving.[200] Contrary to AL 2.0, RL suggests that even a legal system that accommodates non-legal knowledge through specific legal provisions, cannot remain (normatively) autonomous, since law-application involves a mixture of formal legal reasoning, technocratic non-legal knowledge and value-laden judgments. In this way, RL broadens the field of the legally relevant and seeks to incorporate to legal reasoning not only scientific knowledge, but also normative evaluations about the purposes and effects of legal action.[201] Simultaneously, unlike AL, RL is concerned about enforcement problems and institutions dynamics.

Legal institutions may put aside the modus operandi of AL and adopt a responsive attitude when they are confronted with reasonable disagreements in hard cases.[202] Such cases make visible the indeterminacy and gaps in law as well as the normative uncertainty that permeates legal systems.[203] Such cases do not occur only when there is semantic or normative uncertainty or when the law is silent,[204] but also when a legal norm is neither applicable nor inapplicable or

[192] NONET & SELZNICK, *supra* note 8, at 62; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-87 (1978)
[193] Scott & Sturm, *supra* note 19, at 3-4.
[194] A caveat is necessary here: AL 2.0 is not formalistic as it can use scientific, value-free non-legal knowledge when this is explicitly allowed. In addition, AL 2.0 as refined by exclusive legal positivism does not maintain the pretense that law-application is a normatively neutral enterprise. Yet, as already indicated AL 2.0 refined is compatible with RL.
[195] NONET & SELZNICK, *supra* note 8, at 70-72.
[196] The ethos of modern bureaucracy (fidelity to rules, correct procedures and defined jurisdictions).
[197] NONET & SELZNICK, *supra* note 8, at 78-86.
[198] These endogenous dynamics can be affected by external events. For instance, new technologies can create a reality that cannot be properly regulated by the existing legal norms. Another example is when new economic learning reveals previously unknown effects of legal rules. Such external events can expedite the legitimacy crisis of AL.
[199] As a result legal system becomes more responsive to the social realities it intends to regulate Jerome Frank, 'Mr Justice Holmes and Non-Euclidian Legal Thinking' (1932) 17 CORNELL LAW QUARTERLY 568, 586.
[200] As Hart puts it in the penumbra of legal rules judges inevitably exercise moral judgment. This is 'in effect an invitation to revise our concept of what the rule is' H.L.A. Hart, *Positivism and the Separation of Law and Morals*, HARVARD LAW REVIEW 71, 72 (1958).
[201] Lon Fuller, *American Legal Realism*, 82 UNIVERSITY OF PENNSYLVANIA 429, 434 (1934).
[202] An example of AL 2.0 using an inclusive legal positivist strategy to deal with the problem of reasonable disagreement could be found in HART, *supra* note 3 at 258-9.
[203] According to Kelsen, 'every law-applying act is only partly determined and partly undetermined'. KELSEN, *supra* note 186, at 349.
[204] Arguably, this is not a problem since law deals with silence via deontic logic closure rules. For instance, Kelsen denies of the possibility of legal gaps in the sense of silences. Hans Kelsen, *On the Theory of Interpretation*, 10(2) LEGAL STUDIES 127, 132 (1990). In a similar vein, Raz argues

when valid legal norms both applicable at once clash and there exists no third legal norm that resolves the conflict.[205] When dealing with such cases, legal institutions may realize the limitations of the AL model: they may look at the records of past institutional decisions, they may employ the conventional canons of interpretation, they may even use value-free, scientific knowledge when explicitly required, and still they remain unable to eradicate reasonable disagreements.[206] Considering reasonable disagreements as a negative state of affairs which has to be eradicated is the corollary of AL's conceptualization of law. By seeking to eradicate instead of taming them, AL ends up proposing a modus operandi that fails to materialize the value(s) of law.[207]

Nonetheless, it worth asking why the communication crisis which we call here 'reasonable disagreements' emerge in the first place? Such disagreements inevitably arise when the law is open-textured and its application requires a fresh choice. As Hart has noted law uses authoritative general language and general classifying terms to regulate reality. Yet, 'in all fields not only that of rules, there is a limit inherent in the nature of language, to the guidance which general language can provide' and, thus, 'canons of interpretation cannot eliminate though they can diminish these uncertainties'.[208] On this basis, Hart underlines that the open texture of law leaves to courts a law-creating power: they need to make a fresh - even though not arbitrary or irrational - choice, so as to render initially vague standards determinate, resolve uncertainties of statues or develop and qualify rules only broadly communicated by precedents.[209] More than this, Hart insightfully explains why 'a fully articulated legal system detailed enough to determine in advance all the instances of its application' would be a *false ideal*: our 'relative ignorance of fact' and 'relative indeterminacy of aim' oblige the law to communicate via general standards of conduct.[210] In this sense openness is a general feature of law that could be traced in several fields not only antitrust.

How does AL react in front of reasonable disagreements? The first option, as already noted is the AL 1.0 approach. In order to maintain law's autonomy, AL 1.0 submits that legal forms could fully guide law application without need to exercise any choice. To achieve its purpose, AL 1.0 may even suggest that the meaning of a rule is fixed and frozen and that its general terms necessarily have the same meaning in every case of its application. As a result, legal clarity and certainty will be maximized, but the law will become over- or under-inclusive.[211] From this perspective AL 1.0 corresponds to 'mechanical jurisprudence' and suffers from the vice known in legal theory as formalism or conceptualism.[212] In its quest to exorcise openness and indeterminacy it ends up with a rigid and ineffective legal system. However, eradicating reasonable disagreement by closing off the law is like throwing the baby out with the bathwater.

The second option of the AL is the AL 2.0 version. However, this updated version of AL cannot fully eradicate reasonable disagreements. The main reason for this inadequacy is that when confronted with indeterminacies or gaps, legal institutions cannot always apply value-free knowledge and of course they are not free to apply the law as they wish.[213] At this point AL 2.0 may raise the following defense: on such occasions, legal institutions, even though they have to engage in a value judgment, they are under a legal obligation to apply the 'morally best extra-legal principles'.[214] However, this defense falls short from being convincing since it admits that law-application sometimes requires value judgments and moral reasoning (without offering any further guidance in this respect). Instead of securing the AL model, this line of defense underlines that law is an open normative system the operationalization of which requires normative investigations, as well as extra-legal knowledge.[215] Hence, if AL 2.0 makes such a claim, it is forced to accept some of the key assumptions and prescriptions of the RL model. If it does not, it remains vulnerable to RL's critique that it cannot account for and deal with the problem of reasonable disagreement.[216]

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when a legal norm is linguistically vague, because its source is vague or linguistically indeterminate, the said norm gives a legally binding obligation to the courts to engage in moral reasoning so as to interpret it. Joseph Raz, *Incorporation by law*, 10 LEGAL THEORY 12-14 (2004).

[205] For instance, Kelsen highlights that 'when a legal body applies the law, the interpretation of the applicable law through a cognitive act combines with an act of will through which the body applying the law makes a choice between the possibilities revealed by cognitive interpretation.' HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 460 [1934] (Paulson & Paulson trans., OUP 1992). RAZ, *supra* note 54, at 70 (noting that 'no closure rule, however ingenious, can guarantee to eliminate these latter types of gaps').

[206] DWORKIN, LAW'S EMPIRE, *supra* note 2, at 7.

[207] The AL model remains normatively neutral and thus is incapable of dealing with reasonable disagreements, since it lies on the position that the validity of a norm depends only on its sources never on its merits. John Gardner, '5 ½ Myths about Legal Positivism' (2001) 46 The American Journal of Jurisprudence 202, 212, 213.

[208] HART, *supra* note 3 at 126.

[209] *Id*.136.

[210] *Id*. 128.

[211] AL 1.0 forces 'to settle in advance and in the dark issues which can only reasonably be settled when they arise and are identified'. Hart 130

[212] Roscoe Pound, *Mechanical Jurisprudence*, 8(8) COLUMBIA LAW REVIEW 605, 608 (1908). By the term formalism I refer to approach according to which solely source-based (posited) norms and content-independent legal reasoning suffices to determine legal outcomes. For a more refined version of formalism see Frederick Schauer, *Formalism*, 97(4) YALE L.J. 509, (1988) (distinguishing between absolute and presumptive formalism and defining the latter as rule-governed decision making. Yet, only few would deny the capacity of legal forms to impose constraints on decisional choice. The crucial issue is to what extent legal forms alone can fully determine legal interpretation).

[213] John Gardner, *Legal Positivism: 5 ½ Myths*, 46 AMERICAN JOURNAL OF JURISPRUDENCE 211-8 (2001) (This is why to defend legal positivism Gardner argues 'Legal positivism militates against the assumption that judges should only and always apply valid legal norms' (…) Obviously, legal reasoning, in this sense, is not simply reasoning about what legal norms already apply to the case. It is reasoning that has already-valid legal norms among its major or operative premises, but combines them nonredundantly in the same argument with moral or other merit-based premises).

[214] Joseph Raz, *Legal Principles and the Limits of Law*, 81(5) YALE LAW JOURNAL 823, 847–8 (1972); Timothy Endicott, *Raz on Gaps - The Surprising Part* in RIGHTS, CULTURE AND LAW (L. H. Meyer et al. eds., OUP 2003).

[215] JOSEPH RAZ, PRACTICAL REASON AND NORMS 152-4 [1975] (Princeton University Press 1990).

[216] The alternative to exclusive legal positivism, 'inclusive' or 'soft' legal positivism brings a legal system well into the RL model. This happens because inclusive legal positivism goes a step further and argues that legal validity can be determined by moral tests and facts, namely by normative

As the AL model cannot fully guide their interpretive efforts or navigate their enforcement enterprise, legal institutions may adopt a more responsive attitude. This entails that legal institutions stop being concerned only about procedurally of formally valid decisions, and instead they seek to attain the substantive ideals underlying the legal provisions. For this purpose, they deepen their understanding of the purpose of the law and they invest in their cognitive competence and substantive capabilities. They use 'constructive teleological interpretation' to forge operational legal tests. This method of interoperation will be analyzed further in section VI. It is worth noting here that it refers to an interpretative enterprise under which the use the key concepts and the case law of the relevant law building blocks of an argument (or an interpretive theory) about what is the best account of the law in virtue of a specific case, and the judge chooses among the various interpretive theories the one that best fits and justifies the law. Such an interpretive attitude take seriously the normative openness of the law and its purpose, is sensitive to the consequences of legal interpretation and espouses a problem-solving and result-oriented attitude towards the law.[217]

A distinction should be made here between the two distinct legal institutions, enforces and adjudicators, and their functioning under RL. Administrative bodies, that opt for responsiveness, abandon some AL features and operate as post-bureaucratic organizations. Bureaucratic organizations, the hallmark of AL, use mainly formal and procedural rationality and are concerned about administrative regularity, while stakeholders address them only through officially established legal channels. Such enforcers understand their purpose as explicit and fixed, their internal organisation is hierarchical and their external communications with other bodies pass only through formal channels. In contrast, post-bureaucratic bodies are mission-oriented and flexible; they are organized internally on teams and task forces, and externally communicate openly with other bodies.[218] They encourage participatory procedures, explain their reasons for action, and welcome feedback from stakeholders and epistemic communities.[219] Post-bureaucratic bodies are also concerned about cognitive capacity and substantive authority; they are open to non-legal domains of knowledge, and they adopt a problem-centered approach. They are also often organized on network structures and rely on institutional interactions so as to learn from each other and apply the law contextually.[220]

Adjudicators may follow the RL model when they are called to make decisions under conditions of complexity and uncertainty. On such occasions, they may realize that they do not operate in an institutional vacuum but as chains in a multilevel governance structure, affecting the capacity of the administrative bodies to apply the law effectively. They may also realize that the application of the law involves a combination of scientific, value-laden and formal legal reasoning. Conceptual interpretation and legal formalism would not suffice. In such instances, adjudicators may not restrain themselves in only reviewing the legality of the output of the administrative bodies. They may participate in an argumentative practice; open a dialogue with administrators to affect their normative elaborations and capacity building;[221] and, seek to promote the way non-legal actors understand the legal norms as reasons for action and as a problem-solving device.[222] In a nutshell, instead of being simply norm-elaborators and law-applying institutions, courts that opt for responsiveness use the law to structure focal points of intra and inter institutional and private argumentative activity. They operate as catalysts, namely a) as argumentation platforms where different interpretive theories about the law compete and occasionally one prevails over another, and a) as responsiveness motivators, i.e. as nodes of an institutional network that can responsibilize other actors to engage in effective and responsive problem-solving.[223]

Consequently, post-bureaucratic enforcers and catalyst adjudicators may emerge when the problem of reasonable disagreement reveals the shortcomings of the AL model. The AL model suggests that upholding the Rule of Law will suffice to deal with and even eradicate eventually reasonable disagreements. Yet, on such occasions, legal institutions may realize that the fundamental rule-of-law principles do not suffice to materialize the underlying values of the relevant law. Concerned about law's integrity, legal institutions may realize that rule-of-law principles set boundaries to the law but they cannot fully guide legal interpretation in hard cases. As a result, they may adopt a responsive attitude and exploit law's openness to materialize its purpose.[224] Thus, motivated by integrity concerns, legal institutions may transcend the artificial divide between law-application and law-making and abandon the ineffective AL modus operandi and adopt a responsive attitude.[225]

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investigations. By making such a claim about legality and law's nature, inclusive legal positivism is more compatible with the RL than with the AL model. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICHIGAN LAW REVIEW 473 (1977); David Lyons, *Principles, Positivism and Legal Theory*, 87(2) YALE LAW JOURNAL 415 (1977); Jules Coleman, *Negative and Positive Positivism*, 11 JOURNAL OF LEGAL STUDIES 139 (1982); WILFRED WALUCHOW, INCLUSIVE LEGAL POSITIVISM (Oxford: Clarendon Press 1994).

[217] In deciding specific cases, legal reasoning becomes closely congruent with the logic of moral and practical judgment Nonet and Selznick, 89. Yet, they do not talk about constructive teleological interpretation. This is one of the refinements I propose here and I explain how this method of interpretation can play out in antitrust in section III.

[218] In addition, contrary to AL that focuses on adjudication, RL adopts a more holistic stance and considers law's enterprise a multi-step process that relies both on administration and courts.

[219] NONET & SELZNICK, *supra* note 8 at 95, 99-100.

[220] NONET & SELZNICK, *supra* note 8 at.

[221] Scott & Sturm, *supra* note 19 at 5-10.

[222] *Id.* at 5-10.

[223] *Id.* at 5-10.

[224] Foer and Durst voice integrity concerns when they note 'administrative efficiency can be a justification for a model, but within a democratic polity the model has to be viewed as not only internally consistent and providing a reasonable degree of predictability and administrative feasibility, but enough of a sense of justice to receive widespread public support based on outcomes over time'. Foer & Durst, *supra* note 20, at 507.

[225] NONET & SELZNICK, *supra* note 8 at 77 (stating 'legal interpretations looks more like policy-making'). The RL model recognizes that the separation of powers principles does not entail a separation of law-making powers from law-applying powers, but rather the separation of legislative

At this point it becomes clear that the RL model recognizes that reasonable disagreements are created by two antithetical yet complementary endogenous forces of the law: openness and integrity. The RL model allows such a conclusion for it does not view the law simply as a set of rules but as a purposive enterprise. Unlike AL, the RL model does not perceive the law as an entirely independent, self-sufficient and self-governing, but rather as a *special* instrument for achieving *social purposes*. For RL, legal systems earn their legitimacy and maintain their legal authority on the basis of their capacity to realize their purpose or underlying value when reasonable disagreements arise. Hence, law is purposive. But its purpose cannot be achieved with any means since this would sacrifice its integrity.

In this regard, three are the core claims of RL model: (a) reasonable disagreement are the by-product of two endogenous forces of law, openness and integrity, and cannot be eradicated, only tamed; (b) legal institutions may become responsive when they, tormented by reasonable disagreements, understand the law as a purposive enterprise and take seriously the role of openness and integrity in the operation of a legal system (descriptive claim) (c) balancing openness and integrity could keep legal institutions responsive, namely capable of effectively dealing with reasonable disagreements in the future (normative claim). The table below summarizes the discussion up to this point.

	Autonomous Law	**Responsive Law**
Goal	Rule of Law	Balancing Openness and Integrity
Legitimacy	Legality	Integrity
Methodology	Separation thesis Separability thesis Social thesis	Integration thesis
Legal Hermeneutics	AL 1.0: Formal legal reasoning Legal formalism OR AL 2.0: Legal formalism & usage of scientific, non-legal knowledge	Constructive teleological interpretation
Enforcement	Narrow delegation Rule of Law sets the boundaries	Open delegation & constraints by law's integrity
Institutional organization	Bureaucratic	Post-bureaucratic Networks
Adjudication	Norm Elaborators	Catalysts

Table 1. *A Typology of Legal Orderings*

Undoubtedly, the oscillation between openness and integrity can create tensions and contradictions in the application of the law even when legal institutions operate in a responsive manner. Specifically, if legal institutions overemphasize law's openness by relaxing the rule-of-law requirements, law may lose its capacity to restrain officials and protect its subjects. Such an attitude could lead to the instrumentalization of law.[226] Instrumentalizing the law means that legal institutions disregard the independent value of Rule of Law,[227] or use the law for achieving goals unrelated to its core mission and underlying values. The law then would stops being a *special* instrument for achieving a purpose and it will lose its integrity. Additionally, excessive openness can harm law's integrity by making the legal system too easily affected by developments in other non-legal domains.[228] Law's openness can, moreover, create compliance problems, since law's subject may be unable to predict the decisions of legal institutions. Simultaneously, legal institutions may

powers of law-making (i.e. unrestrained power to posit new norms as legally valid) from judicial powers of law-making (i.e. interpretative power to make new norms by combining source-based and merit-based arguments).

[226] For Nonet and Selznick instrumentalization is a feature of repressive law where law is subordinated to politics and used blatantly and opportunistically for achieving goals unrelated to its core mission and underlying values. NONET & SELZNICK, *supra* note 8 at 76.

[227] In this respect, Teubner refines the idea of RL by distinguishing between its substantive rationality from its reflexive rationality. The role of RL is not to promote some substantive and material objectives through legal mandate, but to provide the structured frameworks, parameters and arenas for self-regulation within other social systems. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW AND SOCIETY REVIEW 239 (1983); Julia. Black, *Constitutionalising Self-Regulation*, 59 MODERN LAW REVIEW 24 (1996).

[228] This could be a reason explaining why competition law, even if it were possible, should not become simply a branch of applied microeconomics as some Chicagoans envisaged. Frank Easterbrook, *Allocating Antitrust Decision-making Tasks*, 76 GLJ 305, 305 (1987). However as noted above, other prominent members of the Chicago School such as Bork and Posner underlined that antitrust decisions cannot be made on the basis of an empirical assessment of allocative efficiency.

incur significant error and administrative costs in their attempt to incorporate new sophisticated scientific knowledge and engage in contextual law-application. It should be also noted that as institutions become more open to their stakeholders, they can also become more vulnerable to regulatory capture.[229]

Nonetheless, the absence of openness (if it can even exist) can make the law rigid and incapable of materializing its objective. Consequently, the main challenge of RL is to calibrate openness and integrity. For this purpose, the said model advocates in favour of a specific legal-institutional modus operandi.[230] The first step of this approach consists in legal institutions understanding the law as a purposive multistep institutional enterprise. This change of view will, subsequently, incentivize legal institutions to try to integrate the substantive, formal and procedural dimensions of law, and engage in constructive teleological interpretation. In addition, given that this model recognizes that legal hermeneutics alone cannot solve all indeterminacies in law, it also suggests that enforcers need to behave as post-bureaucratic institutions, and interact with each other in network structures sensitive to openness and integrity concerns.[231] The prescriptive part of the model closes with the suggestion that courts function as 'catalysts' so as to keep enforcers responsive.[232]

IV. Taking Reasonable Disagreements Seriously

It might be obvious that AL 1.0 is mechanical and rigid for antitrust. Yet, one might wonder why the AL 2.0 approach - canons of interpretation and usage of positive economics – cannot eradicate reasonable disagreements. Thanks to economics, we increasingly acquire a better understanding of the welfare implication of market behavior and we become increasingly more capable to devise appropriate legal rules or standards and enforcement techniques.[233] Nevertheless, economics have not yet brought us to the end of antitrust history and it will be overoptimistic to think that they could do so.

A Commission's statement summarizes some of the key reasons for this. As the Commission noted 'economic theory cannot be the only factor in designing antitrust policy because (a) economics necessarily relies on simplified assumptions and stylized theoretical modes that cannot take into account the complexities of real markets; (b) economics is just one of the several relevant sources of policy which has to be applied in the context of existing legal texts and case law; (c) a full economic analysis will be very costly in identifying restrictions of competition'.[234] With regards to point (a), Wils has underlined that there is not one but many economic theories, Lianos has shown the difference between economic models and reality,[235] and Devlin and Jacobs have highlighted the epistemological limitations of economic analysis in antitrust, and therefore the need for an error analysis.[236] Point (b) indicates that, as argued here, antitrust is a relatively open system of norms, while point (c) implies that the AL 2.0 modus operandi is likely to be ineffective due to excessively high implementation costs.

One additional reason why economics cannot eradicate reasonable disagreements relates to the fact that antitrust is law.[237] For instance, Bork notes that 'weighing effects in any direct sense will usually be beyond judicial capabilities'.[238] The mission of economics analysis is to show the potential welfare effects of different categories of practices. Subsequently, adjudicators will develop objective criteria and presumptions to 'divide transactions likely to be predominantly favorable to consumers through the creation of efficiency from those likely to be predominantly injurious through their suppression of competition'.[239] In the same line, Posner argues that antitrust analysis should search 'for ways of avoiding prohibiting efficient, albeit noncompetitive, practices without having to compare directly the gains and losses from a challenged practice'.[240] In other words, the two most famous proponents of efficiency and economic analysis recognize that courts should not 'attempt to measure the efficiencies since measurement, for all practical purposes, is impossible'.[241] This is also the reason why Hovenkamp supports the normative CW hypothesis instead of the TW one,[242] and suggests that the judicial construction of balancing is mostly a myth.[243] Along the same lines Easterbrook contends that the irresolvable empirical uncertainty about the workings of markets and the capabilities of courts support forgoing

[229] NONET & SELZNICK, *supra* note 8 at 76, 102.
[230] In section III below I discuss how the RL model could be operationalized in antitrust.
[231] AYRES & BRAITHWAITE, *supra* note 17 at 54-100.
[232] Famously, Parson noted that there are four minimum conditions that enable inter alia legal systems (or subsystems) to survive: adaptation (the capacity of society to interact with the environment), goal attainment (the capability to set goals for the future and make decisions accordingly), integration (coordination and inner consistency that ensure equilibria), and latent pattern maintenance (reproduction of values and evaluative standards necessary for conflict management). TALCOTT PARSONS, THE SOCIAL SYSTEM 15-44 (London: Routledge & Kegan Paul Ltd 1970).
[233] AREEDA AND HOVENKAMP ANTITRUST LAW (3rd ed 2010) 1500 381.
[234] European Commission, *Green Paper on Vertical Restraints in EC Competition Policy*, COM (96) 721, January 22, 1997, para 86.
[235] Wouter Wils, *The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance*, 37(4) WORLD COMPETITION: LAW AND ECONOMICS REVIEW 405; Ioannis Lianos, *Global Value Chains in Competition Law*.
[236] Alan Devlin and Michael Jacobs, *Antitrust Error*, 52 WILLIAM & MARY LAW REVIEW 75 (2010).
[237] For instance, according to Hart it is impossible to transmit to others standards of conduct that settle every contingency in advance. Thus, judicial discretion is a necessary by-product of the inherent indeterminacy of law as a device for social guidance. HART, *supra* note 3 at 123.
[238] Bork, *supra* note 70 at 387-90.
[239] Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65 COLUMBIA LAW REVIEW 401, 410 (1965).
[240] POSNER, *supra* note 61,at 29.
[241] Bork, *supra* note 70 at 387-90.
[242] Hovenkamp makes a practicability argument. Hovenkamp, *supra* note 69 at 88-89, 93. Along the same lines Pitofsky has notes that antitrust enforcement along economic lines incorporates large does of hunch, faith and intuition. Pitofsky, *supra* note 29 at 1065.
[243] Herbert Hovenkamp, *Antitrust Balancing*, 12 2 N.Y.U. JOURNAL OF LAW AND BUSINESS 369 (2016).

factual investigations and adopting a streamlined model of antitrust enforcement focused on minimizing error costs.[244] Hence, the AL 2.0 promise to eliminate disagreements by recourse to positive economics is significantly constrained by the juridical structure of antitrust.

A fifth reason why economic analysis, and therefore AL 2.0, cannot eradicate reasonable disagreements lies in the fact that economics cannot provide comprehensive criteria for settling such disagreements.[245] The debate between the Chicago and the Post-Chicago School is illustrative of this point.[246] Both schools share the view that economics is 'the essence of antitrust' and that protecting consumer welfare, defined in terms of allocative efficiency, should be its exclusive goal.[247] Yet, these two schools disagree over a set of issues such as the measure of market power, the competitive assessment of tying, vertical restraints and predatory pricing, as well as about the durability of cartels and oligopolies.[248] As Jacobs shows despite the technocratic flavor of this debate, what divides the two schools is a set of different views on human nature, firm behavior and judicial competence.[249] In other words, even though these two schools agree on certain fundamental issues they are found to pursue essentially different policies in several matters because of divergent views about the efficacy of government intervention in private markets and the judicial capacity to understand economic data and arguments.[250] On this basis, Jacobs notes that 'far from having marginalized the role of value choice in antitrust, the ascendancy of economics underscores its enduring importance'.[251] Choosing between different economic theories necessarily involves choosing between different normative orderings and making value judgments.[252] Hence positive and normative economics analysis is necessary for applying antitrust.

It becomes clear at this point, the AL model does not do justice to reasonable disagreements by considering them as temporary sources of indeterminacy or uncertainty that can be eliminated via conceptual legal interpretation and positive economics input. In other words, the AL model misdiagnoses the problem and due to this reason it proposes an inadequate modus operandi for dealing with it. On the contrary, conceptualizing antitrust as a form of 'responsive law' is compatible with diagnosing that such disagreements derive from tensions between antirust's openness and integrity, and thus are endogenous.

V. Responsiveness in Action

If the previous analysis is correct a paradox emerges: how is it possible that EU and US antitrust systems operate in general in a coherent and effective manner when reasonable disagreements in antitrust are so ubiquitous and persistent. The response given here is that antitrust institutions on many occasions have adopted features of RL, even though the antitrust community when it theorizes the problem of reasonable disagreement usually adopts an AL point of view.

A comprehensive discussion of the RL of EU and US antitrust goes beyond the purposes of the present study. For our purposes, it suffices to give only a few examples of responsiveness. First, antitrust institutions in several cases interpret vague concepts by resorting to the purpose of the law or the potential effects of an interpretation. For instance, when the ECJ was asked whether the restriction of competition derives from an 'agreement', a 'concerted practice' or a 'decision of an association of undertakings', it clarified that the three concepts overlap and noted that there is no need for a clear-cut distinction since Article 101 TFEU 'is *intended* to apply to all collusion between undertakings, whatever the form it takes'.[253] In addition, when confronted with the question 'what is an undertaking' the ECJ took a functional approach and notes that 'the concept of an undertaking encompasses every entity engaged in an economic activity,

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[244] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L REV 972, 977-80 (1986).

[245] More precisely, the absence of an economics meta-theory prevents antitrust community from resolving reasonable disagreements purely on economic grounds. Larry A. Alexander, *Modem Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST L.J. 3 (1981).

[246] These schools represent competing views about the nature of market and antitrust intervention. The Chicago School assumes that market are generally self-correcting, market imperfections are transitory, and judicial enforcement costly, blatant and thereby should be more cautious about false positives. The Post-Chicago school identifies frequent and persistent market imperfections, notes that strategic interaction among firms can make cartels and oligopolies enduring and therefore underline that antitrust enforcement despite its costs should not be light weighed because it can bring up more efficient outcomes. Richard Posner, *The Chicago School of Antitrust Analysis*, 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 925 (1978). Hovenkamp, *supra* note 39 at 215.

[247] Jonathan B. Baker, *Recent Developments in Economics That Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 646 (1989).

[248] The Post-Chicago arguments on these matters could be found in Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L.J. 3 (1992); Phillipe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 A. ECON. REV. 388 (1987); Joseph F. Brodley & Ching-to Albert Ma, *Contract Penalties, Monopolizing Strategies, and Antitrust Policy*, 45 SLR 1161 (1993); Charles A. Holt & David T. Scheffman, *Strategic Business Behavior and Antitrust* in ECONOMICS & ANTITRUST POLICY 39,47-63 (Robert Larner & James Meehan eds., Praeger 1989); Steven Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187, 194-201 (2000).

[249] Jacobs, *supra* note 51, at 219.

[250] In addition, both schools admit that empirical economic inquiries yield in many occasions ambiguous answers. Frank H. Easterbrook, *Allocating Antitrust Decision-making Tasks*, 76 GEO. L.J. 305, 308-09 (1987).

[251] Jacobs, *supra* note 51, at 225.

[252] Sen argues that economics has two origins. The first relates to ethics and is concerned about human ends and motivations. The second is associated with an engineering approach and is concerned with primarily logistic issues (instructions on material prosperity) rather than ultimate ends. For Sen all great economists followed both approach even though they focused on one or the other. For instance, Adam Smith, John Stuart Mill and Karl Marx grappled with ethical questions, while David Ricardo, Augustine Cournot and Leon Walras were more concerned about engineering problems. Importantly though none of them pursued purely the one or the other approach. He has also argued that the attempt of modern economics to be uncontaminated from the ethics approach has reduced the basis of a good deal of descriptive and predictive economics. AMARTYA SEN, ON ECONOMICS AND ETHICS 2-7 (Blackwell Pub 1988).

[253] Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125 para. 108.

regardless of the legal status of the entity or the way in which it is financed'.[254] Instead of focusing on the legal form of the entity, the Court investigated whether the nature, aims and function of the entity's activity warrant the conclusion that it is an economic activity. Even though these concepts seem fairly 'legal' and technical, AL 1.0 or 2.0 cannot justify the actual legal outcomes: the judges in these cases did not determine the content of the law by using solely legal forms, the text of the Treaty or some original intent. They also did not simply use scientific, non-legal input (i.e. positive economics). Instead they viewed antitrust as a purposive mission and engaged in constructive teleological interpretation.

The same non-formalistic, teleological reasoning underlies the 'single, overall agreement' doctrine.[255] Under this doctrine, undertakings can be held responsible for the overall cartel even if they are not involved in all its operations on a day-to-day basis or do not participate in all of its constituent elements. Participation in the overall agreement is sufficient to establish the responsibility if the Commission proves that the undertaking knew, or must have known, that the collusion in which it participated was part of an overall plan intended to distort competition. Thus, legal formalities or their absence do not preclude antitrust liability, and the Commission does not have to provide evidence of actual engagement of an undertaking with each and every element of the said anticompetitive practice. Such an approach takes into consideration of the economic realities (i.e. how cartels operate in practice) and gives to the law the necessary flexibility to be gapless and materialize its purpose: eliminate and deter collusive practices. By adopting such an approach EU antitrust went beyond the AL model.

Such teleological and consequences-sensitive reasoning is also not unknown to the other side of the Atlantic. The rule of reason analysis, the standard mode of antitrust scrutiny in the US provides clear evidence of this point. The trigger for this mode of analysis was the observation that only unreasonable restraints of trade should be condemned under the Sherman Act.[256] Thus, when a restraint of trade is not per se illegal a fact-specific inquiry into whether a restraint of trade is 'unreasonable' is warranted.[257] Yet, the exact content of the rule of reason analysis and its dividing line from the per se category have been a matter of interpretive contestation.[258] In general, the per se category refers to an irrebutable presumption of unlawfulness that applies only to naked restrictions - i.e. restrictions that lack procompetitive virtues and their profitability depends on market power -, while the rule of reason analysis is conventionally view as a balancing exercise.[259]

However, as Hovenkamp has shown an appealing way to view these juridical constructions is not as classifications of restraints but as modes of analysis which are performed based on economically-informed presumptions and burden-shifting mechanisms.[260] Instead of silos, per se and rule of reason are parts of a continuum or a 'sliding scale' with different fact finding requirements for different situations.[261] From this perspective, a rule of reason analysis involves showing market power and potential or actual anticompetitive effects, while a per se analysis does not require proving market power and the anticompetitive effects are largely inferred from the conduct itself.[262] The categories of practices which will be assessed via a per se or a rule of reason analysis may alter based on historical experience, economic knowledge and normative orientation. This implies that the factors that have affected whether a certain practice is assessed in one way or another have been concerns about the purpose of US antirust (i.e. what is and what should be its goal), judges' capabilities and the potential effects of certain categories of commercial practices.

The changing classification of vertical restraints is another illustrative example of US antitrust's responsiveness. In *Dr. Miles* the Court viewed minimum resale price maintenance clauses (RPM) as unlawful per se without assessing market power or anticompetitive effects.[263] Yet in 2007 in *Leegin* though the Supreme Court overruled nearly a century of authority and applied the rule of reason.[264] Maximum RPM was considered unlawful in *Albrecht* in 1968, while in *Khan Oil* it was submitted to a rule of reason analysis 'which can effectively identify those situations in which it amounts

[254] Case C-41/90 *Höfner and Elser v Macroton GmbH* [1991] ECR I-1979, para. 21; Case C-309/99 – *Wouters and Others* [2002] ECR I-1577 para. 57.
[255] Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/ 94, T-329/94, T-335/94 – *LVM v Commission* [1999] ECR II-931 para. 773.
[256] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 346 (1897); Standard Oil of N.J. v. United States, 221 U.S. 1, 64–65 (1911).
[257] Restraints of trade generally are subjected to a rule of reason, while specific types of restraints such as 'agreements to fix [and] maintain prices' are automatically (per se) deemed unreasonable. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).
[258] For two different judicial approaches see United States v. Addyston Pipe & Steel Co., 85 F. 271, 283–84 (6th Cir. 1898) and Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) 246 ('The true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition.'). Maurice E. Stucke, *Does the Rule of Reason violate the Rule of Law*, 42(5) UC DAVIS LAW REVIEW 1375 (2009).
[259] United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) ('courts routinely apply a balancing approach' requiring plaintiff to 'demonstrate that the anticompetitive harm . . . outweighs the procompetitive benefit')
[260] Hovenkamp, *supra* note 71 at 31-36, 38-40, 64; AREEDA AND HOVENKAMP, *supra* note 233, at 1507.
[261] The following passage is highly illustrative of this point: "as the circumstances here demonstrate, there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object [of quick look analysis] is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions". California Dental Association v FTC, 526 U.S. 756, 780–81 (1999) 780-781.
[262] Newman v. Universal Pictures, 813 F.2d 1519, 1522–23 (9th Cir. 1987), cert. denied, 486 U.S.
[263] A druggists' cartel using their supplier Dr. Miles to impose resale price maintenance in order to discipline retail discounters. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) 399-400.
[264] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) at 888–89.

to anticompetitive conduct'.[265] The underlying rationale of these shifts was the gradual realization that vertical restraints are less likely to have anticompetitive effects than horizontal ones. Purely vertical agreements were considered to be competitively neutral or benign, unless they were accompanied by an additional element likely to have a negative impact on competition in the form of upstream exclusion, downstream foreclosure or cartel facilitation. The core argument that justified this change of attitude was that such restraints alone are unlikely to lead to output reductions and prices increases and, thus, harm the consumers, as long as there is intense inter-brand competition (i.e. absent a horizontal effect).[266] We see, accordingly, that the interpretive struggles revolved around the purpose of antitrust and the consequences of its interpretation, as well as the purpose and effects of the said practices, and clearly affect the development of the law.

Up to this point I have given some example of constructive teleological interpretation being already at play in US and EU antitrust. Yet, as already noted constructive teleological interpretation is only one of the hallmarks of RL, whereas 'responsive post-bureaucratic enforcers' is another. EU antitrust enforcement, for instance is organized around a decentralized yet hierarchical network of enforcers, where the Commission is primus inter pares, but communicates and coordinates its activities with the activities of the nodes (i.e the national competition authorities).[267] In addition, the Commission (and the NCAs) dispose a wide range of enforcement tools of varied intensity. As a result, on several occasions the Commission has not applied the law in a crime-tort manner, but used market investigations and commitments or soft law instruments to investigate the market context, send signal to the various stakeholders and maximize compliance.[268] There are also many instances where the Commission has intervened in a continuous manner and with both a restorative and prophylactic attitude.[269] Furthermore, the internal structure of the Commission into problem-solving oriented task forces, and the creation of the office of Chief Competition Economist in 2003 demonstrate its concern about epistemic capacity and delivering results.[270] Lastly, the various guidelines and guidance papers could be perceived as interpretative theories that attempt to reconstruct the law in the mode of constructive teleological interpretation.[271]

To conclude our analysis a last example should be given of courts behaving as catalysts. Since its inception, antitrust raises the question: how does economic complexity affect judicial decision-making, and how can a judge tackle competition problems that are at least partially economic in nature?[272] In the early years the EU Courts responded to this question by formulating a doctrine of judicial deference.[273] According to this doctrine EU Courts would engage in a comprehensive review of the Commission decision, unless that decision contains a 'complex economic assessment'.[274] This means that in principle the EU Courts respectful of the institutional balance, will apply two different standards when assessing Commission decisions. They will exercise marginal or limited review to technical economic issues, and full, comprehensive review to any other non-technical, general legal issue.[275]

Yet, the establishment of the General Court created in 1988 (at the time Court of First Instance) triggered an intensification of judicial review.[276] Without dismissing the formulation of the doctrine the GC went beyond what the

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[265] In *Khan Oil* the Supreme Court overruled *Albrecht* and held that maximum RPM is not inherently unlawful, but it also noted that this did not mean that this behavior is per se lawful. Albrecht v. Herald Co., 390 U.S. 145 (1968); State Oil Co. v. Khan, 522 U.S. 3 (1997).

[266] In *Sylvania*, a case concerning non-price vertical restraints the Supreme Court suggested that vertical restraints may restrict intrabrand competition but intensify interbrand competition. Thus, a balancing of these effects is in order 314Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 54-55.

[267] Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty , O.J. 2003, L 1/1. See also *Wouter PJ Wils, Competition Authorities: Towards More independence and Prioritisation?*, 39 KING'S COLLEGE LONDON LAW SCHOOL RESEARCH PAPER 110-11 (2017); James S. Venit, *Brave New World: The Modernization and Decentralization of Enforcement Under Articles 81 and 82 of the EC Treaty*, 40 COMMON MARKET LAW REVIEW 545, 562–563 (2003).

[268] This enforcement armoury allows the Commission to be a 'responsive regulator'. AYRES & BRAITHWAITE, *supra* note 17 at 4-7.

[269] Commission's intervention in the energy sector via market investigation, commitments (primarily) and infringement decisions is a good example of this attitude. For the broader issue see Ioannis Lianos, *Competition Law Remedies in Europe: Which Limits for Remedial Discretion?*, 2 CLES RESEARCH PAPER (2013).

[270] MICHELLE CINI AND LEE MCGOWAN, COMPETITION POLICY IN THE EUROPEAN UNION 15-37 (2nd ed. Palgrave 2008).

[271] Commission Guidelines on the application of Article 81(3) of the Treaty, OJ No. C 101 of 27 April 2004; Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication from the Commission, Brussels, 3 December 2008).

[272] Michael Baye and Joshua Wright, *Is Antitrust too complex for generalist judges? The impact of economic complexity and judicial training on appeals*, JOURNAL OF LAW AND ECONOMICS (2009) available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319888.

[273] In *Costen and Grundig* the Court found anticompetitive the agreement between Grundig and Costen merely by virtue of the fact that it segmented the market.[273] The Court condemned Grundig for it found that its distribution system led to the absolute territorial protection of Consten without finding it necessary to consider economic data.[273] The Court recognized that the issue should be examined in its economic and legal context. Yet, it maintained that the exercise of the Commission's powers necessarily implies complex evaluations on economic matters for which the Commission enjoys a certain margin of discretion. Cases 56 and 58/64 *Consten and Grunding v. Commission* [1966] ECR 229, 343, 347

[274] This formulation has been repeated in voluminous case law. See Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para. 62; and Case C-7/95 P *Deere v Commission* [1998] ECR I-3111, para. 76; Cases T-39/92 and T-40/92 *Groupement des Cartes Bancaires 'CB' and Europay International SA v Commission* [1994] ECR II-49, para 109; Case T-29/92 *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid and Others v Commission* [1995] ECR II-289, para 288; Case T-112/99 *Metropole Television and Others v Commission* [2001] ECR II-2459, para 114; Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, upheld on appeal by order of the Court of Justice in Case C-241/00 P *Kish Glass v Commission* [2001] ECR I-7759.

[275] Marc Jaeger, *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?*, 2(4) JOURNAL OF EUROPEAN COMPETITION LAW & PRACTICE 296 (2011).

[276] See especially T-68/89 *Societa Italian Vetro SpA v Commission* [1992] ECR II-1403 para 160; T-374/94 *European Night Services*; Joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission of the European Communities*, [1996] ECR II-00649; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381; Case T-201/04 *Microsoft v. Commission* [2007] ECR II-3619, paras 87-88.

doctrine implied and engaged in an increasingly more meticulous review of the Commission decisions. In most occasions the ECJ verified this approach. Progressively both courts reduceed the scope of the doctrine and reviewed more thoroughly issues that in the past were considered as 'complex economic assessments.' For instance, in *Clerstream*, *Tetra Laval* the General Court questioned Commission's market definition,[277] whereas in *Astra Zeneca* the ECJ recognized that Commission's assessments of technical matters are not immunized from judicial review due to their technical nature.[278] In *Woodpulp* the Court reviewed substantial body of complex economic arguments and it even appointed its own economic experts to assess the rate of recovery of costs in a predatory pricing situation.[279] In *Airtours*, *Tetra Laval*, *Microsoft,* and *Ryanair* the General Court reviewed new economic theories and detailed econometric studies.[280] In *Deutsche Telekom* both Courts assessed Commission's calculations for finding a margin squeeze.[281]

Even though the shell of the doctrine survived, the functioning of judicial review changed. Both EU courts kept scrutinizing more thoroughly the economics of Commission decisions, while they did not hesitate to annul a decision if they remained unconvinced about Commission's assessment of economic data. As economic analysis was becoming more and more prominent in EU antitrust and the Commission was moving from a form-based to a more economic approach the Court increased its expectation and level of scrutiny so as to ensure that the Commission will remain responsive and apply the law effectively.

VI. Calibrating Openness and Integrity

The previous analysis suggested that responsiveness is already part of our current antitrust reality. In this section I present in a more detailed manner the RL modus operandi. The aim of the analysis is to show concretely how the RL model can benefit antitrust. As already noted, the AL model does not take reasonable disagreements seriously and fails to resolve them. The RL model, however, has more modest aspirations: by recognizing that reasonable disagreements are 'natural phenomena' of antitrust, it aspires only to tame their eliciting forces, i.e. openness and integrity. Hence, first of all, this model helps us see that openness and integrity are simultaneously the source and the solution of the problem. From a RL perspective, reasonable disagreements are not only inevitable but also desirable: they exercise constant pressure for improvement; they help antitrust law and enforcement avoid formalism, adapt in changing circumstances, and materialize its core mission.

We can imagine writing all antitrust laws in the form of clear-cut rules; specifying a very clear and narrow objective of the law and prescribing the precise economic method for applying it.[282] This type of antitrust would be easily enforced in a crime-tort fashion, while adjudicators would not need to do more that exercising a strict legality review. In such case, antitrust would approximate the AL model, but would lose its integrity. Without openness, it would transform it into a set of rigid rules unable to incorporate new learning and take into consideration the market context. Antitrust as AL would be incapable of effectively addressing the challenges of modern economy. If eradicating openness would make the law formulaic and ineffective, too much openness could lead to its instrumentalization or create tensions with the Rule of Law. Being, for instance, too sensitive to changes in economics can transform antitrust enforcement into a highly unclear, unpredictable and costly enterprise. On such occasions openness becomes part of the problem not of its solution, it is thus excessive.

We can portray openness and integrity as communicating vessels: (i) their complementary relationship means that up to a point the more open the law is the more integrated is likely to be; (ii) their antithetical relationship means that beyond on below this point openness can clashes with integrity (see figure 1 below).

[277] Case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] II-03155, paras 47-74; Case T-5/02 *Tetra Laval BV v Commission*, ECLI:EU:T:2002:264, paras 175, 259-269.
[278] Case C-457/10 P *Astra Zeneca v Commission* ECLI:EU:C:2012:770, paras 36-52.
[279] Joined Cases C-89/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Alhstrom Osakeyhtio and Others v Commission* [1993] ECR I-1307 para 163.
[280] Case T-342/99 *Airtours v Commission* [2002] ECR II-2585, paras 17-48, 158-181; Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381, paras 23, 119; Case C-12/03 P Commission v Tetra Laval [2005] ECR I-987, para. 19; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, para. 482; Case T-342/07 *Ryanair v Commission* 6 July 2010, paras 30, 139-195, 447-525.
[281] T-271/03 *Deutsche Telekom v Commission* [2008] ECR II-477, para 185 and Case 280/08 P *Deutsche Telekom v Commission*, para 143.
[282] It is true that the elimination of openness could entail the end of reasonable disagreements in antitrust. The reverse - i.e. sacrificing integrity for the sake of openness - is absurd, because in this case competition law will stop being law.

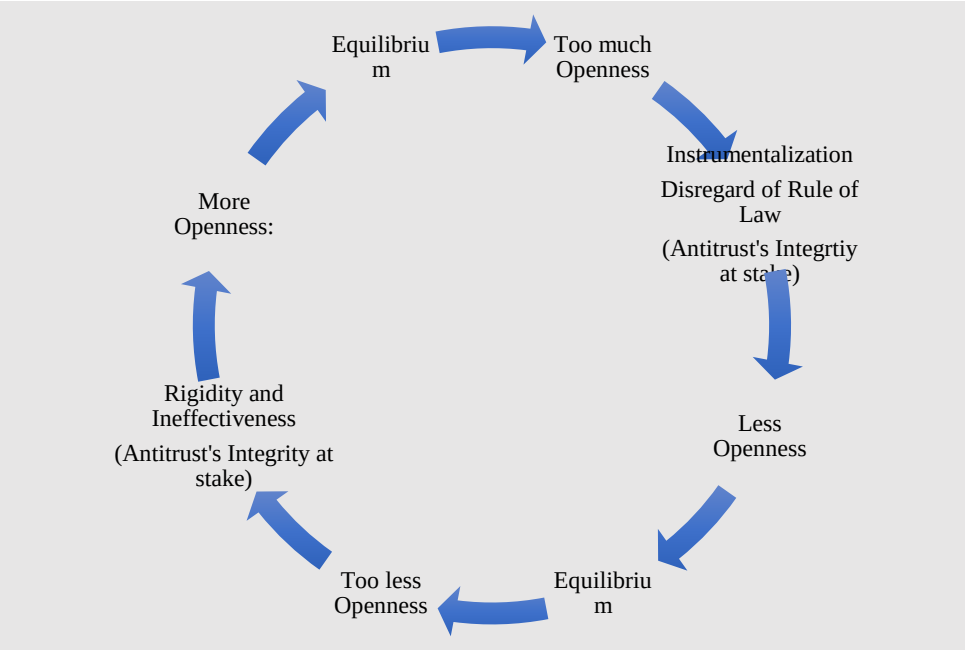

Figure 1. *Openness and Integrity as communicating vessels*

The above observations imply that openness has 'increasing positive returns' up to a point, beyond this point it brings decreasing positive returns to the law's integrity. Thus, the relationship between openness and integrity could be represented as an inverted U curve (see figure 2 below). The figure below also implies that equilibria between openness (horizontal axis) and integrity (vertical axis) could and should be found. From this angle, a mechanism for the finding of such equilibria can make antitrust responsive.

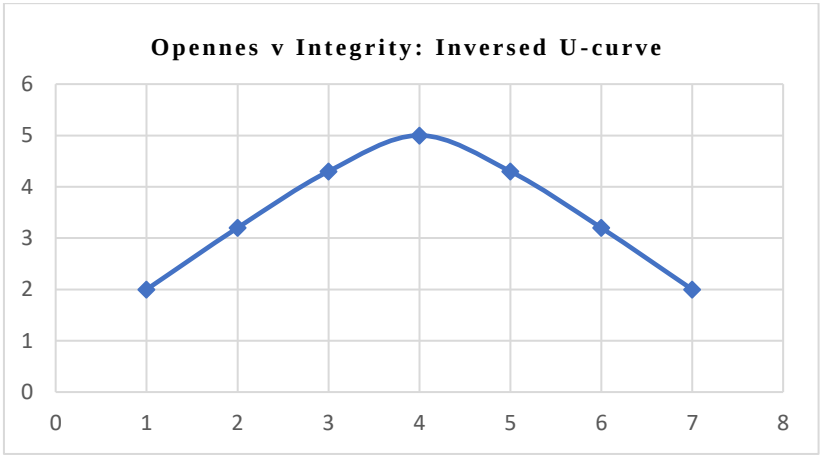

Figure 2

Hence, by relying on the RL model we can propose a legal-institutional approach for calibrating openness and integrity.[283] This approach involves three key elements: (i) constructive legal interpretation; (ii) enforcers that behave as responsive post-bureaucratic institutions and cooperate with each other in networked structures, and (iii) adjudicators that function as catalysts. Figure 3 below presents the three key elements of responsive antitrust that I analyse in turn.

[283] It should be noted that Nonet and Selznick's typology was descriptive and conceptual and the modus operandi proposed here is not developed by them. NONET & SELZNICK, *supra* note 8, at 8-17.

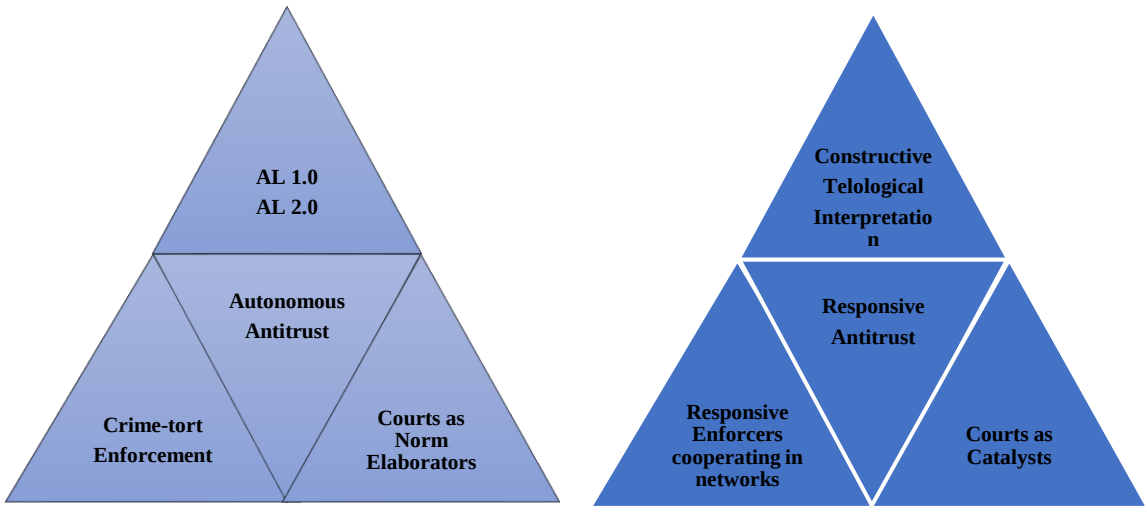

Figure 3. *Two Types of Antitrust*

The responsiveness approach starts from the premise that antitrust is a purposive legal mission that seeks to materialize the promotion and protection of competition as a multifaceted ideal.[284] This ostensibly mundane remark links questions of legal interpretation with questions of legitimacy. It makes clear that respecting the confines of the Rule of Law is necessary, but not sufficient for successfully applying the law; the success of antitrust intervention depends also on the degree it manages to attain its core ideal. In addition, this mundane remark implies that the responsiveness approach adopts a reflexive attitude towards the goals debate.[285] Given that the 'protection and promotion of competition' is a multidimensional and multi-layered ideal that can be pinned down only by recourse to intermediary values such as total welfare, consumer welfare or rivalry, the present approach highlights the need for constructive legal interpretation. If antitrust is a legal field where law, policy and economics intertwine and the line between legality and legitimacy is blurred, constructive teleological interpretation could be particularly useful to apply the law effectively.

But what is exactly constructive teleological interpretation? Constructive interpretation is a 'matter of imposing purpose on an object or practice in order to make it the best possible example of the form of genre to which it is taken to belong'.[286] It opens a dialogue about the purpose, the rules and the effects of the law, and advocates in favour of a purposive, principle-based and results-oriented interpretative attitude.[287] This approach suggests that legal institutions should recognize plaintiff's and defendant's argumentation as parts of interpretive theories about the law, namely as argumentative attempts to reconstruct the object of the law in virtue of its purpose. Then they should choose the interpretive theory that presents the law in its best light and generates legal outcomes that both *fit* and *justify* it.[288]

The best interpretive theory is the one that fits and justifies in the most plausible way and provides a specific legal response to a certain factual problem. The 'fit' element implies that the interpretive theory must account for the paradigmatic aspects of antitrust law.[289] The justification component consists in putting antitrust norms in their best light by taking into consideration their purposes, functions and effects.[290] Thus, the interpreter needs to theorize - even reconstruct - the purpose served by the practice whose interpretation she seeks.[291] As a result, what is considered as legally

[284] MONTI, *supra* note 158, at 2 (stating 'it is hard to provide a definition of 'competition' everyone will agree with, or to obtain consensus about the reasons for having competition law').

[285] This means that competition law is understood as an 'antipoietic system'. Autopoietic systems are systems that reproduce themselves from within themselves. Niklas Luhmann, *The Autopoiesis of Social Systems* in SOCIOCYBERNETIC PARADOXES: OBSERVATION, CONTROL AND EVOLUTION OF SELF-STEERING SYSTEMS, eds. 172 (F. Geyer and J. Van d. Zeuwen eds., London: Sage 1986).

[286] DWORKIN, LAW'S EMPIRE, *supra* note 2, at 49-53.

[287] Constructive interpretation is made up of three analytical stages: (1) pre-interpretive stage, (2) interpretive stage, (3) post-interpretive stage. In the pre-interpretive stage, a participant identifies the rules and standards that constitute the practice. Then, in the interpretive stage, the interpreter settles on some general justification for those elements identified at the pre-interpretive stage. At the post-interpretive stage, participant adjusts his sense of what the practice really requires so as to better serve the justification she accepts at the interpretive stage. The proposal must (1) be consistent with the data identified as constituting the practice at the pre-interpretive stage; (2) shows the law in its best light. See DWORKIN, LAW'S EMPIRE, *supra* note 2 at 45-86, 225-227.

[288] The determination of what is legally valid, Dworkin says, is settled by choosing the best interpretive theory. For example when we are called to decide whether a certain conduct is courteous our decision turns on the best theory of what 'courtesy' is. Similarly, when we decide whether a certain proposition is or is not legal we turn to the best theory of what the law 'is'.
DWORKIN, LAW'S EMPIRE, *supra* note 2, at 1-44, 52.

[289] Timothy Endicott, *Herbert Hart and the Semantic Sting*, 4 LEGAL THEORY 283 (1998).

[290] Shapiro notes that a purpose 'fits' the object to the extent that it recommends that the object exists or that it has the properties it has. A purpose is 'justified' to the extent that it is a purpose worth pursuing. Scott Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, 77 PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES 35 (2007).

[291] Dworkin following Gadamer says that we must apply intention. The positing of intention is the formal structure that any jurisprudential interpretation must have. DWORKIN, LAW'S EMPIRE, *supra* note 2, at 51-53, 421-2.

irrelevant under AL becomes relevant by informing interpretive theories that use a mixture of pure legal reasoning, technocratic non-legal knowledge and value-laden judgments to reconstruct the purpose of the law in light of its effects. Under this modus operandi RL avoids the clutches of rigid formalism and adapts the law to its context. Simultaneously, it keeps the law open and increases its capacity to attain its underlying values without losing its integrity.[292]

This interpretive attitude brings about several benefits for antitrust. It avoids the deadlocks of the holistic approaches that attempt to eliminate disagreements by reducing competition law to a single value be that total or consumer welfare or freedom to compete.[293] Simultaneously, it accepts that normative discussions do and should affect legal interpretation through the articulation of interpretive theories. It cautions though that what is often called the 'goals debate' is futile, unless it becomes internal and takes the form of a debate about the operational standards of the law.[294] Moreover, it puts into perspective the dominant orthodoxy of consumer welfare. Consumer welfare, under this perspective, is not the ultimate end of the law or the 'end of antitrust history', but a particularly useful standard for identifying instances where competition is distorted or restrained. Promoting innovation, ensuring equality of opportunity or safeguarding consumer well-being could, in a similar way, become key proxies of consumer welfare, as long as they were accompanied by operational legal tests. Accordingly, this method of interpretation makes intramural what is often viewed as an external normative debate and indicates that antitrust' fuzzy mandate, elastic vocabulary and rules & standards mode of analysis are not a weakness but a strength. They allow for antitrust openness under which several interpretive theories compete for providing the account that best fits and justifies the law.

As interpretive theories attempt to give a convincing account of the law they are sensitive to input from economics about past or future effects. Consequently, an additional benefit of constructive teleological interpretation is that it opens antitrust to both positive and normative economic input. More importantly though, the responsiveness approach debunks the myth that antitrust can solely rely on positive economics and be applied in a value-free fashion.[295] It makes clear that value-judgements underlie antitrust analysis even in its sophisticated form, namely when it avoids non-competition, non-economics considerations and focuses on consumer welfare, allocative efficiency and uses econometric analysis. This does not mean that the responsiveness approach denies the numerous benefits of positive economic analysis. It merely implies that there is not a categorical but only a blurring line between positive and normative economics.[296] Hence, both positive and normative economics are legitimately used to construct the legal standard that best fits and justifies the law under the circumstances of a specific case.[297]

At this point the proponents of the AL model for antitrust could object that the use of normative economics would make the application of the law similar to policy and push enforcers and adjudicators to go beyond the confines of the Rule of Law. Even though there is no scientific way of making the value-judgments associated with normative economics, there are several methods to address value conflicts in legal reasoning.[298] Consequently, by openly recognizing the inevitable role of value-judgments in legal interpretation, we do not turn antitrust into a less technocratic or arbitrary field of law. We simply dismiss the pretense of scientific objectivity. Such disenchantment is likely to lead to more robust legal reasoning. For instance, given that welfarist balancing is often a myth and no court or enforcer actually measure all the welfare implications of a specific practice before condemning or approving it, choosing one among many evidence-based and value-laden interpretive theories under the criteria of 'fit' and 'justification' may make legal reasoning more transparent, allow for refinement of existing doctrines and in the end lead to better outcomes.

Realizing the role of normative economics in antitrust will also reflect developments in philosophy of science. Modern philosophy of science recognizes that normative substrata underlie the foundation of scientific theories, and that any scientific theory hinges unconsciously, but in a significant measure, upon its correspondence with the value system of the theory-builder.[299] Yet, even though modern philosophy of science has admitted that value-judgments sometimes define the scientific enterprise, this has not entailed the end of empirical inquiry, or counsel against the continued pursuit of objective knowledge.[300] Hence, the responsiveness approach by admitting the role of normative economics and value

[292] For instance, teleological interpretation provides criteria for rational reconstruction of outmoded or inappropriate precedents.

[293] Adam Smith insightfully observed that 'the propensity to account for all appearances from as few principles as possible' is a common feature of all people but could be found especially in philosophers who engage in such endeavours as means to display their ingenuity. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 299 [1790] (Oxford Clarendon Press 1975).

[294] As Jacobson notes the question today is what the standard should be in assessing the economic consequences of a practice or a transaction. Jacobson, *supra* note 121, at 5.

[295] Modern economics has made many efforts to acquire a non-ethical character. In 1930 Robbins maintained 'it does not seem logically possible to associate the two studies [economics and ethics] in any form but mere juxtaposition. Economics deals with ascertainable facts; ethics with valuations and obligations.' LIONEL ROBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 132 (Macmillan 1932). This line of thinking became fashionable and modern economics assume that human being behave rationally and define rationality as internal consistency of choice and maximization of self-interest. However, the rationality assumption has been heavily criticized. Herbert Simon, Theories of Bounded Rationality in DECISION AND ORGANIZATION 361 (C.B. McGuire & Roy Radner eds., North Holland 1972).

[296] SEN, *supra* note 252 at 8-9, 78-9 (Blackwell Pub 1988).

[297] Jacobs, *supra* note 51, at 219.

[298] There are however certain methods. See GIOVANNI SARTOR AND HENRY PRAKKEN (eds.) LOGICAL METHODS OF LEGAL ARGUMENTATION 43-118, 119-140 (Springer 1997); ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION 211-286 (OUP 1989); Phan Minh Dung, *On the acceptability of arguments and its fundamental role in nonmonotonic reasoning, logic programming and n-person games*, 77 ARTIFICIAL INTELLIGENCE 321, 325-334 (1995).

[299] THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111-35, 171-73 [1962] (2d ed., University of Chicago Press 1970).

[300] For a distinction between moral and scientific objectivity see Julian Reiss & Jan Sprenger, *Scientific Objectivity*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2017 Edition), at https://plato.stanford.edu/archives/win2017/entries/scientific-objectivity/; Geoff

judgments in antitrust explains not only why reasonable disagreements are persistent in antitrust, but also why they cannot be eradicated but only tamed through economically-informed, data-based and value-laden legal hermeneutics.[301] This is why, the responsiveness approach suggests that value-judgments and normative economics choices, being inevitable, should not be hidden under the rug but put out in the open air and stress tested through their proxies. In so doing, this approach avoids the uncertainty associated with encrypted policy discussions and stimulates compliance.[302] It also allows for legal change without undermining the integrity of the law: enforcers or adjudicators can revisit a doctrine that relies on a misguided interpretive theory and, thereby, improve the state of the law. Moreover, it may lead to legitimate and effective normative elaborations and allow for interactions between different legal institutions.[303]

Nonetheless, the RL approach suggests that reasonable disagreements cannot be addressed exclusively by sharpening our legal hermeneutics. Much of the indeterminacy and uncertainty of the law can be tackled by appropriate enforcement techniques and strategies. To fully appreciate the contribution of the responsiveness approach in antitrust enforcement we need to compare first this enforcement style with the one associated with AL. The crime-tort modus operandi of AL advises enforcers to focus exclusively on eliminating antitrust injuries that occurred in the past and protect law's beneficiaries from harmful acts.[304] Competition rules are, thus, conceptualized as binary switches that identify a practice as legal or illegal, pro- or anti-competitive.[305] Such enforcement style emphasizes individual cases, is fact-bound and backward looking.[306]

However, crime-tort enforcement cannot deal satisfactorily with mixed behavior, namely with behavior that despite its anticompetitive effects may bring important efficiencies to the market.[307] By simply prohibiting this conduct consumers will be deprived of the benefits of large aggregations of capital. On the other hand, by simply permitting this behavior in virtue of its welfare enhancing qualities, competition in the market may be significantly impeded with unpredictable ramifications for innovation, variety and quality.[308] Instead of merely condemning past injurious behavior enforcers could apply the law in way that manages market behavior and structure to capture the efficiencies inherent in large aggregations of capital or joint ventures, while minimizing their inefficiencies.[309] This requires that enforcers pay attention to both the pro- and anti- competitive side of the behavior so as to weed out the anticompetitive from the procompetitive elements of the same behavior, and intervene to offer guidance to market players for more competitive solutions.[310]

From this angle, the crime-tort model leaves enforcers with insufficient tools given the complexity of modern industrial and digital markets.[311] It concentrates antitrust intervention on identifying a past, frequently elusive, sinful act instead of supervising the capital-concentrating effects of markets and seeking to identify optimal structure and behavior for large corporations.[312] In this sense the crime-tort model focuses on legality issues and puts aside legitimacy concerns. It also does not provide sufficient guidance to antitrust enforcers. For example, under this model, enforcers do not know how to prioritize different violations of the law courts cannot evaluate their selection of cases. Thus, the crime-tort model does not help enforcers articulate a comprehensive enforcement policy and leaves them unguided in cases where openness clashes with integrity.[313]

In contrast, responsive enforcement without negating the crime-tort model, expands and improves it. The basic premise of this model is that enforcers viewing antitrust as a purposive mission should seek to prevent firms from inflicting distortions of competition e.g. by engaging in welfare-minimizing behavior, while alsocreating incentives for firms to engage in procompetitive ways.[314] Responsive enforcers are, thus, like gardeners who tend a plant in order to

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Sayre-McCord, *Moral Realism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2017 Edition), at <https://plato.stanford.edu/archives/fall2017/entries/moral-realism/>.

[301] LARRY ALEXANDER & EMILY SHERWIN, DEMYSTSTIFYING LEGAL REASONING 9-30 (Cambridge University Press 2008); NICOS STAVROPOULOS, OBJECTIVITY IN LAW 125-164 (Clarendon Press 1996).

[302] John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 967-94 (1984).

[303] Such interactions can make the system as a whole more responsive. As I argue below constructive teleological interpretation can enhance the effectiveness of regulatory conversations and is closely linked to courts operating as catalysts.

[304] First, *supra* note 13, at 9-10.

[305] HAYEK, *supra* note 11, at 128.

[306] This enforcement model reflects a legalist culture and requires that enforces intervene only when conduct violates the rules. See First, *supra* note 13 at 9-10; Melamed, *supra* note 14, at 13-14.

[307] As Crane notes 'most monopolists secure and maintain their position through some complex combination of skill, foresight, industry, accident, luck, shrewdness, strategic behavior, manipulation, and interrelated industry features'. Crane, *supra* note 14, at 32.

[308] In many occasions, it is impossible to engage in a accurate balancing of pro- and anti-competitive effects of a conduct when incommensurable values or goals are at stake such as quality. See Rebecca Haw Allensworth, *The Commensurability Myth*, 69(1) VANDERBILT LAW REVIEW 1, 24-44 (2016).

[309] Crane, *supra* note 14, at 32.

[310] Given that the expectation of correct liability will deter anticompetitive behaviour, while the expectation of mistaken will chill procompetitive behaviour, assigning liability will be optimal when $p^H \times H > p^B \times B$. P indicates the probability and H and B the expected harm and expected benefit of a practice respectively. If a factor has effect on p^H but not on p^B, it should trigger antitrust intervention, whereas if it raises p^B and has no effect on p^H, enforcers should refrain from acting. Louis Kaplow, *On the Relevance of Market Power*, 130(5) Harvard Law Review 1304, 1325-8 (2017)

[311] First, *supra* note 13, at 10; Melamed, *supra* note 14, at 11.

[312] Crane, *supra* note 14, at 46.

[313] For a compelling case supporting the inevitability of discretionary judgments by enforcers see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 39 (University of Illinois Press 1976).

[314] The responsiveness approach show that the legality of enforcement depends on its legitimacy and thereby invites us to focus on the cognitive capacity and substantive competence of enforcers.

create the conditions most favorable for its growth.[315] To be responsive enforcers need to pursue the goal of the law via different proscriptive and prescriptive, proactive and reactive enforcement tools and strategies.[316] They should also escalate or de-escalate their intervention depending on the players' response.[317] They, additionally, need to set up participatory, learning based procedures that enable them to learn by different stakeholders and create forums where different stakeholders can participate and affect public policy.[318] In a nutshell, responsive enforcers are not preoccupied only with punishing and deterring, but also with compliance, learning and trust-building.[319] They punish or persuade after understanding the context and the motivations of those involved, and stimulate compliance through voluntary cooperation and trust-building.[320]

Responsive enforcers can improve their expertise and enforcement skills if they operate in a networked structure where each node disposes a wide variety of tools and communicates with the others before and after making a key decision.[321] Compared to a centrally organized hierarchical structure, such a network is more capable of learning and allows for more innovation and adaptability in the interpretation and application of competition law.[322] In other words a networked structure can combine traditional command-and-control strategies with experimentalist governance that facilitates 'learning from difference' and 'learning by doing' experimentation. This is possible because in such a structure different nodes can test different theories of harm or remedies, communicate and learn form each other, and monitor and revisit their performance. Therefore a networked structure allows for experimental enforcement and stimulates 'regulatory conversations', namely in informal or semi-formal processes of communication through which the nodes interact, build common understandings and express their divergent opinions.[323] By sharing experiences, exchanging knowledge, testing their theories and remedial design, and revisiting their common performance, enforcers are likely to accumulate the knowledge necessary to settle several reasonable disagreement. In other words, if antitrust enforcement operates as a deliberative process continually revised by its participants in light of new experience is likely to resolve problems that cannot be settled by legal hermeneutics alone.[324] In this sense, a network of responsive enforcers is likely to trace equilibria between openness and integrity.

The last component of the responsiveness approach relates to the role of courts in antitrust enterprise. The AL model understands courts as norm elaborators and rights enforcers. From this point of view, in public enforcement, courts need only to investigate whether enforcers respected the Rule of Law when punishing a violation of an antitrust prohibition and refrain from substituting enforcers complex economic assessment.[325] When it comes to private enforcement courts should investigate whether the plaintiff has been harmed by a violation of an antitrust prohibition. However, if courts follow this legalistic culture and restrain themselves to such a strict legality review, enforcers would be left without any guidance about how to be responsive. Their residual discretion would remain unchecked, as long as the Rule of Law requirements are met. In addition, the courts will intervene only when antitrust governance fails and refrain from improving the functioning of the system.

Nonetheless, this type of adjudication cannot maintain the responsiveness antitrust. First, it strictly separates legality from legitimacy and accountability. As a result, it discourages using antitrust's openness to ensure its integrity. In addition, this type of adjudication disregards the role of constructive teleological interpretation and thereby leaves antitrust vulnerable to clashes between openness and integrity. Third, it offers insufficient guidance to enforcers when they exercise their residual discretion. This means that enforcers will not have incentives to improve their cognitive capacity and substantive competence. Fourth, it ignores that courts can act as arbiters of interaction across different levels of governance and institutional nodes and improve the enforcement of antitrust.

To ensure enforcement's responsiveness, courts needs to get rid of the legalistic culture of AL and operate as catalysts in a multilevel antitrust governance system. This means, first of all, that courts need to function as platform of argumentation and openly recognize the added value of constructive teleological interpretation. Put differently, the courts should function as terrains where various competing interpretive theories compete and occasionally one of them prevails over another. As noted by Scott and Sturm the catalyst role invites the courts to recognize that they face a wider range of

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[315] F. A. HAYEK, THE ROAD TO SERFDOM 71 (University Chicago Press 2007).

[316] Pablo Ibáñez Colomo, *On the Application of Competition Law as Regulation: Elements for a Theory*, 29 YEARBOOK OF EUROPEAN LAW 261, 263-276 (2010).

[317] See John Braithwaite, *Types of Responsiveness* in REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 117, 118-121 (Peter Drahos ed, ANU Press 2017). Smart regulation theory has identified two occasions where a graduated response is inappropriate: where there is a serious risk of imminent irreversible loss, because the risks are too high, and where there is no relationship involving continuing interactions between the parties. NEIL GUNNINGHAM & PETER GRABOSKY, SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 5-19 (OUP 1998) 5-19.

[318] WARREN BENNIS, BEYOND BUREAUCRACY: ESSAYS IN THE DEVELOPMENT AND EVOLUTION OF HUMAN ORGANIZATION 96 (McGraw-Hill 1973).

[319] FIONA HAINES, CORPORATE REGULATION: BEYOND 'PUNISH OR PERSUADE' (Oxford: Clarendon Press 1997).

[320] This approach intends to strike a balance between laissez faire, command-and-control and cooperative regulation, and incorporates a mix of regulatory strategies and tools. AYRES & BRAITHWAITE, *supra* note 17, at 7-15.

[321] The present approach suggests that the responsiveness of antitrust would be enhanced if it is applied through a network-based structure that relies on and facilitates regulatory conversations. On the contrary, the AL model does not impose any other additional constrain or benchmark for institutional cooperation except the Rule of Law.

[322] MAARTJE DE VISSER, NETWORK-BASED GOVERNANCE IN EC LAW 7-14 (Hart Publishing 2009).

[323] Julia Black, *Regulatory Conversations*, 29 JOURNAL OF LAW AND SOCIETY 163 (2002).

[324] Wouter Wils, *The European Commission's "ECN+": Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers*, 4 CONCURRENCES 60, 64 (2017); James S. Venit, *Brave New World: The Modernization of Enforcement under Articles 81 and 82 of the EC Treaty*, 40 COMMON MARKET LAW REVIEW 545, 562–3 (2003).

[325] Cases 56 and 58/64 *Consten and Grunding v. Commission* [1966] ECR, paras 343-7.

choice than simply deferring or dictating outcomes, and that many hard cases require a combination of knowledge from different domains.[326] By functioning in this way courts are likely to shed light to the normative foundations, the purpose and the consequences of all possible interpreations of the antitrust norms. They will also enable legal change when necessary: precedent will be revised or overruled when this is demanded by law's integrity.

The second way according to which courts can operate as catalysts is by assuming their role as responsiveness motivators. This means that courts should exercise their decision-making powers to enhance the capacity of other actors to make legitimate and effective decisions.[327] For this purpose courts need to recognize their dynamic relationship with enforcers; not simply assess the legality of enforcers' decisions, but also evaluate whether enforcers were indeed responsive. When enforcers are proven unresponsive, judicial catalysts should discipline them so as to restore the responsiveness of the system. Courts as catalysts should also encourage enforcers to provide full and fair participation to all stakeholders; monitor the epistemic or informational bases of enforcers' decisions, and require transparency and accountability as an essential element of enforceability.[328] By adopting such a role, courts will incite enforcers to engage in constructive teleological interpretation and they will set the conditions for normatively motivated and accountable inquiry in case of reasonable disagreement. In addition, they will enhance the capacity of the antitrust network to remain open (e.g. by engaging in modest experimentalism) without undermining the integrity (e.g. the uniform application) of the law.

Table 2 below summarizes the previous discussion and exemplifies the key differences between the assumptions, features and modus operandi of autonomous and responsive antirust.

Two types of Antitrust		
	Autonomous Antitrust	**Responsive Antitrust**
Goal	Application of competition rules	Protecting and Promoting Competition
Legitimacy	Rule of Law	Integrity of Law
Legal hermeneutics	Legal conceptualism Pure legal reasoning	Constructive Teleological interpretation
Competition norms	Prohibitions	Multifaceted screens
Methodological foundation	The separation thesis	The integration thesis
Enforcer's Discretion	The Rule of Law set the boundaries of enforcer's discretion.	Open but delimited by law's integrity
Enforcement Style	Crime-tort model	Responsive Enforcement
Institutional Cooperation	Rules for cooperation (uniformity and unchecked discretion)	Regulatory conversations - Mix of uniformity and modest experimentalism
Judicial Review	Courts as norm elaborators and law enforcers (Strict Legality Review).	Courts as Catalysts

Table 2. *Two Models of Antitrust*

Table 3 recaps the key features of the RL modus operandi.

Interpretation	Constructive Teleological Interpretation: choosing among various interpretive theories the one that fits and justifies the law. Economically-informed, principle-based, results-oriented and value-laded. Integrates legality and legitimacy, law-application and policy, positive and normative economics.
Enforcement	Responsive strategies and techniques. Participatory, learning-based procedures. Network governance and regulatory conversations ensure uniformity while allowing for learning through modest experimentalism. Maximizing learning and compliance, and problem-solving are the key elements. Principled and results-oriented enforcement.

[326] Scott & Sturm, *supra* note 19, at 1, 2, 5-10.
[327] This conceptualization of courts, as Scott and Sturm note, seeks not only to make sense of what courts are already doing, but also to provide a way of thinking about and evaluating that role that goes beyond the traditional and formalistic understanding of law and adjudication. *Id.* at 1, 5.
[328] Scott & Sturm, *supra* note 19, at 10-16.

Adjudication	As catalysts: a) Platforms for argumentation: different interpretive theories reconstruct the law and attempt to present an account that best fits and justifies the law while it provides a specific solution to the particulat problem. b) Responsiveness motivators: Use of judicial review, standards of proof and procedural principles to keep enforcers responsive by monitoring the epistemic and informational base of enforcers' decisions, and requiring transparency and accountability as elements of enforceability.

Table 3. *The RL modus operandi*

Conclusion

In this article, I argued that reasonable disagreements cannot be fully eliminated from antitrust as they are triggered by the conflict of two endogenous forces: its openness and its integrity. Openness and integrity are simultaneously in a complementary and antithetical relationship. The fuzzy mandate, the conceptually elastic vocabulary and the rules & standards mode of analysis of antitrust imply that this field of law is and needs to remain open to realize its goal, namely the protection and promotion of competition. Yet, openness can undermine antitrust's integrity by destabilizing fundamental rule-of-law principles or inciting law's instrumentalization. Hence, even though we cannot legitimately imagine an antitrust that is not open, its openness inevitably poses challenges to its integrity. Reasonable disagreements are the price to be paid for law's openness.

Even though reasonable disagreements appear to be endogenous in antitrust, the antitrust community has on most occasions considered them as temporary and eradicable. This diagnosis derives from viewing antitrust through the lenses of AL. Such an approach, however, underestimates the problem of reasonable disagreement. The RL model, on the contrary, openly recognizes and can explain the endogeneity of reasonable disagreements.

Nonetheless, this is not the only weakness of the AL model. This model cannot fully explain the way antitrust is interpreted and applied in the two leading jurisdictions. In its strongest version, AL allows for teleological interpretation but this *telos* is some original or systematic intent. Yet, ordinarily antitrust adjudicators have interpreted the sparse competition norms by *giving* a purpose that makes the antitrust enterprise meaningful. Normative discussions and value-judgments have always found their way in antitrust litigation and especially in grave occasions of reasonable disagreement. Furthermore, antitrust enforcers have frequently and still do behave to a certain extent as responsive post-bureaucratic institutions, not simply as law enforcers as the AL model suggests. Lastly, antitrust adjudicators on many occasions do not function merely as norm elaborates, but as catalysts: they enable interpretive struggles about the purpose of the law and monitor or rectify the responsiveness of antitrust enforcement. In this regard, the added value of the RL approach at bringing additional clarity: admitting that antitrust institutions do not operate in an applicative but in a rule-creating manner, and use not only positive but also normative economics (and other value judgments) may illuminate a key aspect of the antitrust enterprise.

Finally, the RL model proposes a modus operandi that could perhaps be more effective in dealing with reasonable disagreements than the one proposed by AL. This modus operandi revolves around (a) constructive teleological interpretation; (b) responsive enforcers organized in networks structures and (c) adjudicators that operate as catalysts. If antitrust institutions view competition law as a form of responsive law, they might be more able to make value-judgments, incorporate new knowledge and apply the law contextually without diminishing its integrity.