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ANTITRUST AS CONSUMER CHOICE:
COMMENTS ON THE NEW PARADIGM

*Spencer Weber Waller**

I have been searching for some time for the perfect movie about antitrust. So far my top two are *Grosse Pointe Blank*¹ with John Cusack and Dan Ackroyd and *Demolition Man*² with Sylvester Stallone and Sandra Bullock. Both movies deal with consumer choice in different ways as the lodestone for antitrust and show why Professor Robert Lande, with his colleague Neil Averitt of the Federal Trade Commission, has articulated a lasting vision for antitrust enforcement in their articles about consumer choice and his remarks at the American Antitrust Institute symposium.³

In *Grosse Pointe Blank*, John Cusack is a young hit man for the mob who is returning home for his tenth high school reunion. He is being stalked by Dan Ackroyd, an older rival hit man who is infuriated by Cusack's willingness to take jobs for a lesser fee. In the middle of a shoot out from opposite sides of a car, Ackroyd proposes forming what he dubs a "union" that would set fees for hits so they would keep from undercutting each other. The anti-competitive potential of such an arrangement is obvious and would be per se unlawful under Section 1 of the Sherman Act.⁴

Professor Lande's point about consumer choice is perhaps better borne out by my favorite antitrust film, *Demolition Man*. In that movie Sylvester Stallone is a violent cop who has been frozen cryogenically and eventually thawed out to capture an even more violent super criminal who has escaped from the deep freeze into a docile world long since evolved beyond violence. Sandra Bullock is assigned to escort Stallone and acclimate him to his new

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1. GROSSE POINTE BLANK (Hollywood Pictures 1997).
2. DEMOLITION MAN (Warner Bros. 1993).
3. Robert H. Lande, *Resurrecting Incipency: From Van's Grocery to Consumer Choice*, 68 ANTITRUST L.J. 875 (2001); Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REP. 44 (1998) [hereinafter Averitt & Lande, *Consumer Choice*]; Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997) [hereinafter Averitt & Lande, *Consumer Sovereignty*].
4. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Such an arrangement would also be unlawful under any number of provisions of the federal criminal code and the laws of all fifty states.

surroundings. Stallone passes by a public space and sees a sign for a Taco Bell and says: "I can't believe you still have Taco Bells!" Bullock looks puzzled and replies: "I don't understand what you mean. Taco Bell was the only restaurant to survive the Franchise Wars. Now all restaurants are Taco Bells."⁵

Unless you want to live in a world in which all restaurants are Taco Bells, Robert Lande has elegantly summed up the case for using consumer choice as the fundamental rule of antitrust. In this essay, I will both praise and extend Lande's consumer choice paradigm and give some concrete examples of how consumer choice can help anchor antitrust decision-making by both the agencies and the courts.

I. CONSUMER CHOICE AND THE FUTURE OF ANTITRUST

Consumer choice is a particularly valuable way to synthesize the underlying purposes of antitrust and consumer protection law because it highlights the inadequacy of the current tools of the trade. I share Professor Lande's fundamental point that price theory alone is an inadequate tool to make all antitrust decisions.⁶ I also share Professor Gundlach's fundamental point that price theory, and indeed all of antitrust economics, can be usefully supplemented through looking at business theory, particularly marketing and strategic planning, in deciding whether to bring cases and how they should be determined.⁷

What consumer choice gives us is a relatively simple (in a good way) lens to distinguish between which competitive restraints should be the subject of antitrust concern and which should be either ignored as benign or applauded as helpful to consumers. It is particularly heartening that the agencies and the courts have acted recently in a way that is consistent with the consumer choice paradigm even if they have not necessarily adopted this terminology.⁸

5. http://www.sciflicks.com/demolition_man/quotes.html (last visited Mar. 16, 2001).

6. Averitt & Lande, *Consumer Choice*, *supra* note 3, at 55; Averitt & Lande, *Consumer Sovereignty*, *supra* note 3, at 755-56.

7. See Gregory T. Gundlach, *Choice as the Focus of Antitrust: A Marketing Perspective*, 62 U. PITT. L. REV. 527, 528-29 (2001). See also Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. ___ (2001).

8. Perhaps the closest is Commissioner Thomas Leary who has discussed "consumer sovereignty" and "buyer freedom" (along with "seller freedom") as the organizing principal and tension in modern antitrust. Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 ANTITRUST L.J. 545 (2000).

The cutting edge of antitrust enforcement, at least for the immediate future, appears to be cases involving non-price restraints.⁹ These are the innovative hard cases where price theory has little to add to their analysis or resolution, and post-Chicago economics is still struggling to get beyond ad hoc analyses of individual cases. Consumer choice can be the starting place to shed light on where the government should spend its investigative resources, and what, if anything, the agencies and the courts should do.

A. Tying Together Intel, Microsoft, AOL/Time Warner, Travelocity, Visa/Mastercard

Consumer choice provides a broad theme tying together the recent high profile cases brought by both the Antitrust Division and the FTC. These cases reveal a pattern of common concerns without regard to who should win any of these individual cases. What seems to be at stake is an overriding concern that firms in industries characterized by network effects, strong intellectual property protection, and a tendency toward winner-take-all outcomes not position themselves as the gatekeepers at the key checkpoints of the new economy. In all of these cases, the fear is that the dominant firms are preventing existing competitors and new entrants from access to consumers. Similarly, consumers are denied the ability to select the type of products and innovative technology that might prevail in the market but for the dominant firm(s) keeping a choke hold on an essential facility or at least a key gateway to consumers.

One of the first such modern cases was *MCI Communications Corporation v. American Telephone & Telegraph Company*,¹⁰ where MCI prevailed in proving that AT&T had unlawfully prevented interconnection for newly deregulated long distance providers with its then monopoly over the network for local telephone service that was necessary to complete both ends of any long distance call.¹¹ This decision was the beginning of a process, along with the breakup settling the government monopolization suit against AT&T,¹² which has brought us to the brink of an era of extensive competition

9. These are the innovative cases that both the Antitrust Division and the Federal Trade Commission have chosen to pursue in recent years beyond the type of hard-core criminal price-fixing cases and limited merger enforcement that enjoy a broad consensus over the years.

10. 708 F.2d 1081 (7th Cir. 1983), cert. denied, 464 U.S. 891 (1983).

11. See *id.* at 1131-45.

12. See *Justice Department's Competitive Impact Statement on Settlement with American Telephone and Telegraph Co.*, reprinted in 42 ANTITRUST & TRADE REG. REP. (BNA) 401 (1982); *Justice Settles AT&T Case; Bell System Agrees to Divest Local Operating Companies*, 42 ANTITRUST & TRADE

in both local and long distance communications¹³ and the revolutionary prospect of Internet telephony at little or no charge.

The *Microsoft* case has been cast by both the parties and the court as involving whether Microsoft used its dominance in operating systems to foreclose the growth of other competing technologies and software platforms.¹⁴ The most important question now before us is whether the court's remedy of separating Microsoft's operating systems division from its software division through divestiture achieves meaningful consumer choice in the Goldilock's sense: not too much as Microsoft fears, and not too little as certain critics of the timidity of the plan suggest, but just right (at least as much as one can expect in the real world).

While the FTC ultimately settled its case with Intel,¹⁵ and the private plaintiff did not prevail in its case against the same conduct,¹⁶ similar concerns animated those cases as well. Was Intel using a position of dominance to coerce customers into surrendering innovative technology that could potentially be used to undermine Intel's dominance in the chip market?

Similarly, will the Time Warner/AOL merger create a similar gatekeeper for media content?¹⁷ Will the cable, Internet, and telephony mergers create the same gatekeeper for delivery of such content?¹⁸ Do the Visa/Mastercard affiliation rules lock in dominance for those networks against their competitors and promote an inappropriate coziness for relations between members of the network?¹⁹ Will the new airline joint venture for online ticketing create either of these concerns?²⁰ While the questions are relatively easy to articulate, the answers are not. However, all of these cases share a concern of preventing the creation of choice destroying monoliths, *à la*

REG. REP. (BNA) 82 (1982).

13. See Telecommunications Act of 1996, 47 U.S.C. § 397 (1996).

14. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (order as to relief); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact).

15. *Intel Corp.*, 64 Fed. Reg. 20,134 (Apr. 23, 1999) (analysis to aid public comment and commissioners' statements); *Intel Corp.*, 64 Fed. Reg. 14,246 (Mar. 24, 1999) (proposed consent decree).

16. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999).

17. *FTC, FCC are Urged to Scrutinize AOL/Time Warner Deal for Access Abuses*, 78 ANTITRUST & TRADE REG. REP. (BNA) 465 (2000).

18. *Critics Question Telecom Merger Wave, Can't Formulate Proposal to Reject Consolidation*, 78 ANTITRUST & TRADE REG. REP. (BNA) 530 (2000).

19. *DOJ Would Ban Simultaneous Service on Governing Boards of Visa, Mastercard*, 79 ANTITRUST & TRADE REG. REP. (BNA) 164 (2000).

20. *IG Urges Regulators to Implement Measures to Ensure Web Site as Competition Friendly*, 79 ANTITRUST & TRADE REG. REP. (BNA) 81 (2000).

Microsoft, in the myriad of new forms of network industries that are arising in the most vibrant sectors of our economy. Consumer choice tells you where to look and tells you what questions to ask.

B. Prescription Drugs v. Generics

Another series of cases currently being pursued by the FTC are an additional illustration of how consumer choice can take us further than any of the conventional theories. In March 2000, the FTC charged two drug makers with violating Section 5 of the FTC Act by reaching agreements with generic drug makers to delay bringing competing generic drugs into the market.²¹ On that same day the FTC also announced that it negotiated consent decrees with two other drug companies charged with similar violations.²² The nature of the violation was simple: by keeping a competing generic version of a branded prescription drug off the market consumers (and prescribing physicians) had been deprived of a clear choice between branded and generic medicine, which had the potential to save hundreds of millions of dollars per year.²³ A district court in Michigan subsequently agreed with this analysis and held one of these agreements to constitute *per se* unlawful market allocation in a private consumer class action.²⁴

In these investigations, the FTC appears to be wielding consumer choice as a scalpel not an ax. The FTC recently chose *not* to charge Eli Lilly for its agreement with a drug manufacturer that manufactured a competing version of a Lilly drug about to go off patent. While the public record is silent as to the precise basis for the FTC's decision not to proceed, one fact stands out. Lilly acquired rights not to a generic clone of its drug, but to a new substance that performed the same functions as the branded drug but without certain key side effects. Presumably the FTC did not view this agreement as the type of collusion it had previously challenged, but instead chose not to proceed following the standard antitrust joint venture or acquisition analysis it routinely undertakes in this and other high-tech industries. Under the rubric of consumer choice, this case can be distinguished since consumers stand to benefit through increased opportunities to treat their conditions without debilitating side effects.

21. Press Release, *FTC Charges Drug Manufacturers with Stifling Competition in Two Prescription Drug Markets*, available at <http://www.ftc.gov/opa/2000/03/hoechst.htm> (last visited Feb. 18, 2001).

22. *Id.*

23. *Id.*

24. *In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 682 (E.D. Mich. 2000) (Order No. 13).

II. SOME OLD FRIENDS

Consumer choice does not only work at the frontier of antitrust issues. It is also a powerful analytical tool for some of the lasting conundrums of antitrust enforcement.

A. Resale Price Maintenance

One of the continuing controversies is the continuing per se treatment of minimum resale price maintenance agreements. Only a rather blatant form of such an agreement would even be subject to per se condemnation at the present time. Maximum resale price maintenance is now subject to the full rule of reason after the Supreme Court's decision in *Khan*.²⁵ Most minimum resale price maintenance will be considered under some version of the rule of reason because of restrictive definitions of both "agreement" under *Monsanto*²⁶ and "price" under *Sharp Electronics*.²⁷

Plaintiffs who have been terminated as price cutters who fail to meet either or both of these legal hurdles find themselves subject to summary dismissal, and occasionally sanctions, despite having alleged and proved that they were terminated specifically for their discounting and that prices then went up substantially after their termination.²⁸ Where they usually fail is the ability to show that there was an underlying agreement between the manufacturer and the remaining distributors as to price or price level.²⁹ Despite this rather accommodating standard for checking what is technically per se unlawful, the remaining enthusiasts from the Chicago school continue to press the case that even explicit resale price maintenance agreements hold sufficiently pro-competitive potential that it should be treated under the full rule of reason (if not ignored completely).³⁰

25. *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

26. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

27. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

28. *See, e.g., Center Video Indus. Co. v. United Media, Inc.*, 995 F.2d 735 (7th Cir. 1993).

29. *See, e.g., Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998).

30. *See* Lino A. Graglia, *Is Antitrust Obsolete?*, 23 HARV. J.L. & PUB. POL'Y 11 (1999); Andy M. Chen & Keith N. Hylton, *Procompetitive Theories of Vertical Control*, 50 HASTINGS L.J. 573 (1999); Roger D. Blair & John E. Lopatka, *The Albrecht Rule After Khan: Death Becomes Her*, 74 NOTRE DAME L. REV. 123 (1998); Roger D. Blair & John E. Lopatka, *Albrecht Overruled—At Last*, 66 ANTITRUST L.J. 537 (1998).

Both the evolution of the economy, and the teachings of business theory as Professor Gundlach has elaborated, suggest why we should be *more* suspicious, rather than *less*, of such arrangements.³¹ In today's economy the brand reigns supreme. Indeed whole sectors of the economy, like the dot coms, have little current value except for their brand equity.³²

In more old fashion antitrust terms, product differentiation (even monopolistic competition) dominates business strategy and defines the modern marketplace. In this world, consumer choice may be defined almost entirely by the very type of intra-brand competition that RPM seeks to eliminate. Robert Pitofsky, the current chairman of the Federal Trade Commission perhaps stated it best in his 1983 article *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*.³³ Pitofsky effectively rebutted in eight pages the hundreds of pages devoted to the arguments on the other side and succinctly stated: "[A]uthorizing the manufacturer to decide what mix of products and services is desirable, instead of allowing the market to decide that question, is inconsistent with the nation's commitment to a competitive process."³⁴

B. Price Discrimination

Price discrimination remains the *bête noire* of antitrust, particularly secondary line injury cases under the Robinson-Patman Act. These issues are almost entirely the creature of counseling and private antitrust litigation, since neither enforcement agency devotes any significant resources to this area. In such Robinson-Patman cases, a distributor receives less favorable prices than one of her competitors and brings a private treble damage action. The courts

31. See Gundlach, *supra* note 7, at 530-33. See also LESLIE DE CHERNATONY & MALCOLM McDONAL, CREATING POWERFUL BRANDS IN CONSUMER SERVICE AND INDUSTRIAL MARKETS 10, 20 (2d ed. 1998) (successful brand has ability to sustain added value in the face of competition); ROBERT M. GRANT, CONTEMPORARY STRATEGY ANALYSIS 208 (2d ed. 1995) (superiority of differentiation over cost advantage as strategy to create sustainable competitive advantage); KEVIN LANE KELLER, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY 4, 9 (1998) (product differentiation is the goal of brand management with non-price advantages of successful branding including brand loyalty, barriers to entry, and the creation of transferable legal property).

32. See Kurt Badenhausen, *Brandwagon*, FORBES, June 12, 2000, at 60B (reporting results of over 1,000,000 surveys of which brands are on upswing or downswing and stating "In the post-industrial age intangibles are everything"); Al Ries & Laura Ries, *The Hazards of Corporate Vanity*, UPSIDE, June 1, 2000, at 252 (discussing eleven so-called immutable laws of internet branding).

33. Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487 (1983).

34. *Id.* at 1493.

hold that a substantial price differential over time creates virtually an irrebutable presumption that competition has been injured permitting recovery.³⁵

This presumption and the entire Robinson-Patman Act has been the subject of withering criticism for decades. The Act and its interpretation have been attacked as operating counter to the spirit of the antitrust laws, counter to common sense, and as inconsistent with legislative history.³⁶ Most critics prefer its repeal or its interpretation to track more closely the other provisions of the Clayton Act and Sherman Act.³⁷

The law and economics crowd further critiques the Act as prohibiting a practice that increases efficiency and has the potential of increasing output and reducing dead weight loss to society as a whole.³⁸ They also attack the Act as a form of special pleading for inefficient mom and pop grocery stores that injures consumers by limiting competition from more efficient larger competitors.³⁹

Part of the skepticism toward the need for price discrimination rules has stemmed from the historical belief that price discrimination affecting competition is relatively rare. It requires both significant market power and the means to implement the differential pricing scheme and preventing arbitrage from low price buyers to high price ones. Even if successful, it often would only have a negligible, or even positive, impact on output and consumers. Customers would be free to opt for the benefits of high costs personalized shopping at the corner store or the less personal low price option at the Kmart or Wal-Mart type operation.

Changes in the economy and the insights of consumer choice again suggest that the situation is not quite as cut and dried as most people think. First, a combination of intellectual property law and the rapid growth of the Internet have made perfect price discrimination a real possibility. Indeed, Wendy Gordon, a prominent intellectual property professor has described the essence of intellectual property as the ability to achieve true price discrimination.⁴⁰ The transfer of information by electronic download from the

35. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

36. For a recent example see Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125 (2000).

37. See, e.g., Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save It, Let It Go*, 48 EMORY L.J. 1057 (1999).

38. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 280-98 (1978).

39. See *id.* at 284-85, 296-98. The bill was originally entitled the Wholesale Grocers Protection Act. See HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 13.6 n.2 (1985).

40. Wendy J. Gordon, *Viewing Intellectual Property as Price Discrimination: Implications for*

Internet is the new frontier for the application of price discrimination—not the kindly country doctor who charges the town millionaire more for his annual check-up than the poor widow and her children. Even in the world of tangible goods, the growth of auction and reverse auction models on the Internet has brought us back to the era around the turn of the century, before Wannamakers in Philadelphia broke from tradition and introduced price tags, when salesmen carefully assessed the likely resources and knowledge of the prospective buyer and quoted prices accordingly. Today, the combination of Internet auction and reverse auction technology and the voluminous personal information available on-line creates the reality of each book, song, software, or autographed photo of your favorite sports hero being sold to you at precisely the price that reflects the intensity of your use or desire for the item with the technological means to prevent its transfer to other buyers. Whether this promotes or harms meaningful choice is a complex question that is beyond the scope of this essay, other than to note that careful attention to consumer choice also requires the careful reexamination of both old doctrines as well as the cutting edge theories of antitrust.

C. Monopolization

Consumer choice finally can help illuminate one of the oldest, and yet most troubling, aspects of antitrust—the difference between an enlightened technological visionary and an evil rapacious monopolist. The agencies and courts have struggled with this from the time of *Northern Securities*⁴¹ and *Standard Oil*⁴² to the *Microsoft*⁴³ case of today. The current legal formulations are vague and virtually useless.⁴⁴ *Alcoa* talked about unlawfully maintaining a monopoly through means other than superior skill, foresight, industry, or having such monopoly thrust upon it.⁴⁵ *Grinnell* talked about unlawfully acquiring or maintaining a monopoly other than as a result of superior

Shrinkwrap Contracts and the Internet, Public Lecture at Brooklyn Law School (Apr. 18, 2000).

41. *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904).

42. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

43. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000) (order as to relief); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact).

44. See William L. Reynolds & Spencer Weber Waller, *Legal Process and the Past of Antitrust*, 48 SMU L. REV. 1811, 1824-27 (1995).

45. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

product, business acumen, or historic accident.⁴⁶ *Aspen* modified this standard to focus on the presence or absence of a legitimate business justification.⁴⁷

Controversial cases like *Aspen*⁴⁸ and *Kodak*⁴⁹ now make sense when viewed through the lens of consumer choice. Each case dealt with opportunistic behavior by firms who dramatically changed their behavior to take advantage of consumers who were locked into dealing with a particular supplier, even if that supplier did not have market power in the traditional price theory sense of the term. In *Kodak*, the plaintiffs demonstrated that they were entitled to a trial by showing material issues of fact as to how choice was restricted and competition harmed for those consumers already locked into a Kodak copier system who wished to purchase parts and/or service through an independent service organization.⁵⁰ In *Aspen*, the dominant ski mountain owner abruptly stopped marketing a joint lift ticket with its remaining competitor in the area despite years of prior and profitable practice.⁵¹ The plaintiffs prevailed at trial and ultimately on appeal in the Supreme Court by showing, in a masterful and common sense way, how consumers skiing in the Aspen region were harmed and choice restricted by this behavior.

III. CONCLUSION

Consumer choice is an extremely powerful and important tool for rationalizing antitrust policy. That does not mean it is an uncontroversial one. The debates over the meaning and purpose of the antitrust laws have shown that the fundamental fight is one of value choices not original intent. Although values are deeply personal, stubbornly held, and not easily changeable by rational argument, consumer choice already has struck a chord with many people within the antitrust community. Consumer choice is one of the most appealing value choices to come along to guide us toward the kind of legal rules to regulate in the most light-handed way possible the economy as it evolves in directions we can only guess.

46. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

47. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604-05, 608 (1985).

48. *Id.*

49. *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992).

50. *Id.* at 473-77.

51. *Aspen*, 472 U.S. at 606-08.