

PART III

Reconciling Equity and Efficiency

*The Challenge of Effective Antitrust Enforcement*

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## Designing Effective Enforcement Systems

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## 14

## Competition Culture and the Cultural Dimensions of Competition

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## 14.1 INTRODUCTION

The late political and linguistic pundit William Safire wrote that “ideology” was “originally a system of ideas for political or social action,” but in what he mischievously declared was current political use, ideology means “a mental straitjacket, or rigid rules for the philosophically narrow-minded.”<sup>1</sup> Professor Eleanor Fox’s ideology is neither rigid nor narrow-minded. Indeed, the flexibility, tolerance, and cultural pluralism of her approach to “competition culture,” both domestically and internationally, are some of its distinguishing characteristics. Her writings provide a background for consideration of both the concept of competition culture and the cultural dimensions of competition.

The Foxian ideology can be quickly summarized with respect to her academic home base of antitrust in the US: it is multidisciplinary and process-oriented, reflecting a passionate interest in broader political and normative values that were being squeezed out of the antitrust enterprise by a single-minded worship of efficiency.<sup>2</sup> Expanding to global horizons, the Foxian ideology emphasizes both the commonalities between jurisdictions and the diversity of national antitrust jurisdictions that must be respected as a fact on the ground and also as a natural outcome of the differences between political institutions, laws, and customs.<sup>3</sup> In this,

My thanks to AAI research fellow Arthur Durst for research and editorial assistance. This chapter does not purport to speak for the AAI.

<sup>1</sup> William Safire, *Safire’s Political Dictionary* (3rd edn, Random House, 1978), 320.

<sup>2</sup> See e.g. the following by Eleanor M. Fox, ‘Modernization of Antitrust: A New Equilibrium’ (1981) 66 *Cornell Law Review* 1140, 1182; ‘The Battle for the Soul of Antitrust’ (1987) 75 *California Law Review* 917; ‘The Efficiency Paradox’, in Robert Pitofsky (ed.), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press, 2008), 77, at 88; ‘Against Goals’ (2013) 81 *Fordham Law Review* 2157, 2160.

<sup>3</sup> See Eleanor Fox, ‘Antitrust and Regulatory Federalism: Races Up, Down and Sideways’ (2000) 75 *NYU Law Review* 1781; Eleanor Fox, ‘Toward World Antitrust and Market Access’ (1997) 91 *American Journal of International Law* 1, 2 (“I conclude that we need a vision of liberal antitrust to fit the

she agrees with Professor David Gerber by emphasizing that the laws of individual states govern global markets.<sup>4</sup>

Within the International Competition Network (ICN), Fox has supported efforts to create what is called “competition culture,” while at the same time urging space for jurisdictions to reflect their own special backgrounds and needs. As she puts it, “[t]he idea that there is one right route is nonsense.”<sup>5</sup> The Foxian ideology stresses that each jurisdiction must be understood as a system and that antitrust is only a part of the system.<sup>6</sup> Professor Fox is therefore suspicious of convergence efforts that fail to recognize deep-seated differences.<sup>7</sup>

Fox has called our attention to context,<sup>8</sup> institutional differences,<sup>9</sup> politics,<sup>10</sup> and culture.<sup>11</sup> Culture has probably been the least developed of these concerns, though always present, and it is to distinctions between the notion of a competition culture and the cultural dimensions of competition that I address this chapter.

worldview of liberal trade; not without derogations, but with a framework for permissible derogations”).

<sup>4</sup> David J. Gerber, *Global Competition* (Oxford University Press, 2010), 3; Stephen Breyer, *The Court and the World* (Knopf, 2015), 99–107 (describing the considerations in the *Empagran* decision and the complexities in dealing with global commerce and national regulation); *F. Hoffmann-La Roche Ltd. v. Empagran SA*, 542 US 155 (2004).

<sup>5</sup> Email from Eleanor Fox to author (February 11, 2016) (quoted with permission; on file with author); Eleanor Fox, ‘Monopolization and Abuse of Dominance: Why Europe Is Different’ (2014) 59 *Antitrust Bulletin* 129, 130 (“[C]onvergence through derived international standards tends to obscure fundamental differences and may thereby detract from a deeper comparative understanding of the law. The efforts presume an ease of and incentive toward horizontal accommodation by each jurisdiction to the other free from loyalty to its own system, and thus they discount the reality that each system answers to its own drummer”).

<sup>6</sup> Eleanor M. Fox, ‘Linked-In: Antitrust and the Virtues of a Virtual Network’ (2009) 43 *International Law* 151, 152.

<sup>7</sup> Eleanor M. Fox, ‘GE/Honeywell: The US Merger That Europe Stopped – A Story of the Politics of Convergence’, in Eleanor Fox and Daniel Crane (eds.), *Antitrust Stories* (Foundation Press, 2007), 331, 356–7 (“A single standard – whether achieved through soft harmonization or world rules – has its costs. Uniform rules, if too specific, would constrain the adaptation of law to a changing world. Moreover, they would frustrate localities’ efforts to frame their own law according to their specific, contextual needs”).

<sup>8</sup> Eleanor M. Fox, ‘Why People Fail in the Struggle with Poverty’, in Consumer Unity & Trust Society (ed.), *Better Governance for Inclusive Growth: CUTS 30th Anniversary Lecture Series 2013–14* (CUTS International, 2014) 91, 92.

<sup>9</sup> Eleanor M. Fox, ‘Antitrust and Institutions: Design and Change’ (2010) 41(3) *Loyola University Chicago Law Journal* 473, 487.

<sup>10</sup> Eleanor M. Fox, ‘Chairman Miller, the FTC, Economics and Rashomon’ (1987) 50(4) *Law & Contemporary Problems* 33–55, n. 107.

<sup>11</sup> Eleanor M. Fox, ‘Monopolization and Dominance in the United States and the European Community’ (1986) 61 *Notre Dame Law Review* 981, 983.

## 14.2 COMPETITION CULTURE AND THE CULTURE OF COMPETITION

### 14.2.1 *A Common But Narrow View of Competition Culture*

The concept of “competition culture” (perhaps coined as a global expansion of the business literature’s “corporate culture”) is frequently referenced in the global antitrust community.<sup>12</sup> The Advocacy Working Group of the ICN issued a “Competition Culture Project Report” (“the Report”) in 2015.<sup>13</sup> The Report picks up on an earlier Working Group project that related “competition culture” to “competition advocacy.” The latter refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.<sup>14</sup>

Development of a competition culture was then identified as “one of the key aims of competition advocacy,” which the Report defined as “the awareness of economic agents and the public at large about competition rules. This included the business community, other governmental agencies, academia and society as a whole.”<sup>15</sup>

The Report is largely based on a survey of ICN Members in 2013–14, in which forty-nine jurisdictions responded to a questionnaire. The working definition of competition culture used in the Report is:

A set of institutions that determine individual and/or group behaviour and attitudes in the sphere of market competition. These are influenced by wider social

<sup>12</sup> e.g. the Turkish Competition Authority’s website provides a paragraph on competition culture, which begins as follows: “The existence of a competition culture has an extremely important role in the succeeding of a competition policy. competition culture mainly involves being informed about the benefits introduced by competition, and the formation and development of the necessary awareness in the society as to the role possessed by the implementation of competition rules in securing such benefits” ([www.rekabet.gov.tr/en-us/pages/competition-culture](http://www.rekabet.gov.tr/en-us/pages/competition-culture)). Another example is a 2010 “Competition Culture” report of the Danish competition authority, whose foreword begins:

This report is a first attempt to identify and describe aspects of the competition culture in Denmark. the term ‘competition culture’ refers to the behaviour of firms, consumers and the public sector in specific market situations and how their behaviour is affected by factors such as legislation and its enforcement, as well as norms and values. the competition culture is a determining factor for the actual intensity of competition in the Danish economy.

The focus of the report and of the supporting analyses is on describing and identifying key aspects of competition cultures in Denmark, Germany, and the UK. As the competition culture has not previously been analyzed, and inasmuch as it is characterized by a quite complex set of causal linkages, this report does not undertake to explain how the competition culture has developed or why it varies from one country to another ([www.en.kfst.dk/media/3333/competition-culture-06012010.pdf](http://www.en.kfst.dk/media/3333/competition-culture-06012010.pdf)).

<sup>13</sup> ICN Advocacy Working Group, *Competition Culture Project Report* (2015), at [www.internationalcompetitionnetwork.org/uploads/library/doc1035.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc1035.pdf)

<sup>14</sup> *Ibid.*, at 3.

<sup>15</sup> *Ibid.*

institutions and public policy choices and include customs impacting the degree of business competition and cooperation within a jurisdiction.<sup>16</sup>

It is further explained that:

This definition recognises that each jurisdiction is situated differently with respect to public policies that promote market competition or cooperation. For example, transition economies and small island economies may be characterised by a more regulatory approach, in which there is greater state involvement in the running of markets and where markets are highly concentrated. It is also important to recognise that the objectives of promoting competition principles of efficiency and consumer welfare can be superseded by other public policy considerations, including social policy, public interest and national security. What may be considered a 'strong competition culture' in one jurisdiction may not be feasible or appropriate in another.<sup>17</sup>

And finally:

Regardless of larger public policy contexts, the mission shared by competition agencies is to pursue enforcement based on sound legal and economic principles, to determine whether specific business conduct harms competition. This task is an anchor for effective competition advocacy and the foundation for building a strong competition culture.<sup>18</sup>

This framework recognizes the ICN membership's predominant antitrust ideology of efficiency and consumer welfare, while also recognizing these concepts have different meanings in different contexts and that they may be superseded by public interest values.

My concern is that neither the ICN nor more than a small handful of scholars has taken what might be thought of as the prior step of delving more deeply into the role of a nation's culture (or even multiple subcultures) in forming fundamental attitudes toward competition and cooperation.<sup>19</sup> In the remainder of this chapter I will explain what I mean and outline a research agenda.

<sup>16</sup> Ibid., at 9. I would like to think that my remarks as a non-governmental adviser to the advocacy working group contributed to the references to institutions, choices, and customs (see American Antitrust Institute, 'Bert Foer Remarks from ICN Advocacy Working Group Workshop' (December 13, 2013), [www.antitrustinstitute.org/content/bert-foer-remarks-icn-advocacy-working-group-workshop](http://www.antitrustinstitute.org/content/bert-foer-remarks-icn-advocacy-working-group-workshop)).

<sup>17</sup> ICN Advocacy Working Group, *Competition Culture Project Report*, 9.

<sup>18</sup> Ibid.

<sup>19</sup> Te-Ping Chen, 'Wheat vs. Rice: How China's Culinary Divide Shapes Personality', *WSJ Chinarealtime* (May 9, 2014), <http://blogs.wsj.com/chinarealtime/2014/05/09/wheat-vs-rice-how-chinas-north-south-culinary-divide-shapes-personality> (contrasting the differences between north and south China – e.g. southerners are less individualistic than northerners – and attributing those differences partially to a reliance on cultivating rice in the south). A recent review of cross-cultural data comparing individualistic with collectivistic cultures may be found in Robert M. Sapolsky, *Behave: The Biology of Humans at Our Best and Worst* (Penguin, 2017), 266–82, 495–500.

As a starting point, let us look briefly at the ICN Competition Culture Report's survey results. "The survey reveals that just under a third of respondents feel confident their government officials understand the social benefits of competition and respect competition principles in its work."<sup>20</sup> "[O]nly a minority of respondents were confident their judges have both a high awareness of competition and are able to understand and interpret economic evidence."<sup>21</sup> "[Twenty-one percent] of respondents said there were no firms or lawyers specialising in competition law and general commercial lawyers dealt with competition law cases. These ten respondents are largely young competition agencies with limited enforcement experience."<sup>22</sup> Competition authorities were also asked to rate competition awareness among large businesses and SMEs within their jurisdictions. Basically (and not surprisingly), large businesses were thought to be more aware of the competition laws than smaller ones and "many firms are still not investing in the sorts of activities and initiatives that raise awareness of competition internally and make it less likely that an infringement will be committed within the firm."<sup>23</sup> Finally, the survey asked competition authorities to estimate competition awareness among members of the public. "The majority of the responses ... show some limited confidence that members of the public have basic competition awareness."<sup>24</sup>

This focus on awareness of competition laws indicates that we surely have a long way to go before key segments of governments, courts, the legal profession, businesses, and the public will understand why we have competition laws, much less why they should voluntarily abide by such laws. *But the conception of culture as being contained in awareness of a law reflects an extremely narrow and potentially misleading view of culture.* Culture is a much broader and, frankly, more important topic, especially when we try to understand a rapidly changing economic institution.

#### 14.2.2 On Strong and Weak Cultural Dimensions

Institutionalist economist Douglass C. North correctly observes: "It is not sufficient to describe societal change; rather we must attempt to find the underlying forces shaping the process of change."<sup>25</sup> The advent of global antitrust as an institution has occurred quickly. I believe that to a large extent, antitrust's expansion, running

<sup>20</sup> ICN Advocacy Working Group, *Competition Culture Project Report*, 10. The survey is subject to numerous methodological criticisms, but it seems to reflect what a self-selected group of responding national competition authorities thinks about how strong a competition culture exists in their nations; 77 percent of the respondents were authorities whose competition policy regime was at least 10 years old; 24 percent had no private enforcement (*ibid.*, Appendix B).

<sup>21</sup> *Ibid.*, at 14.

<sup>22</sup> *Ibid.*, at 15.

<sup>23</sup> *Ibid.*, at 20.

<sup>24</sup> *Ibid.*, at 23. The report has many recommendations for how competition authorities can go about increasing the level of awareness in the various segments of society.

<sup>25</sup> Douglass C. North, *Understanding the Process of Economic Change* (Princeton University Press, 2005), 13.

alongside the dramatic changeover to and freeing up of market economies, has for a great many nations been imposed from the top down. What role was played – and will be played – by cultures? Does it matter whether the underlying cultures of these countries are historically in synch with market competition and its increasingly common antitrust protector? North stressed that “the intimate interrelationship of beliefs and institutions, while evident in the formal rules of a society, is most clearly articulated in the informal institutions – norms, conventions, and internally held codes of conduct.”<sup>26</sup> While not focusing on antitrust as such, North comes close in this observation:

Belief systems embody the internal representation of the human landscape. Institutions are the structure that humans impose on that landscape in order to produce the desired outcome. Belief systems therefore are the internal representation and institutions the external manifestation of that representation. Thus the structure of an economic market reflects the beliefs of those in a position to make the rules of the game, who enact rules that will produce the outcomes (that is, the sort of market) they desire, whether those desires are to create monopoly or to create a competitive market (always with the caveat that their beliefs may be incorrect and produce unanticipated consequences).<sup>27</sup>

We can think of culture as a substructure upon which is built a society’s economy, its political system, and ultimately its laws.<sup>28</sup> However, while it is entirely possible to have laws that are imposed from the top down, as opposed to bubbling up from the underlying culture, it is also possible for laws to shape culture. No doubt the co-evolutionary interactions between culture, politics, and law are complex, multi-directional, and variable.

If culture refers to norms of appropriate behavior that are widely shared in a society, the nature of the relationship with law will depend on how deeply imbedded within the culture a particular norm might be. Consider cigarette smoking. As I was growing up, smoking a cigarette was celebrated in the movies and on television, flaunted in high school halls, and even encouraged during brief breaks in Army basic training (“If you’ve got ‘em, light ‘em up!”). As information on the negative health impact of tobacco became more definitive and subject to both

<sup>26</sup> Ibid., at 50.

<sup>27</sup> Ibid., at 49–50. Economist Joel Mokyr recently observed, “[M]any mainstream economists are now committed to the significance of culture in the evolution of modern economics.” In a book focused on the cultural underpinnings of the industrial revolution, he argues that “culture” affected technology “both directly, by changing attitudes toward the natural world, and indirectly, by creating and nurturing institutions that stimulated and supported the accumulation and diffusion of ‘useful knowledge’” (*Culture of Growth: The Origins of the Modern Economy* (Princeton University Press, 2017), 7).

<sup>28</sup> Geert Hofstede, Gert Jan Hofstede, and Michael Minkov, *Cultures and Organizations: Software of the Mind* (3rd edn, McGraw-Hill, 2010). This is a key resource on cross-cultural research. The authors define culture as “the unwritten book with rules of the social game that is passed on to newcomers by its members, nesting itself in their minds” (ibid., at 26).

governmental regulation and non-governmental anti-smoking advocacy, the behavioral norm gradually but substantially changed. In this case, law and education combined to alter the behavioral norm, but it took roughly several generations to have a substantial impact, and even today there is a resurgence of tobacco use in certain segments of US society.

A more dramatic change apparently occurred with regard to the social acceptability of sexual lifestyles that were until recently widely condemned by law, religion, and social practices. In less than a generation, social practice and the law itself led the way toward change, so that today the federal law recognizes a constitutional right to same-sex marriage. Social practices have definitely changed in the direction of greater toleration but supporters of traditional marriage have indicated that the cultural and political battle to reverse the law or at least control the social acceptability of non-traditional lifestyles will go on. What does this have to do with competition?

These examples suggest that some types of cultural norms are susceptible to change from the top down, over varying durations and with varying intensities of change advocacy. The case of cigarette smoking involved political intervention by federal, state, and local governments as well as expanding scientific knowledge and its widespread dissemination, within a context that related to habits created by advertising and an addictive drug. The case of gay rights involved intervention by the courts more than by elected officials within a context of deeply held religious values. Using an analogy to the ICN Report's "strong or weak competition culture," one could say that change in smoking habits takes place within a relatively weak social culture while the evolution of gay rights takes place within a stronger and religiously based culture.

The question posed for the future of global antitrust convergence is whether cultural attitudes toward competition and cooperation are relatively weak or relatively strong. Are they malleable enough that universal standards can not only be formally imposed by governments, but also sustained through enforcement over a prolonged period of time? Or will we find out that fundamental attitudes and values are of such a strong nature that political systems will not adopt universal standards in their laws, or that even if they do, variations in enforcement will reflect diverse cultural attitudes that effectively undermine the formal law? Or, a third alternative: will there be a kind of compromise outcome where some areas of antitrust (such as civil anti-cartel enforcement) are susceptible to universal standards while others (such as unilateral conduct by dominant firms) are not? The future extent and success of antitrust convergence will depend to a significant degree on how we answer these questions.

#### *14.2.3 Cultural Clusters and Competition–Cooperation*

Multinational corporations are grappling with doing business around the world in varying cultural environments. David Livermore, president of the Cultural

Intelligence Center and a consultant to such multinationals, has written a book to prepare the businessperson to recognize and deal with diverse cultural contexts. He describes ten cultural clusters in terms of their key cultural value dimensions.<sup>29</sup> The cultural value dimensions of most relevance to antitrust would appear to be individualism/collectivism and cooperative/competitive.

Livermore says that “cooperative” cultures are characterized by “[e]mphasis upon cooperation and nurturing behavior; high value placed upon relationships and family.” “Competitive” cultures are characterized by “[e]mphasis upon assertive behavior and competition; high value placed upon work, task accomplishment, and achievement.”<sup>30</sup> His examples of clusters where cooperative values are highest include Nordic and sub-Saharan African clusters, while examples of clusters where competitive values are highest include Anglo and Germanic cultures. Clusters falling in the middle of the cooperation/competition scale include Arab, Confucian Asia, Eastern Europe, Latin America, and Latin Europe.<sup>31</sup>

Obviously, these dimensions, drawn from the study of cultural anthropology, are not intended to relate competition or cooperation directly to a particular form of government or economy, not to mention a particular approach to antitrust law. Nor can one necessarily jump from relationships in the home and family to attitudes toward marketplace competition, although one detailed critique of competition in the US pays roughly equal attention to sports, education, and the economy,<sup>32</sup> raising at least the possibility that a particular culture may hold a consistent view on competition that is reflected in all three of the principal categories of recreation,

<sup>29</sup> David Livermore, *Expand Your Borders: Discover 10 Cultural Clusters* (Cultural Intelligence Center, 2013). Appendix B defines seven pairs of cultural dimensions and examples of countries within ten different cultural clusters: (1) individualism (“individual goals and rights are more important than personal relationship”); collectivism (“personal relationships and benefiting the group are more important than individual goals”); (2) low power distance (“status differences are of little importance; empowered decision-making is expected across all levels”); high power distance (“status differences should shape social interactions; those with authority should make decisions”); (3) low uncertainty avoidance (“focus on flexibility and adaptability; tolerant of unstructured and unpredictable situations”); high uncertainty avoidance (“focus on planning and reliability; uncomfortable with unstructured or unpredictable situations”); (4) cooperative (“emphasis upon cooperation and nurturing behavior; high value placed upon relationships and family”); competitive (“emphasis upon assertive behavior and competition; high value placed upon work, task accomplishment, and achievement”); (5) short term (“values immediate outcomes more than long-term benefits (success now)”); long term (“values long term planning; willing to sacrifice short term outcomes for long-term benefits (success later)”); (6) low context (“values direct communication, emphasis on explicit words”); high context (“values indirect communication, emphasis on implicit understanding”); (7) being (“social commitments and task completion are equally important; diffuse boundaries between personal and work activities”); doing (“task completion takes precedence over social commitments; clear separation of personal and work activities”) (ibid., at 101).

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Alfie Kohn, *No Contest: The Case Against Competition* (Houghton Mifflin, 1992). Kohn observed, “[D]ifferent cultures depend on competition to different degrees in structuring their economic system or schooling or recreation. At one end of the spectrum are societies that function without any competition at all. At the other end is the United States” (ibid., at 1–2).

education, and the economy. Given the reciprocal impact of laws and institutions on culture, this seems to me unlikely.

The whole matter is complicated.<sup>33</sup> In Livermore's analysis, certain cultural dimensions such as individualism (rather than collectivism), low power distance, low uncertainty avoidance, low context, and doing orientation<sup>34</sup> would appear to be present for the US, UK, and Germany, which are categorized as the principal proponents of marketplace competition. On the other hand, the Nordic cluster is placed by Livermore within the extreme individualism end of the individualism/collectivism scale alongside the Anglo and Germanic cultures, but is also placed within the extreme cooperative dimension and the extreme "being orientation" whereas the Anglo and Germanic clusters are not only within the extreme competition end of the cooperative/competition scale, but also in the "doing orientation" extreme of the "being orientation/doing orientation" scale.

In other words, there is an interplay between the various cultural dimensions that relate to marketplace competition.<sup>35</sup> Stress on individualism may be typical of strongly pro-market countries, but can also characterize a highly cooperative culture. This fact might suggest caution about assuming that education, recreation, and economy within a given country will all reflect similar attitudes toward competition-cooperation.

It is intriguing to observe that the US is usually considered to be at the extreme competitive end of the individualism/collectivism scale, but a few years ago when I had a conversation with a group of competition lawyers in a former Soviet satellite country, I asked them if the competition lawyers there had their own organization. "No," they answered; in their country, everyone worries only about his own business. It is not, they pointedly said, like they perceive it to be in America, where people voluntarily join with their competitors for the betterment of the community. I was reminded of the American icon, Benjamin Franklin, advocate of the competitive norm ("time is money," "early to bed, etc.") and also founder of public libraries, post

<sup>33</sup> I go into this in more detail in Albert Allen Foer, 'Culture, Economics, and Antitrust: The Example of Trust' (2018) 63(1) *Antitrust Bulletin* 65. The literature on the relation of culture to human behavior is excellently related and evaluated in Sapolsky, *Behave*.

<sup>34</sup> Livermore, *Expand Your Borders*.

<sup>35</sup> Andrew I. Gavil, 'Competition and Cooperation on Sherman Island: An Antitrust Ethnography' (1995) 44 *DePaul Law Review* 1225, 1226–7 (fn. omitted):

More than just an economic policy reflected in the antitrust laws, competition is a pervasive component of the fabric of American life that emerges in discussions of all aspects of political, social and economic institutions. As a category of human relations, however, competition exists only in relation to other norms. 'cooperation' and 'individualism' are as much a part of the American culture as is 'competition', and at the source of each are 'relationships' – social, economic, and political. We define ourselves, our families, our governments, even our civilizations in terms of these relationships; be they 'competitive', 'cooperative' or 'individualistic.' Each of these concepts, however, masks a complex of assumptions about human behavior and character, the role of government and the character of business. those assumptions are deeply rooted in the American historical experience, indeed in the broader history of the development of western civilizations, and are in a continuing state of evolution.

offices, and social groups galore. We are a nation of joiners and cooperators and also a nation of competitors.

Exactly what characteristics should a researcher consider in evaluating how competitive a given culture actually is? And how far back in time should one look? For example, in the case of formerly communist countries, should one look for a tsarist culture, pre-communist culture, communist culture, or a post-communist culture? Where is the appropriate benchmark in any particular society?<sup>36</sup>

#### 14.2.4 Competition and Cooperation

Another question worth pondering is whether it is appropriate to treat competition and cooperation as two ends of a cultural spectrum. Clearly the two concepts are closely related. A substantial amount of scholarship has investigated the relationship, including the disciplines of anthropology, evolutionary science, and game theory. We now think we know a good deal about how the earliest communities of hunter-gatherers were organized and how customs of cooperation developed over time. Game theorists have used computer simulations to test out various models over the equivalent of thousands of years of evolution, revealing the likely role of direct reciprocity, indirect reciprocity (the power of reputation), spatial selection and multilevel selection, kinship, and punishment in generating behaviors that are altruistic or otherwise cooperative.<sup>37</sup> We are even beginning to learn about neural mechanisms that may affect levels of

<sup>36</sup> Ibid., at 1250 (fn. omitted):

Americans throughout our history have simultaneously exhibited enthusiasm for economic growth and apprehension for the safety of our cherished political, social and economic freedoms in the face of large institutions, be they governmental or economic. And while early Americans formulated those feelings based upon their colonial experience, later generations have faced their own demons, only to arrive at the same state of cultural impasse. Ironically, despite the many differences among Americans that can flow from distinct historical encounters with authority, there persists common ground, a core American, and perhaps not so American, character, that desperately wants to balance the desire for personal autonomy, the profound need for community and the fear of the 'leviathan', however clothed. Culturally, we looked to antitrust in 1890, and continue to do so today, to resolve that imbalance. And that is a tall order for competition law to fill.

See also Colin Woodard, *American Character: A History of the Epic Struggle between Individual Liberty and the Common Good* (Penguin, 2016).

<sup>37</sup> Albert A. Foer, 'Competition, Cooperation, and Martin Nowak's Supercooperators', American Antitrust Institute (July 28, 2015) (mimeo) (reviewing Martin Nowak, *The Supercooperators: Altruism, Evolution, and Why We Need Each Other to Succeed* (Free Press, 2011)). A great deal of thought has gone into the origins of cooperation, see: Ashley Montagu, *Darwin, Competition and Cooperation* (Schuman, 1952); Robert Axelrod, *The Evolution of Cooperation* (Basic Books, 1984); Robert Wright, *The Moral Animal: Why We Are the Way We Are* (Abacus, 1995); Matt Ridley, *The Origins of Virtue, Human Instincts and the Evolution of Cooperation* (Penguin, 1996); Robert Wright, *Nonzero* (Pantheon, 2001); Geerat J. Vermeij, *Nature: An Economic History* (Princeton University Press, 2004), 4–21; Samuel Bowles and Herbert Gintis, *A Cooperative Species:*

competitiveness in individuals,<sup>38</sup> which suggests a truly exciting line of future inquiry: does the presence of the neuroactive hormone oxytocin, which may be linked to feelings of cooperativeness, vary from one culture to another, and if so, are these variations consistent with differences in observed attitudes toward competition and cooperation? And if there turns out to be a correlation, does causation run from oxytocin to cooperation or from cooperation to oxytocin? Or both?

Even if the starting point for natural selection is pure competition, we get to the possibility, indeed the necessity, of cooperation. But competition and cooperation are closely intertwined, as is increasingly being pointed out by some advocates of innovation and creativity.<sup>39</sup> From earliest history, anthropologists believe that small hunter-gatherer groups cooperated internally but competed against other groups.<sup>40</sup> Judge Frank Easterbrook, after acknowledging “the picture of ‘pure competition’ found in economic texts, is a hypothetical construct,” draws on Ronald Coase’s theory of the firm to succinctly describe the relationship of competition and cooperation within the antitrust context:

*Human Reciprocity and Its Evolution* (Princeton University Press, 2011); Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Harvill Secker, 2015); Sapolsky, *Behave*.

<sup>38</sup> Paul J. Zak, ‘Values and Value’, in Paul J. Zak (ed.), *Moral Markets* (Princeton University Press, 2008), 266–70 (“In sum, a large number of researchers have demonstrated that the neural representation of moral values is automatic and difficult to suppress, and often utilizes affective representations in the brain. I propose that values in economic transactions utilize similar neural mechanisms” (ibid., at 270)); Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Penguin, 2012), 270–4 (“The men who received oxytocin [via nasal spray] made less selfish decisions – they cared more about helping their group, but they showed no concern at all for improving the outcomes of men in the other groups”); Sapolsky, *Behave*, at 108–17, summarized at 135 (“Oxytocin and vasopressin facilitate mother–infant bond formation and monogamous pair-bonding, decrease anxiety and stress, enhance trust and social affiliation, and make people more cooperative and generous. But this comes with a huge caveat – these hormones increase prosociality only toward an us. When dealing with them, they make us more ethnocentric and xenophobic. Oxytocin is not a universal love hormone. It’s a parochial one”). Sapolsky, a biologist and neurologist, provides the most recent summary of what is known (Robert M. Sapolsky, *Behave* (Penguin, 2017)).

<sup>39</sup> Charles Leadbeater, ‘Why Co-Operation Will Be More Important Than Ever’, *The Guardian* (January 3, 2012), at [www.theguardian.com/sustainable-business/co-operation-more-important-competition-charles-leadbeater](http://www.theguardian.com/sustainable-business/co-operation-more-important-competition-charles-leadbeater) (“Milton Friedman argued that self-interest is fundamental to economic growth, actuating agents. He was wrong: most people, most of the time, are motivated by co-operation and fairness, as well as self-interest. An economy that neglects co-operation and fairness will not innovate and grow”).

<sup>40</sup> Sapolsky, *Behave*, ch. 11. Consider this description of a relationship between competition and cooperation in keiretsu capitalism in Japan in the 1990s: “Despite the well-known Japanese desire for harmony, there is nothing sentimental about these unions; they can be ruthless. Each keiretsu resembles a fighting clan in which business families join together to vie for market share. Keiretsu and cartels or cartelized groups recognize one another as competitors, as ‘us’ versus ‘them’, just as competing companies elsewhere in the west do. And virtually all business activity is part of one or another keiretsu or cartel” (Robert L. Cutts, ‘Capitalism in Japan: Cartels and Keiretsu’ (July–August 1992) *Harvard Business Review*, at <https://hbr.org/1992/07/capitalism-in-japan-cartels-and-keiretsu>).

Every market entails substantial cooperation over some domain in order to facilitate competition elsewhere. Every firm has webs of internal cooperation. Exxon entails far more coordination than the average cartel. Every joint venture, every partnership, indeed every contract creates cooperation among people who might otherwise be rivals. Markets themselves are organized . . . Antitrust law permits, even encourages, cooperation within a ‘firm,’ for such cooperation is the basis of economic productivity. But everything done within a firm could be done by market transactions as well.<sup>41</sup>

A specific example of the interrelationship of competition and cooperation is the way antitrust approaches the setting of standards by competitors and potential competitors. The cooperative setting of standards, even with its inherent risks of both horizontal and vertical collusion, is generally encouraged because of the value it can bring to the economy in the form of technological advancement, but certain activities within this context may be challenged as abusively anti-competitive. Antitrust draws the line between positive and negative, authoritatively approved and disapproved instances of cooperation. Similarly, antitrust as well as other laws such as those relating to arson, bribery, and murder, approves or disapproves of certain modes of competition. In this sense, *the fundamental purpose of antitrust should be seen as assigning both competitive and cooperative values to various classes of economic behavior, such as mergers, horizontal collusion, vertical restraints, monopolization, and natural monopoly.*

It seems to me, then, that we make a mistake in our rather modern conception of antitrust as being fundamentally about competition, as if what Easterbrook labeled ‘pure competition’ is the necessary default. Rather, antitrust is a nation’s political tool for drawing lines defining when cooperation is the desired mode and when it is competition, or when some combination is most appropriate, and the line-drawing is likely to be influenced – to a degree that is not entirely clear – by the nation’s cultural values.<sup>42</sup> Finally, when we attempt to place a national orientation on a competition–cooperation spectrum, à la David Livermore, we need to be clear

<sup>41</sup> Frank H. Easterbrook, ‘The Limits of Antitrust’ (1984) 63(1) *Texas Law Review* 1; see also his opinion in *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (“Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment”).

<sup>42</sup> In the US, as many court opinions note, the Sherman Act is not read literally to bar every restraint of trade. The courts have been engaged in identifying the contours and particulars of appropriate and inappropriate cooperation and restraints for over a hundred years now. See generally FTC & Department of Justice, *Antitrust Guidelines For Collaborations Among Competitors* (2000), [www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf](http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf); OECD, *OECD Reviews of Regulatory Reform: Indonesia Competition Law and Policy* 5 (2012), n. 5, [www.oecd.org/indonesia/chap%203%20-%20competition%20law%20and%20policy.pdf](http://www.oecd.org/indonesia/chap%203%20-%20competition%20law%20and%20policy.pdf) (explaining that Indonesian competition law has “concurrent purposes” with “Pancasila,” a broad national philosophy that includes “(i) belief in one god; (ii) just and civilised humanity; (iii) the unity of the country; (iv) democracy guided by the inner wisdom in the unanimity

about whether we are really advancing a generalization about the culture's shaping of education, recreation, or economy, taken together; or whether we are focusing on one important aspect of a culture, say its attitude toward markets as compared to central planning, based on the coming together of a number of other cultural values in conjunction with the vagaries of history.

The close relationship of competition and cooperation finds its way into the title of a book by business school professors Adam Brandenburger and Barry Nalebuff: *Co-opetition*. As they put it, “[b]usiness is cooperation when it comes to creating a pie and competition when it comes to dividing it up.”<sup>43</sup> Co-opetition may be a useful term for certain market phenomena, but it may mask the variety of proportions with which competition and cooperation are likely to be mixed under comparable circumstances within a diverse group of nations.

#### 14.2.5 Divergent Cultural Norms and Antitrust

Several scholars based outside of the US/Western Europe tradition have reviewed social science literature and applied it to their local expertise in competition law. For instance, the invidious nature of cartels today seems to be one of the most widely shared perceptions in the international antitrust arena, while vertical relations tend to be viewed with more variations. Both cartels and vertical relations are used by Professor Thomas K. Cheng of the University of Hong Kong to make the point that “Divergent cultural norms mean that firms and consumers may behave differently across countries.”<sup>44</sup> “Cartels in countries with a more trusting culture will tend to be more stable. Traditional mechanisms that have proved to be effective in breaking down the trust among cartel members may be less useful in these countries.”<sup>45</sup>

Cheng cites the fact that stability and long-term relationships are more valued in some countries, such as Japan, than in others, illustrating that “the incentives to enter into vertical agreements may vary across cultures.”<sup>46</sup> Cheng believes that the cultural value most directly implicated by abuse of dominance claims is

arising out of deliberations amongst representatives and (v) social justice for all the people of the country”).

<sup>43</sup> Adam M. Brandenburger and Barry J. Nalebuff, *Co-Opetition* (Harvard Business School, 1996), 4.

<sup>44</sup> Thomas K. Cheng, ‘How Culture May Change Assumptions in Antitrust Policy’, in Ioannis Lianos and D. Daniel Sokol (eds.), *The Global Limits of Competition Law* (Stanford University Press, 2012), 205.

<sup>45</sup> *Ibid.*, at 206; Foer, ‘Culture, Economics, and Antitrust’.

<sup>46</sup> Cheng, ‘How Culture May Change Assumptions in Antitrust Policy’. Apparently, East Asians process information differently from westerners. The former have a more holistic as opposed to focused manner. For example, typically westerners’ eyes first look at a picture’s center, while East Asians scan the overall scene. Sapolsky, *Behave*, at 276. A holistic approach toward vertical antitrust issues would be more likely to capture power relationships than the US approach which focuses more on in-market competition. Compare the US and Japanese/Korean handling of abuse of a supplier by a powerful buyer. The US involvement is limited to concern with abuse of monopoly power; both Japan and Korea have statutes outlawing abuse of superior bargaining power. See Albert A. Foer, ‘Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?’, American

competitiveness, saying “there seem to be marginal differences in competitiveness across different cultures that may affect the likelihood of abusive conduct by dominant firms.”<sup>47</sup> His overall conclusion is consistent with the Foxian ideology: “A drive for complete convergence is likely to be counterproductive and may even compromise the effectiveness of enforcement in jurisdictions with a significantly different cultural milieu from the mainstream antitrust jurisdictions in the West.”<sup>48</sup>

Ki Jong Lee, a South Korean law professor, writes this:

Countries with individualistic values are likely to have a more rigorous anti-cartel policy than those with collectivist ones; countries with high tendency to avoid uncertainty are inclined to have a relatively lax anticartel policy and countries with a similar combination of cultural values to that of the United States tend to have a more rigorous anticartel policy; Anglo cluster countries (United States, Canada, United Kingdom, Ireland, Australia, and New Zealand) tend to have a relatively rigorous anticartel policy.<sup>49</sup>

Based on similar value systems in Korea, China, and Japan, Professor Lee advocates the potential of promoting competition-friendly values on a regional level in northern Asia to promote the convergence of competition policies in the region. He concludes his discussion with these relevant insights:

From a static point of view, the correlation between national culture and competition policy might simply represent the cultural limits on competition policy. But the correlation works both ways – culture affects competition policy and vice versa. Countries could maximize the receptiveness of their competition policies by aligning them with their national culture.<sup>50</sup>

The Latin American region is described by Julian Pena, an antitrust attorney in Argentina. Latin American countries, he says, “do not have a competition culture. Centuries of Spanish and Portuguese (in the case of Brazil) colonialism forged the roots of an anti-market institutional system where the government is omnipresent.”<sup>51</sup> Moreover, based on Latin America’s inherited Catholic values, he observes that individual success is relegated to social justice and to the prioritization of family and friendship. Also, “[i]ndividual success is not necessarily perceived by society as something positive and generally provokes distrust as to the means used to achieve such success.”<sup>52</sup>

Antitrust Institute Working Paper No. 16–02 (2016), [www.antitrustinstitute.org/sites/default/files/aii%20working%20paper%20no.%2016-02.pdf](http://www.antitrustinstitute.org/sites/default/files/aii%20working%20paper%20no.%2016-02.pdf)

<sup>47</sup> Ibid., 218–29.

<sup>48</sup> Ibid., 220.

<sup>49</sup> Ki Jong Lee, ‘Promoting Convergence of Competition Policies in Northeast Asia’, in Lianos and Sokol (eds.), *Global Limits of Competition Law*, at 222–3.

<sup>50</sup> Ibid., at 234.

<sup>51</sup> Julian Pena, ‘The Limits of Competition Law In Latin America’, in Lianos and Sokol (eds.), *Global Limits of Competition Law*, at 237.

<sup>52</sup> Ibid., at 240.

Pena's discussion highlights the problem of top-down imposition of antitrust rules:

Since the late 1980s (at least until the late 1990s), Latin American countries started implementing the premarket policies included in the so-called Washington Consensus. In particular the different countries, at their own pace and manner (1) deregulated their economies, (2) privatized the state owned enterprises, (3) eliminated some government subsidies, (4) received strong foreign investments inflows, (5) liberalized their foreign trade, and (6) implemented competition policies. This overnight pendulum shift of the economic paradigm was not a result of a drastic self-examination and recognition of the failure of the previous paradigm. Instead, it was a set of "recommendations" from the Washington-based international financial institutions, which needed to be followed by the different countries in order to attain debt relief.

The failure of the Washington Consensus policies to provide sustainable development with social welfare in the region resulted in a return to the greater state interventionism paradigm . . . A common response to the crisis of the Washington Consensus in the region is characterized by a greater presence of the state in the market.<sup>53</sup>

All of which leads Pena to conclude that "competition laws in Latin America in theory look identical to those of developed countries but their enforcement differs substantially given different economic, political, institutional, and cultural environments."<sup>54</sup>

### 14.3 CONCLUDING REMARKS

I have provided in this chapter a sampling of culture-based commentary by a few antitrust scholars. I believe it is likely to be representative of what we would find if a more systematic effort were made to investigate the linkages between national cultures and national competition policies and their enforcement. On that basis, I want to offer several concluding observations and a proposal for further research.

First, I believe that the material presented here justifies a skeptical view of how far convergence of international competition policies is likely to go. A nation's culture, along with its particular history and institutions, contributes to the manner in which the state combines values relating to competition and cooperation. But causation is difficult to untangle and how cultural values manifest themselves in substantive policy, procedure, and enforcement is likely to vary not only by country, but by time period and by category of economic behavior (such as horizontal collaboration, merger controls, dominance, vertical arrangements, and sectoral regulation). Complexity also enters because different aspects of culture may be distinguished

<sup>53</sup> *Ibid.*, at 237–8.

<sup>54</sup> *Ibid.*, at 250.

by their susceptibility to change and because there is a co-evolution of culture with institutions, including law and economic knowledge.

Second, I believe that a multidisciplinary approach to the relationship of competition and cooperation undermines the teaching of some economic theorists that an efficiency-based, consumer welfare model should become a universal standard for all nations having market economies.<sup>55</sup> Deeply held values of fairness and sharing of power may be reflected differently by subcultures within a nation, and the generation of competition policy may reside more with an elite that shares a particular competition culture than with subgroups within the nation or, in the case of a democracy, the electoral majority. It is therefore possible that a national competition authority within which a particular competition culture predominates will be able to promote and extend its vision of competition policy to additional subgroups within the nation, as is encouraged within the ICN. But this should not be premised on the idea that there is a single universal conception of competition policy that captures all national competition authorities any more than it should be premised on an assumption that a single vision can be sold to cultural groups aligned with some different values.

And, third, I believe the conception of a continuum of competition and cooperation also undermines the neoclassical paradigm of antitrust based on the rational economic man. We've learned too much about the psychological aspects of economic behavior and the variability of cultural inputs to be satisfied with a model that oversimplifies by eliminating these complex factors. The determination of where to emphasize competition and where to emphasize cooperation, and how to combine

<sup>55</sup> In the overview and synthesis of an intriguing study of experimental games played by diverse groups in small-scale societies, the editors point out that:

The institutions that define feasible actions may also alter beliefs about consequences of actions and the evaluation of these consequences. For example, a market-oriented society may develop distinct cognitive capacities and habits. The fact that almost everything has a price in market-oriented societies provides a cognitive simplification not available to people in societies where money plays a lesser role . . . to take another example, extensive market interactions may accustom individuals to the idea that interactions with strangers may be mutually beneficial. by contrast, those who do not customarily deal with strangers in mutually advantageous ways may be more likely to treat anonymous interactions as hostile or threatening, or as occasions for the opportunistic pursuit of self-interest.

Joseph Henrich et al. (eds.), *Foundations of Human Sociality: Economic Experiments and Ethnographic Evidence from Fifteen Small-Scale Societies* (Oxford University Press, 2004), 46

Importantly, the two principal lessons from these studies, at 5, are: first, "There is no society in which experimental behavior is even roughly consistent with the canonical model of purely self-interested actors; second there is much more variation between groups than has been previously reported, and this variation correlates with differences in patterns of interaction found in everyday life." In other words, the results of experimental games conducted with college students in western industrialized cultures and those conducted in non-industrialized small-scale societies reflect very different ways of thinking and valuing. The types of small-scale societies studied are not directly comparable to most nations with antitrust laws, but the variations found support the belief that cultural and institutional differences among antitrust nations deserve serious academic attention.

the two strategies, has to sip from the full cup of social science, including its recognition of cultural and social diversity. Finding the right mixture for a given culture is at essence a job for politicians.

These are my thoughts, but who can say for certain? Empirical and theoretical work needs to be done on a much-enlarged database. A large-scale and systematic study comparable to Michael Porter's four-year study of the national attributes that foster competitive advantage in particular nations and particular industries could be a useful model.<sup>56</sup> Researchers should be drawn from the ranks of legal and economic experts familiar with each target nation's competition policies and they should be tasked with absorbing both the international and local social science literature covering cultural anthropology, history, sociology, political science, religion, philosophy, law, and, yes, economics. Their work product should take the form of a series of ethnographies that describe the operative cultural forces and the extent to which these are reflected in the local history of competition policies and their actual enforcement, including their enactment and any transformation over time. A leadership team would draw generalizations from the ethnographies.

The objectives of such a study would include determination of the relationship between cultural values and national competition policies; assessment of cross-cultural generalizations that do or do not work; depiction of similarities and differences in competition policy regimes; identification of categories of economic behavior that are more or less likely to become subject to the same rules; and, ultimately, prediction of the extent and pace of convergence and harmonization of national competition policies.

At the same time, the study should explore the co-evolution of institutions and values, showing where the enactment of competition laws has or has not led to changes in culture more broadly or competition culture more narrowly.

Perhaps the following three more abstract questions are most basic: (1) what are the best standards for comparing the cultural dimensions of competition and cooperation among nations? (2) To what extent do these cultural differences influence thinking and action about competition laws, policies, and enforcement in specific countries? And (3), under what circumstances are cultural dimensions with respect to competition and cooperation more likely to be enduring or malleable?

<sup>56</sup> Michael E. Porter, *The Competitive Advantage of Nations* (Free Press, 1990). Porter focused on ten nations most closely and utilized over thirty researchers, most of whom were natives of, and based in, the nation they were studying (*ibid.*, 24).