

## Separate Statement of Deborah Malamud

I concur in the Committee majority's recommendation that Peter Hammer be granted tenure, and I would be pleased to have him as a permanent member of the faculty.

Since it is not the usual thing for a separate concurring statement to appear in a Committee report, let me start by explaining why I am writing one, with the chief aim of dispelling any negative inferences about the Committee's deliberations that this statement might otherwise raise.

As will appear below, I find the case for tenure to be a closer one than does the majority. It took me longer than it took the others to come to a bottom line -- perhaps embarrassingly long, given the thoroughness of our deliberations and the many meetings we have had since the fall. Given my uncertainty, I encouraged the emergent majority to write for itself so as not to be delayed by me. Once I concluded that I would support a grant of tenure, I decided that it would be a mistake for the majority to dilute the strength of its own written endorsement of tenure by weakening it any way to meet my concerns. I also developed the view that in a case in the current posture, it was affirmatively a good idea to lay out more than one route through which a recommendation of tenure could emerge. I mean no disrespect to the majority by writing separately, and wish to emphasize that there was no failure of deliberation here, no unwillingness on the part of the majority to meet my concerns. I have fully participated in Committee deliberations throughout the process. The majority has taken my input into the content of its report very seriously, and input from the Committee has vastly improved (I hope) the quality of the document you are now reading. Feel free to attribute my decision to write separately to my procrastination or egotism or bad judgment or some combination of the three if you must, but please do not attribute it to any process failure in our deliberations.

Now on to the substance of my views.

As the Committee report states, our tenure standards require a layering of judgment on teaching, scholarship, and service. I come to Hammer's scholarship sharing the judgment, expressed by both Committees to examine Hammer's record, that his teaching and service are exemplary. He is, for these reasons, of considerable value to our community. The difficult question in Hammer's case has always been the quality of his scholarship, and so it remains. I concur in the Committee's conclusion that Hammer's scholarship is now tenureworthy under our standards. I agree, as well, that the case for tenure is made on the strength of Hammer's post-deferral work, but that the best of his earlier work provides further support for a grant of tenure. (In particular, the faculty might do well to examine Glied's letter, which focuses on Hammer's earlier contributions to issues of industrial organization.)

Our tenure standards require a candidate to produce "work that demonstrates the *high intelligence, care and perception* one would expect of a person on the way to becoming a leading scholar," and that the work "also make a *significant contribution to scholarship*" (emphasis added). This faculty does not make it a practice to dissect "high intelligence, care, and perception" into three distinct qualities, and I would not suggest that we do so. Nonetheless, I have found that making an analytical distinction among them aids me in articulating the grounds for my own decision.

I am convinced by Hammer's work and by many of the letters (including some with negative or ambivalent bottom lines) that Hammer's work shows *high intelligence and perception*. He has a clear understanding of a set of important and complex problems in the health care field, and brings to bear on those problems a sophisticated understanding of the uses and limits of neoclassical and institutional economics that only someone of high intelligence could achieve. Even some of his greatest detractors so acknowledge. The majority report quotes from the review letters to make this point, and I am in full agreement with the majority's conclusions in this regard.

On the question of *care*, however, I find Hammer's file troubling. By "care" I do not mean dishonesty in research practices, sloppiness in citation, or other similar failings. I do not even mean errors in economic or empirical methodology, which are stressed by some reviewers but which others find unproblematic. I mean "care" more in the sense of attention to the craft of writing. Put plainly, I find

Hammer's writing an obstacle rather than an aid to understanding. (I should note, though, that not all of the reviewers agree with my negative assessment of Hammer's writing – Arrow and Sage both praise Hammer's style, Kauper finds the pieces he reviews well-written, and even Ben-Shahar credits some of the work with "elegant writing." I respectfully disagree.) I don't mean merely that his sentences are awkward (which they often are). I mean that in a variety of ways, his writing makes it hard for readers to capture and measure the significance of his arguments.

Let me offer some examples. In Antitrust Beyond Competition (Mich. L. Rev.), Hammer does not adequately signal where he is summarizing existing literature and where he is breaking new ground. His response to adverse comments does a far better job on this score than does the text of the article itself. Some serious criticisms of the work could have been avoided if Hammer had been more direct about why traditional law and economics treatment of legal interventions in the face of market failure fall short of the full-scale institutional analysis that he advocates. Assuming that Hammer and Fox are right that Hammer's economic analysis breaks new ground, I think the blame for critics' failure to see that contribution cannot be laid entirely (as Hammer suggests) on their biased precommitments. His style of exposition must bear part of the blame.

An additional way in which Hammer's exposition diminishes the impact of this article is in the abstract manner in which it approaches issues of implementation. Elhauge suggests that Hammer was not sufficiently concrete in his engagement with "the institutional issues that it seems to me are actually the ones central to the debate," and even Sage acknowledges that Hammer fails to cash in on his comparative advantage as an experienced antitrust litigator when he says that "the concluding section could have been stronger; specifically, his attempt to connect his proposal to his own experiences in antitrust litigation fell flat for me."

In Antitrust, Health Care Quality, and the Courts (Colum. L. Rev.), the authors have retained numerous passages in which they continue to claim that they are, in fact, engaged in a rigorous statistical analysis of quality-talk in health antitrust cases. Here the craft problem is not only in the writing, but in the conceptualization of the project. It should have been apparent to the authors early in the coding exercise that far too few cases devoted any serious attention to quality for a case-counting methodology to be appropriate. It would have been far better to use their coders (or more traditional law-professorial research methods) to identify exemplary cases as examples of "how to" and "how not to" consider quality, and to discuss those cases in depth. If, instead, they wanted to go forward with their case-counting, they should have written a piece that claimed to do no more than to paint a quantitative portrait of the field of health care antitrust law. Such a piece would be dull reading, to be sure, but it might well be useful to those whose own practice or scholarship occupies one small corner of the field to have a better sense of the relative importance of that small corner to the field as a whole. Whether such a piece would be a "significant contribution" would be another story. But at least it would not leave itself so open to critique.

Another problem with this article, also attributable to weak craftsmanship, is that the authors purport to be able to tell "good" quality analysis from "bad" quality analysis, without anywhere disclosing the theoretical basis for their value judgments. Even leaving aside the fact that the article shouldn't have claimed to be about the issue of quality at all, this is a serious problem. If one has a theory about the proper role for quality judgments and the capacity of the courts to make them, it is necessary to lay that theory out for all to see. They fail to do so – meaning that what little analysis of quality decisionmaking there is in the article is presented without meaningful foundation.

Arrow's Analysis of Social Institutions: Entering the Market Place with Giving Hands is, to my mind at least, still another example of infelicitous writing. Here, the problem is the Zen story-line. (I should confess that I read an earlier draft of this piece and urged him to take it out, but he said – and now I see why – that he had been complimented on it by others and preferred to leave it in.) An image that has to be explained by an introductory footnote ought not be the organizational principle for a scholarly article. That is particularly true where, as here, the image does nothing to elucidate the economic insights in the piece. Hammer isn't suggesting that institutions go through a life-cycle of self-awareness that makes it possible for them, ultimately, to offer themselves to the market without bias or self-interest. (At least that's my best version of what one might want to say using the ox-herder story.) Hammer instead postulates that courts or

other social actors must constantly police non-market institutional solutions to monitor the often unpredictable ways in which they can fail. I think that the economic story is itself a subtle one, but the oxherder story doesn't help.

In addition, this article is the clearest indication in the newer work that Hammer has not solved one of the problems flagged two years ago. I quote here from Sallyanne Payton's earlier letter, which is part of the current file:

"He likes to go to high abstractions in order to position himself above the fray and articulate general principles by which specific actions are to be judged; but then he dislikes coming back down and grappling with the real issues and entering the complexity of the clash that is occurring below the level at which he is speaking... There is consequently a lack of density in his work, a lack of the kind of analysis that commands attention."

There are many examples of this problem in the essay, but one in particular stands out: What, precisely, does it mean to say that one must be aware that markets, too, are social institutions? Hammer draws here from Herzog and other critics of law and economics, but he gives no idea at all of what the insight might mean to analysts of health care (or any other) markets.

I should be clear, again, that I see these persistent problems in Hammer's work as going to craftsmanship rather than to intelligence or perception. For whatever reason – whether it is lack of talent or (as I suspect) a distaste for the style in which most lawyer-economists write and a desire to develop a style of his own – Hammer asks his readers to do far too much work.

In the end, however, I have decided that my concerns about Hammer's abilities as a writer ought not to be dispositive of my ultimate judgment of the tenureability of his work. In most cases I can imagine, poor writing would take a serious toll on the significance of an author's contribution to scholarship. Yet in Hammer's case, the work is highly regarded in health law and policy circles (see Bloche, Glied, Jacobson, Sage), where our reviewers do not complain that they found Hammer's work difficult to read. Indeed, there are reviewers who are not members of the health policy studies community who also seem to have found the task of reading Hammer's work straightforward and rewarding (E.g., Eisenberg, Trebilcock). My first temptation was to discount, as not sufficiently engaged with Hammer's writing, any letters that failed to note and respond to what seemed to me (and some others) to be obvious flaws in the work. But through Committee deliberations, I have become convinced that my initial response is incorrect. I think, instead, that what these letters reflect is the important fact that it is possible (as I think Eisenberg and Trebilcock have done) to get past Hammer's style of exposition and judge method and message separate from craft.

The remaining question, then, is whether the work makes a "significant contribution to scholarship." The answer from the health policy community is a resounding "yes." The answer from the community of antitrust scholars is more equivocal. I give full weight to the health policy scholars' letters notwithstanding the fact that some of them come from outside the legal academy. At the same time, however, I find that the views of the antitrust scholars are more central to my evaluation of the case. The reason has to do with the precise nature of the contribution Hammer is said to have made to the health law and policy literature.

My reading of the health law and policy letters dealing with Hammer's recent antitrust work is that Hammer's work is significant for two distinct reasons. First, Hammer is valued for his ability to synthesize important debates in antitrust law and economics. This contribution is made all the more significant by Hammer's decision to make the health policy community his academic home – to present at its conferences, publish and edit its journals, etcetera (See, e.g., McLaughlin). I have some doubts as to whether this contribution to the health policy community, however significant in its view, would support a decision to tenure someone in a law school, but I leave that question aside because that is not the only, or even the major, contribution they see Hammer as making.

As most clearly explained by Bloche, Hammer's most significant contribution lies in his ability to communicate the concerns of the health care policy community to the courts and enforcement agencies that

are the real policymakers on many issues of importance to them. Bloche sees Hammer as a skilled lawyer/economist whose solid grounding in institutional economics makes him sympathetic to concerns of the health policy community that are treated as illegitimate within the usual constraints of the "Chicagoan functionalism" (Bloche's term) that currently dominates antitrust decisionmaking. Bloche predicts that

"[c]ourts and enforcement agencies that consider the varied institutional arrangements being forged by health care providers, insurers, and more and less vertically integrated managed health plans will need to weigh the dynamic efficiency concerns Hammer highlights. They will also need to consider, more squarely, whether myriad institutional arrangements and professional and institutional norms that are, in a literal sense, 'anti-competitive,' nonetheless advance consumer and/or total welfare...He calls upon courts and antitrust enforcement agencies to come out from behind the skimpy veil of 'competition' rhetoric, to embrace the goal of welfare maximization within markets, and to cautiously (with due regard for the risk of being misled) allow conduct that restrains competition but ameliorates other market failures."

To paraphrase, what Bloche is saying is that Hammer's main value to the health policy community lies in his ability to make courts and agencies stand up and take notice. But what this judgment on Bloche's part implies is that the health policy community is not fully capable of judging how well Hammer is playing the role they (and he) hope he can play. To the extent that the power of Hammer's work (vel non) rests on the likelihood that it will capture the attention of antitrust decisionmakers, only antitrust scholars can ultimately judge the value of that work.

In my view, Hammer's work must do more than merely show a competent understanding of antitrust law to be successful in this regard. Work that is merely competent will not make the antitrust community stand up and take notice. If scholars and judges read Hammer's work and respond to its analysis of antitrust economics with "been there, thought that, tried that, rejected that," then Hammer cannot convince scholars and courts that there is any reason to rework antitrust law in directions that are favorable to coherent health care policymaking. To put this discussion in terms of our tenure standards, I do not believe that Hammer's antitrust work can make a significant contribution to health policy scholarship unless it also makes a significant contribution to antitrust scholarship.

The antitrust scholars whose views we have solicited, all of whom have made important contributions to the field of health care antitrust, are divided on that question. We have five letters from antitrust scholars - Havighurst, Blumstein, Elhauge, Kauper, and Trebilcock. Of these, according to my reading of the letters, on the question of the *significance of Hammer's contribution* to antitrust analysis of health care markets only Trebilcock is unguardedly positive. Elhauge I read as unguardedly negative. Havighurst and Kauper are both positive, but their actual analyses of the work are more equivocal. (Kauper, of course, will speak for himself at the meetings.) Blumstein is harder to read. Blumstein takes no stand on whether Hammer's existing corpus makes a "significant contribution to scholarship." He does, however, state that he would not find it "absolutely clear cut from the written work I have reviewed" that there is a promise of future accomplishment, and relies on his "professional interactions with Hammer" in concluding that there is. Furthermore, he suggests that we wait to make a judgment until the next installment of the Robert Wood Johnson corpus is available. On balance, I read him as saying that the existing corpus does not itself contribute significantly to scholarship.

If one reads the antitrust scholars' letters as I do, the count is 3 positive to 2 negative. That is a close margin, but a close margin is nonetheless a margin. A majority of the antitrust scholars we consulted find that Hammer's work makes a significant contribution to antitrust scholarship. This support is sufficient, in my view, to validate the health policy reviewers' unanimous and hearty judgment that Hammer's work has the capacity to make a significant difference in the receptivity of the legal antitrust community to their concerns.

As I analyze the case, then, I am comfortable in reaching the conclusion that Hammer's scholarship satisfies our requirements for tenure. Although it took me some time to find my way to this conclusion, I am confident in it.

I do wish to close, however, with two concerns. Neither is sufficient to undermine my positive view of Hammer's case, but I feel I should raise both in the interest of full disclosure of my own views (now that I have burdened the faculty with a separate statement of those views).

I agree with the view expressed by the dissenting member of our Committee that Hammer's work would be more influential if he made use of the institutions of the law and economics community to solicit critiques that would sharpen his analysis. At the very least, his work would be better and potentially more influential within legal circles if he more sharply signaled the bases for his decision not to directly engage the kind of work law and economics scholars do. It is my understanding that, especially in recent years, the law and economics community has some receptivity to arguments grounded in institutional economics. Hopefully the comfort that comes with tenure will induce Hammer to make greater efforts to bring his work to the law and economics audience.

In addition, I have some concern about how well Hammer will do once his scholarship moves away from his areas of comparative advantage (antitrust and the theory of the firm). He has already taken steps to broaden his engagement with issues in the health policy field with his essays on assisted suicide and on ERISA, and some of the reviewers celebrate the trend. But in my view (although some reviewers disagree), none of Hammer's work to date gives clear positive signals about his ability to produce major high-quality work outside the economic fields in which his past work resides. His Pegram article is, to my view, the best-crafted article in Hammer's file, but, as Payton notes, he took a fairly simple view of the issues presented by the case.

These concerns, however, do not come close to changing my bottom line. Hammer ought to be granted tenure. In light of his teaching and service as well as his scholarly record, he is and will remain a valuable member of this faculty.