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SYMPOSIUM

Introduction to Baxter Symposium

Richard A. Posner*

I met Bill Baxter more than 30 years ago, in the fall of 1967, when I interviewed for a job at the Stanford Law School. I was instantly, immensely, and permanently impressed by the power of his mind and the clarity of his expression, incidentally mimicked by his precisely chiseled features and precise, clipped enunciation. I got the job, and we were colleagues for the year that I taught at Stanford before moving on to the University of Chicago. I learned much from him that year and after. Although Bill's greatest influence has been on antitrust law, he was one of the earliest lawyers to use economic analysis outside of what until the 1960s had been the gilded law-economics ghetto of antitrust and regulated industries. His first article, published in 1963, applied an informal economic analysis to conflict of laws;¹ needless to say, this was the first time such a thing had been attempted. Today, 35 years later, it continues to be cited as a major contribution to the scholarly literature on conflict of laws, even though Baxter never wrote anything else on conflicts and as a result never achieved a high profile in the field. Later he wrote important articles and monographs on environmental topics, in particular airplane noise.² I believe he was the first to emphasize the possibility of an "expanded firm" solution to some environmental issues: internalizing externalities by making the polluter buy the property adversely affected by his pollution. The subtitle of one of Baxter's environmental monographs, *The Case for Optimal Pollution*,³ will give you a sense of how an economist looks at environmental issues. He also did an important empirical study applying public-choice theory to antitrust.⁴ And I believe that

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1. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

2. See, e.g., William F. Baxter & Lillian R. Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1 (1972).

3. See WILLIAM F. BAXTER, *PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION* (1974).

4. WILLIAM F. BAXTER, *The Political Economy of Antitrust*, in *THE POLITICAL ECONOMY OF ANTITRUST: PRINCIPAL PAPER BY WILLIAM BAXTER 3* (Robert D. Tollison ed., 1980).

he was one of the first lawyers (maybe the first) to use calculus in the economic analysis of a legal issue.⁵

I have been speaking thus far only of Bill's academic accomplishments. In 1981 he became the head of the Justice Department's antitrust division. His administration of the division was the most distinguished since Thurman Arnold's, or perhaps ever; and it has not been equaled since. It proved to be a turning point in U.S. antitrust policy, and along with the breaking of the air controllers' strike was one of the defining moments of the Reagan Administration. "[F]rostily cerebral, fiercely independent,"⁶ and alarmingly candid—as when he referred to the "whacko theories and rubbish opinions of the Supreme Court" in antitrust cases⁷—he was witty to boot, as when he said that the purpose of the Robinson-Patman Act was "to put lead weights in the saddle bags of the fastest riders."⁸ He was the first head of the antitrust division to turn his back firmly on the pieties and shibboleths of antitrust policy (though one of his predecessors, Donald Turner, the distinguished lawyer-economist, had taken the first steps in this direction back in the middle 1960s) and to insist in actions as well as words—the most notable action being the abandonment of the Department's monopolization suit against IBM—that the only purpose of antitrust is to promote economic efficiency. His successors, even unto the present Democratic Administration, have toed this line, whatever disagreements they may have with him and with each other over the effect of particular business practices on efficiency. As one journalist summed up,

In two and a half years at the Justice Department, the acerbic 53-year-old law professor disposed of the two largest monopolization suits in history, rewrote the guidelines for corporate mergers, settled several international antitrust disputes and relentlessly pushed antitrust policy away from legal dogma and toward an emphasis on economic efficiency."⁹

In the words of the great antitrust scholar Phillip Areeda, "The greatest strength of his [Baxter's] tenure was a willingness to grapple with difficult and complicated cases and do what he thought was right in a rather courageous way."¹⁰

5. See William F. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267 (1966).

6. Stuart Taylor, Jr., *Fight for the Future: Getting the Ball to Congress*, AM. LAW., Apr. 1992, at 50, 54.

7. Quoted in Michael Isikoff & Merrill Brown, *Baxter's Reign: Evolution, not Revolution; Rethinking of Antitrust Policy Likely to Continue*, WASH. POST, Dec. 11, 1983, at F1.

8. Quoted in *Rill Predicts No Great Merger Change If Clinton Wins Presidential Election*, 63 ANTITRUST & TRADE REG. REP. 338, 340 (1992).

9. Michael Wines, *Experts Say Baxter's Antitrust Bark Was More Radical Than His Bite*, 15 NAT'L J. 2607 (1983).

10. Quoted in David Margolick, *Legacy beyond Mere Policies*, N.Y. TIMES, Dec. 9, 1983, at D4.

Baxter was not a mere retrencher. By threatening to litigate the Department's monopolization suit against AT&T "to the eyeballs,"¹¹ he brought the suit to a triumphant conclusion (over powerful opposition within the Administration, for example from the Defense Department—which he successfully faced down, saying "I do not intend to fold up my tent and go away because the Department of Defense expresses concern"¹²) with the entry in 1982 of a consent decree requiring AT&T to divest itself of the Bell operating companies. This was a landmark in the deregulation movement and set the stage for the enormous growth in telecommunications that is so salient a feature of today's economy, although I share the view of those who believe that it was unwise to limit, as the decree did (and at Baxter's insistence), the right of the operating companies to enter nonregulated businesses. Also of great significance in his tenure as head of the antitrust division was the issuance of merger guidelines in 1982, which codified the modern economic understanding of antitrust economics. Timothy Brennan was quite right to reject the charge that Baxter's appointment as antitrust chief represented the capture of antitrust enforcement by the conservative Reagan Administration.¹³ It represented the depoliticization of antitrust enforcement.¹⁴ It was a triumph of good government, and not just of economic analysis of law.

Bill continued to do good academic work after he returned to Stanford in 1983. I particularly like his 1995 paper with Daniel Kessler in which he attempts to transcend the "horizontal"- "vertical" dichotomy that has so dominated antitrust thinking.¹⁵ Both before and after his stint at the Justice Department he did a great deal of antitrust and other consulting, but I am not familiar with that aspect of his career.

Bill's career has a significance that goes beyond his particular achievements both academic and practical, great though they are. It illustrates a style of academic law that has become unfashionable at leading law schools, a style (also well illustrated by Justice Breyer—but perhaps by very few law professors at these schools who are under sixty) that insists that legal theory, whether interdisciplinary or otherwise, must justify itself by its contribution to improving the legal system rather than by its intrinsic intellectual interest or the fascination that it holds for other academics. The idea that academic law is an adjunct of the practical world of legal practice and public policy used to be dominant and is now fast fading as a younger generation comes up

11. Taylor, *supra* note 6, at 55.

12. Quoted in Robert Pear, *New Antitrust Leader Vows to Break Up A.T.&T.*, N.Y. TIMES, Apr. 10, 1981, at D3.

13. Quoted in *Influence of Economics on Antitrust Predated, Will Survive President Reagan*, ANTITRUST & TRADE REG. REP., Mar. 5, 1987, at 428.

14. See *id.* (stating that the Baxter years represented autonomy from political considerations).

15. William F. Baxter & Daniel P. Kessler, *Toward a Consistent Theory of the Welfare Analysis of Agreements*, 47 STAN. L. REV. 615 (1995).

that sees the audience for its work as other academics—and the judges, practitioners, and government officials be damned.

This is not the place to debate the merits of a form of scholarship that circulates within a vacuum-sealed medium of academic discussion, publication, and debate, with little or no spillover into the world of action. We are here to celebrate an exemplary practitioner of an older and no less worthy form of what in other cultures has been called the engaged intellectual. Bill Baxter's impact on American law and public policy, both directly as a government official and private consultant and indirectly as a seminal contributor to the law and economics movement, has been great; and may his example be an inspiration to coming generations of law professors.