THE SIMPLICITY OF ANTITRUST LAW

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Antitrust law has grown increasingly complex, leading some to the misperception that it is often irrational and varies widely from one country to the next. In fact, antitrust is simpler than it seems. Properly applied, antitrust law focuses simply, and entirely, on combating two of the most innate proclivities in human nature—bullying and ganging up—when such conduct harms competition. Once this is understood, the concerns expressed about irrationality and disharmony begin to disappear.

If it is true that all we really need to know we learned in kindergarten,[1] then all we really need to know about antitrust law we learned there too.

I. IT'S SIMPLER THAN ONE MIGHT THINK

On the surface, antitrust seems more complex than this. Since the seminal case of *Mitchel v. Reynolds*[2] was decided in 1711 and the Sherman Act[3] was passed in 1890, antitrust terminology has grown increasingly complicated. Today, there is a profusion of jargon for antitrust offenses, from abuse of dominance[4] and bundling[5] to technological tying[6] and unilateral effects,[7] plus a host of acronyms and abbreviations such as SSNIPs,[8] HHIs,[9] and UPP.[10] Economics, including econometrics and

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1. ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (1988).

2. (1711) 24 Eng. Rep. 347 (Q.B.); 1 P.Wms. 181.

3. Ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7 (2006)).

4. Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Sep. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

5. Cascade Health Solutions v. PeaceHealth, 502 F.3d 895 (9th Cir. 2007).

6. United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 542 (9th Cir. 1983).

7. U.S. Dep't of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines § 6 (2010) [hereinafter DOJ/FTC Horizontal Merger Guidelines].

8. *Id.* § 4.1.2.

9. *Id.* § 5.3.

10. *Id.* § 6.1; Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog*

behavioral economics, has provided greater insight, but added to the terminological clutter.[11]

Yet all the years of litigation and study reveal that there really are only two offenses against competition: single-actor bullying and multi-actor ganging up. The rest, except for some outlier offenses,[12] are simply variations on these two (with merger enforcement meant to guard against both).[13]

Within the antitrust community, anticompetitive unilateral bullying is labeled monopolization, attempted monopolization, unfair practices, or abuse of dominance. Anticompetitive ganging up is termed combination, conspiracy, cartelization, or boycott, depending on the context. The Sherman Act rests on these two core pillars, as does the competition legislation of the European Union and most other jurisdictions.

This categorization does not mean that all initiatives by powerful firms and all collective activities by competitors are anticompetitive. Monopolists are expected to continue innovating and competing, while competitors are encouraged to create efficiencies necessitating collaboration. Nor does this categorization mean that it is always easy to distinguish what is anticompetitive from what is competitively neutral or even procompetitive. It simply means that all activities harming the economy by undermining the competitive process fit within the category of either bullying or ganging up.

Once this principle is appreciated, it becomes easier to recognize that all competition law, if properly applied, should be directed against, and only against, assaults on competition from bullying and ganging up. It also becomes easier to recognize that there already has been substantial convergence toward this understanding, both within the United States and around the world.

Moreover, it becomes easier to explain to skeptics why competition law exists and why, notwithstanding the cost of compliance and enforcement, the economy is better off having it.

to Fox in Forty Years, 77 ANTITRUST 701, 726 (2010).

11. *See, e.g.*, *Glossary of Industrial Organisation Economics and Competition Law*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) 1, 2 (1993), http://www.oecd.org/dataoecd/8/61/2376087.pdf; Elizabeth M. Bailey, *Behavioral Economics: Implications for Antitrust Practitioners*, (ABA/The Antitrust Source, Chicago, Ill.), June 2010, at 1.

12. *See infra* note 26.

13. Antitrust offenses also may be classified by the type of harm they inflict, such as foreclosure of competitors or artificial elevation of prices to customers, rather than by the nature of the behavior involved.

II. CONDEMNATION IS TIMELESS

While bullying and ganging up may be innate, condemnation of these offenses has an impressively long history itself. Unilateral economic bullying traces back at least to stratagems employed to outmaneuver rivals in ancient Egypt and Rome, at medieval fairs and markets,[14] and to crown monopolies that were empowered to exclude competitors.[15] Disapproval of such practices can be traced to early religious and judicial codes.[16] Under English common law, this disapproval evolved into the economic torts of forestalling, engrossing, and regrating.[17]

Economic ganging up traces back to collusion among tradesmen in isolated hamlets[18] and members of the guilds of European cities.[19] Disapproval of such activity, like disapproval of single-firm anticompetitive activity, also finds its origins in religion and early judicial codes.[20] In England, this evolved into the common law against contracts in restraint of trade and the common law and legislation against combinations in restraint of trade.[21]

The common thread was that the sovereign could establish a monopoly or authorize collective anticompetitive action, but without official approval, monopolization and cartelization faced censure.

Over time, these core principles evolved into the law that served as the basis for today's legislation. The Industrial Revolution transformed manufacturing, distribution, marketing, and retailing, but the law dictating the rules by which firms compete can still trace a direct lineage to the earliest limitations on single firm conduct and collusion.

14. LORD WILBERFORCE, ALAN CAMPBELL & NEIL ELLES, THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES 2–3, 20–21 (2d ed. 1996); William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 368 (1954).

15. Letwin, *supra* note 14, at 356–67.

16. *See* WILBERFORCE, ET AL., *supra* note 14, at 2–3; Jacob Rosenberg and Avi Weiss, *Land Concentration, Efficiency, Slavery, and the Jubilee*, *in* THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS, 74, 76–77 (Aaron Levine ed., 2010).

17. Letwin, *supra* note 14, at 368.

18. *Id.* at 364.

19. WILBERFORCE, ET AL., *supra* note 14, at 27–28.

20. *Id.* at 2–3, 22; Dani Rapp, *The Employee Free Choice Act, Unions, and Unionizing in Jewish Law*, *in* THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS 429, 441 (Aaron Levine ed., 2010).

21. Letwin, *supra* note 14, at 373–85; *see also* MILTON HANDLER ET AL., TRADE REGULATION: CASES AND MATERIALS 103–49 (4th ed. 1960).

III. CURRENT ANTITRUST LAW IS LARGELY CONFINED TO BULLYING AND GANGING UP—AND SHOULD BE

Today's competition laws, guidelines, and commentary are rich with contemporary interpretations and illustrations, but all build upon the same foundation, condemning anticompetitive bullying and ganging up. In the Sherman Act, notable for its simplicity, Section 1 reaches agreements in unreasonable restraint of competition and Section 2 reaches monopolization, attempted monopolization, and conspiracy to monopolize.[22] Similarly, Article 101 of the Treaty on the Functioning of the European Union prohibits agreements that restrict competition, subject to various exceptions, and Article 102 prohibits abuse of a dominant position.[23] In China, the Anti-Monopoly Law likewise includes a series of articles on anticompetitive agreements and another series of articles on abuse of dominance.[24] Other nations' laws follow the same pattern.[25]

Consistent with this legislation, antitrust offenses, for all their variety, almost invariably are based on proof of anticompetitive bullying or ganging up.[26] For example, offenses based on horizontal agreements, such as price fixing, output restriction, market division, and boycotts, all involve anticompetitive ganging up.[27] Competitors conspire against customers to

22. 15 U.S.C. §§ 1–2 (2006). Mergers, once reached exclusively under the Sherman Act, also can be reached under Section 7 of the Clayton Act, 15 U.S.C. § 18 (2006), which includes an incipiency standard to reach threatened monopolization.

23. TFEU, *supra* note 4, arts. 101–02.

24. Anti-monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), chs. II–III.

25. Prominent examples include Japan, Canada, and Brazil. *See* Shiteki-dokusen no Kinshi oyobi Kōseitorhiki no Kakuho ni Kansuru Hōritsu [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Act No. 54 of 1947, ch. III, V; Competition Act, R.S.C. 1985, c. C-34, pt. VIII (Can.); Decreto No. 8.884, de 11 de Junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U] de 13.06.1994 (Braz.). *See generally* ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES (2001).

26. There are certain outlier offenses that have been codified as part of the antitrust laws but are designed to achieve other goals, such as sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. §§ 13(d)–13(e) (2006), which create per se offenses for discrimination in providing promotional services and facilities regardless of the effect on competition. Also, as pointed out *infra*, there have been occasional misguided decisions finding antitrust offenses in the absence of any genuine bullying or ganging up, based largely on misapprehension of the objectives of competition law.

27. *See, e.g.*, Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (anticompetitive market division); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (prohibition on competitive bidding); Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100 (1969) (conspiracy to exclude from foreign markets); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (retailer-initiated boycott of competing retailers by manufacturers and distributors); Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (price fixing as well as restriction of exports and imports).

charge them higher prices or to limit their choices.[28] Customers conspire against sellers to drive down the prices of what they buy.[29] In contrast, legitimate joint ventures and ancillary restraints represent examples of competitors collaborating to create something new without colluding to impede competition that otherwise would exist.[30]

Offenses based on vertical resale agreements such as resale price maintenance involve either unilateral or collective conduct. As the Supreme Court recently explained in the *Leegin* case,[31] vertical restraints can be unreasonable when they are abused by a powerful buyer or seller, or where they are likely to facilitate conspiracy among either manufacturers or distributors to limit competition.[32] Vertical restraints are unlikely to offend the antitrust laws when there is no market power being exerted and the restraint was initiated unilaterally by the seller.[33]

Offenses based on vertical purchase requirements, such as exclusive dealing and tying, require proof of the foreclosure of competition by a firm possessing sufficient market power to become a bully.[34] Monopolization

28. *See, e.g.*, Palmer, 498 U.S. at 49 (noting that horizontal territorial agreements are "formed for the purpose and with the effect of raising" prices); Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 695 (holding that prohibitions on competitive bidding "prevents all customers from making price comparisons").

29. *See, e.g.,* Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948) (recognizing the applicability of the antitrust laws to buyer agreements to eliminate competition among themselves); United States v. Seville Indus. Mach. Corp., 696 F. Supp. 986 (D.N.J. 1988) (same).

30. *See, e.g.*, Texaco Inc. v. Dagher, 547 U.S. 1, 8 (2006) (joint venture agreement was not an anticompetitive horizontal price-fixing agreement); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23–25 (1979) (holding that blanket licenses granted by clearinghouses did not constitute a type of price fixing); *cf.* Am. Needle, Inc. v. Nat'l Football League, 130 S. Ct. 2201, 2216 (2010) (deeming the League subject to antitrust scrutiny while also noting that its constituent competitors "share an interest in making the entire league successful and profitable") (reasonableness to be determined on remand).

31. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

32. *Id.* at 892–94.

33. Nine West Grp. Inc., Docket No. C-3937, 2008 WL 2061410 (F.T.C. May 6, 2008) (modifying a 2000 consent decree to permit respondent to enter into minimum resale price maintenance agreements, under reporting obligations, where restraint was instigated by the manufacturer, not the dealers, and the manufacturer lacked market power). However, the rule of per se illegality against minimum resale price maintenance remains under the laws of certain states. *See, e.g.*, California v. DermaQuest, Inc., 2010-1 Trade Cas. (CCH) ¶ 76,922 (Cal. Super. Ct. Feb. 23, 2010) (the State of California brought a case against DermaQuest, a maker of skin care products, under California's antitrust law on a per se theory and the case was ultimately settled); Verified Petition, People v. Tempur-Pedic Int'l, Inc., No. 400837/10 (N.Y. Sup. Ct. Mar. 29, 2010) (the State of New York brought a case on a per se theory against mattress manufacturer Tempur-Pedic under New York law).

34. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 464 (1992) ("The existence of [monopolistic] power ordinarily is inferred from the seller's possession of a predominant share of the market."); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 13–16 (1984) (requiring proof that an illegal exercise of market power "force a

offenses, such as predatory pricing and other forms of predation, require proof of anticompetitive activity by a firm with the power to control prices or exclude competitors, or the strong likelihood of achieving that power.[35] All of these essentially are instances of single firm misconduct, notwithstanding the fact that the imposition of vertical agreements may play a role.[36]

Merger offenses require proof that the merger threatens to create or enhance the power to bully or collude and harm competition. In the case of horizontal mergers, the offense requires proof that the merged firm will be able to exercise market power over customers or suppliers, usually by changing prices, or that the merger will facilitate collusion among the merged firm and its remaining competitors.[37] In the case of vertical mergers, the offense requires proof that the merged firm will be able to impede competitors at one or both levels, usually by foreclosing them from needed inputs or outlets.[38]

This focus on anticompetitive bullying and ganging up is as it should be, because when courts, enforcers and policymakers extend antitrust law further, trouble follows. For example, there has been sharp criticism of the over-deterrence of joint ventures,[39] challenges to horizontal agreements

purchaser to do something that he would not do in a competitive market").

35. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (holding that under both the Sherman Act and Robinson-Patman Act a claimant must show that a competitor has "priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market"); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (noting that proof that a firm has been "attempting to exclude rivals on some basis other than efficiency . . . characterize[s] its behavior as predatory").

36. *See supra* note 34 (citing cases demonstrating instances of single firm misconduct, including vertical restraints).

37. DOJ/FTC Horizontal Merger Guidelines, *supra* note 7, §§ 6, 7, 12.

38. U.S. Dep't of Justice, Non-Horizontal Merger Guidelines (1984); Richard M. Steuer, *Foreclosure, in* ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 925–37 (2008).

39. These concerns prompted enactment of the National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. §§ 4301–05 (2006)). *See* H.R. REP. NO. 98-1044 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3131, 3133 (describing "widespread concern among members of both houses that . . . firms may be foregoing lawful ventures under the misperception that the antitrust laws preclude such conduct"). In 1988, Secretary of Commerce C. William Verity commented that any attempt to create a production joint venture in the United States "virtually invites an antitrust lawsuit . . . produc[ing] a chilling effect in the U.S. on some kinds of technology development." C. William Verity, *Grant Antitrust Exemptions . . . to Spur Cooperative Ventures*, WALL ST. J., Dec. 27, 1988, at A10. Representative Rick Boucher of Virginia warned Congress that "[t]he threat of treble damages and attorney's fees broadly inhibits the kinds of cooperative arrangements in the United States that flourish in Japan and Europe." 135 CONG. REC. E425-02 (daily ed. Feb. 21, 1989). In 1993, Congress passed the National Cooperative Research and Production Act of 1993, Pub. L. No. 103-42, 107 Stat. 117 (1993) (codified at 15 U.S.C. §§ 4301–05 (2006)).

enabling small competitors to compete against larger competitors,[40] rules of per se illegality for a host of distribution restraints,[41] including maximum resale price maintenance[42] and certain forms of tying,[43] proposals for "no-fault" monopolization laws,[44] challenges to mergers resulting in tiny shares of any relevant market,[45] application of the Robinson-Patman Act without regard to effects on competition,[46] the "nine no-no's" prohibiting most restrictions in patent licenses,[47] and the presumption of market power in all

40. *In re* Great Dane Trailers, Inc., 102 F.T.C. 1307, 1314 (1983) (Commissioners Miller and Douglas dissenting from application of per se rule to restraints initiated by distributors of same brand); *cf.* U.S. Dep't of Justice, Antitrust Div., Response to Linen Systems for Healthcare, LLC's Request for Business Review Letter (Aug. 8, 2006) (approving of proposed joint venture of regional textile maintenance companies to market textile rental and laundry services to specialized health care client); U.S. Dep't of Justice, Antitrust Div., Response to Container America, LLC's Request for Business Review Letter (Mar. 8, 2000), http://www.usdoj.gov/atr/public/busreview/4287.htm (approving of proposed creation and operation of joint selling and purchasing vehicle for five regional manufacturers of steel drums).

41. Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57–58 (1977) (criticizing the per se rule and instead applying the rule of reason to vertical distribution restraint).

42. Khan v. State Oil Co., 93 F.3d 1358, 1363 (7th Cir. 1996) (questioning the continued application of the per se rule to maximum resale price maintenance, but applying the standard), *rev'd*, 522 U.S. 3 (1997) (overturning the per se rule against maximum price fixing). *See also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 134 n.753 (6th ed. 2007) (collecting cases criticizing per se illegality applied to maximum resale price fixing).

43. *Compare* Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947) ("it is unreasonable, per se, to foreclose competitors from any substantial market"), *with* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 502–04 (1992) (applying rule of reason to conclude that replacement parts were a separate market than manufactured machines and hold that defendant may be unlawfully tying the two dependent upon market power), *and* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 31–32 (1984) (applying rule of reason analysis to conclude that a large hospital was not unlawfully tying surgical services to services of anesthesiology firm).

44. Milton Handler & Richard M. Steuer, *Attempts to Monopolize and No-Fault Monopolization*, 129 U. PA. L. REV. 125, 182–90 (1980).

45. United States v. Von's Grocery Co., 384 U.S. 270, 301–02 (1966) (Stewart, J., dissenting) (discussing mergers and commenting that "the sole consistency that I can find is that in litigation under [Section] 7, the Government always wins").

46. Volvo Trucks N. Am. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180–81 (2006) (holding that the Robinson-Patman Act does not signal a departure from the principle that interbrand competition is the primary concern of antitrust law).

47. *Compare* Bruce B. Wilson, Deputy Assistant Attorney Gen., Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions (Nov. 6, 1970) (describing the patent licensing practices covered by the Nine No-Nos and considered to be per se illegal without regard to economic effect), *with* Charles F. Rule, Assistant Att'y Gen., The Antitrust Implications of Patent Licensing: After the Nine No-Nos (Oct. 21, 1986), 4 Trade Reg. Rep. (CCH) ¶ 13,131 (supporting the adoption of a rule of reason approach because the practices covered by the "no-no's" are frequently procompetive). *See also* Abbott B. Lipsky, Current Antitrust Division Views on Patent Licensing Practices, Remarks Before the American Bar Association Antitrust Section (Nov. 5, 1981) (further

patents.[48] These are only some of the best-known instances of the antitrust laws being applied to condemn practices that did not genuinely embody unilateral or collective conduct posing a serious threat to competition.

In fact, upon analysis, it turns out that most of the criticism heaped on antitrust enforcement over the years has been directed at instances in which decision-makers lost sight of targeting anticompetitive bullying and ganging up. If neither exists or is seriously threatened, decision-makers need to ask themselves what exactly they are trying to prevent. The answer may lead to the conclusion that there is no violation at all, or that if there is a violation, it is of another law directed at something other than safeguarding competition.

A number of courts have faced reversal over the years for trying to apply antitrust liability to activity that might offend other laws but does not threaten competition. Some courts neglect to find a threat to competition before looking for bullying misbehavior. For example, in *Spectrum Sports, Inc. v. McQuillan*,[49] the lower court was reversed for treating unfair or predatory conduct as attempted monopolization without evidence of a dangerous probability that monopoly power actually would be achieved. The Supreme Court rejected the "notion that proof of unfair or predatory conduct alone is sufficient" to establish a great enough threat to competition to constitute an antitrust violation.[50] Some courts neglect to find an effect on competition when examining ganging up. In *NYNEX Corp. v. Discon, Inc.*,[51] the lower court was reversed for treating an alleged conspiracy to commit regulatory fraud as an antitrust violation where there was no harm to the competitive process. The Supreme Court explained that the approach taken by the lower court "would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique," into antitrust cases.[52] Other examples are legion.[53]

supporting the application of a rule of reason to the "nine no-no's").

48. Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45–46 (2006) (holding that the mere fact that a tying product is patented does not support a presumption of market power).

49. 506 U.S. 447 (1993).

50. *Id.* at 457. The Court added, "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Id.* at 458.

51. 525 U.S. 128 (1998).

52. *Id.* at 137.

53. *E.g.*, E.I. DuPont de Nemours & Co. v. F.T.C., 729 F.2d 128, 141–42 (2d Cir. 1984) (vacating F.T.C. order prohibiting advance price announcements and most favored nations clauses, which had condemned consciously parallel pricing in the absence of collusion); Official Airline Guides, Inc. v. F.T.C., 630 F.2d 920, 925–28 (2d Cir. 1980) (reversing F.T.C. order against monopolist publisher's refusal to publish connecting flight schedules, which did not enhance the publisher's monopoly); E.J. Delaney Corp. v. Bonne Belle, Inc., 525 F.2d 296, 306 (10th Cir. 1975) (reversing judgment for plaintiff on claim of attempted

Recognizing that competition law is directed against anticompetitive single-firm bullying and collusive ganging up is important, but only the first step to antitrust analysis. Even more important is appreciating that, properly interpreted, competition law should not be directed against anything else, and that, to the extent it is applied more expansively, it is likely to reach haphazard and unfortunate results. The key to public confidence in competition law is to remain faithful to this focus. Acknowledging the limits of competition law is essential to preserving it.

IV. GLOBAL COMPETITION LAW HAS LARGELY CONVERGED

Convergence has been the Holy Grail of competition law for thirty years. Today, there are nearly 170 jurisdictions with competition laws around the world,[54] and over fifty more in the United States alone. While convergence long seemed out of reach, despite the efforts of academic pioneers and such bodies as the International Competition Network and the World Trade Organization,[55] the reality is that there is more convergence today than seemed possible not long ago. Virtually every competition regime limits anticompetitive bullying and ganging up, and while the language and procedures vary enormously, the direction is largely the same.

Different competition laws look very dissimilar on the surface, with a variety of thresholds, safe harbors, exemptions, enforcement mechanisms, and special industry rules, plus a different glossary of terms for each regime. For example, the antitrust statutes of the United States generally are less detailed than the EU competition statutes. Safe harbors in the United States derive from case law and are reflected in enforcement guidelines while in other jurisdictions they are written into the statutes themselves or delineated in block exemptions.[56] Yet underneath, the

monopolization in the absence of market data).

54. There are approximately 169 countries with some form of competition law in place. *See* INTERNATIONAL BAR ASSOCIATION'S GLOBAL COMPETITION FORUM, http://www.globalcompetitionforum.org (last visited Sept. 12, 2011) (noting anti-competition laws of countries around the world under the heading of "laws"). *See generally* ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES (2001) (discussing competition law outside of the United States).

55. *See* Eleanor M. Fox, *Toward World Antitrust And Market Access*, 91 AM. J. INT'L L. 1, 1–2 (1997) (advocating an international system of competition law); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 913–15 (2003) (describing competing strategies to remedy antitrust problems at an international level); *ICN Factsheet and Key Messages*, INTERNATIONAL COMPETITION NETWORK 1, 2 (April 2009), http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf (stating that "[b]y enhancing convergence and cooperation, the ICN promotes more efficient and effective antitrust enforcement worldwide to the benefit of consumers and businesses").

56. *See, e.g.*, Commission Regulation 267/2010, 2010 O.J. (L 83) 1–7 (EU) (discussing

principles on which these laws rest are largely the same.

This is all the more remarkable given the fact that some regimes are based on judge-made common law rules while others are based on codes and regulations. What is striking is not how different these structures are but how similarly they apply legal and economic principles to comparable facts and reach largely similar outcomes—not in every instance, but more and more over time.[57] Commentators never tire of isolating and dissecting the actual or perceived dissonance among decisions in different jurisdictions addressing the same or similar practices—and there have been some whoppers[58]—but for all the historic and cultural differences among legal systems, the core focus, and the outcomes, increasingly are the same.[59]

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the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector and requiring EU Regulation Commission to define the categories of insurance exemptions to antitrust liability); McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15 (2006) (exempting certain activity of insurers from antitrust liability).

57. For example, enforcers in the EU increasingly have employed an effects-based analysis similar to that employed by enforcers in the U.S. *See* Massimo Motta et al., *Hardcore Restrictions Under the Block Exemption Regulation on Vertical Agreements: An economic view* (2009), http://ec.europa.eu/dgs/competition/economist/hardcore_restrictions_under_BER.pdf (stating that "[t]he issuing of the BER, and of the Guidelines on Vertical Restraints . . . which accompanied it, was rightly heralded as the introduction of an effects-based approach into EC competition law on agreements") (internal citation omitted); *see also* Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45/7) (advocating for an effects-based analysis).

58. *See* Case COMP/M.2220, *General Electric/Honeywell*, 2001 E.C.R. II-48/1, *application for annulment denied*; *see also* Case T–210/01, Gen. Elec. Co. v. Comm'n, 2005 E.C.R. II–5575 *and* Case T–209/01, Honeywell Int'l, Inc. v. Comm'n, 2005 E.C.R. II–5532 (declaring a concentration to be incompatible with the common market and the EEA Agreement), *available at* http://www.curia.eu.int/en/content/juris/index.htm; Eleanor M. Fox, *The European Court's Judgment in GE/Honeywell—Not a Poster Child for Comity or Convergence*, ANTITRUST, Spring 2006, at 77 (noting the importance of GE/Honeywell as the first "U.S." merger cleared by the United States and prohibited by the European Union). In years past, the difference between competition law in the EU and in other jurisdictions used to be attributed more to the special priority afforded by the EU to combating barriers between member states. *See* Eleanor M. Fox, *US and EU Competition Law: A Comparison*, *in* GLOBAL COMPETITION POLICY 339, 340 (Edward M. Graham & J. David Richardson eds., 1997) (noting that the respective competition systems have developed out of different concerns and exhibit significant variations).

59. *Compare* United States v. Microsoft Corp., 147 F.3d 935, 940 (D.C. Cir. 1998), *and In re* Intel Corp., F.T.C. No. 9341, (Oct. 29, 2010) (withdrawn Nov. 2, 2010), *and In re* Vitamins Antitrust Litig., 216 F.R.D 168, 169–70 (D.D.C. 2003) (case settled), *and In re* Air Cargo Shipping Servs. Antitrust Litig. MDL No. 1775, 2010 WL 1189341, at *3–4 (E.D.N.Y. Mar. 29, 2010), *and In re* Marine Hose Antitrust Litig., 531 F. Supp.2d 1381, 1381–82 (J.P.M.L. 2008), *with* Press Release, European Comm'n, Commission concludes on Microsoft investigation, imposes conduct remedies and a fine (Mar. 24, 2004); *and* Press Release, European Comm'n, Antitrust: Commission imposes fine of €1.06 bn on Intel for

Of course, much of the convergence is attributable to the practice of many jurisdictions to model their competition laws after those of another jurisdiction with a longer history of enforcement. The EU model has been copied repeatedly, while other regimes are modeled after the American approach.[60]

It also has helped the process of convergence that even in common law jurisdictions, guidelines and official commentaries have proliferated, making the philosophy behind application of the laws more transparent and easier to grasp.[61] Further, it has helped that enforcement officials, academics, and members of the bar from around the world have been meeting, communicating, and collaborating for years.[62] Information sharing, technical assistance, and other collaboration among nations all have facilitated and hastened convergence.

This is not to say that the decision-makers in all these jurisdictions never go astray. However, as in the United States, the most troubling departures abroad have been instances in which the analysis lost sight of core goals and condemned practices for other reasons.[63] To the extent that decisions have been true to preventing and curtailing anticompetitive bullying and ganging up, and nothing more, there has been greater

abuse of dominant position; orders Intel to cease illegal practices (May 13 2009); *and* Press Release, European Comm'n, Commission imposes fines on vitamin cartels (Nov. 21, 2001); *and* Press Release, European Comm'n, Antitrust: Commission fines 11 air cargo carriers €799 million in price fixing cartel (Nov. 9, 2010); *and* Press Release, European Comm'n, Antitrust: Commission fines marine hose producers € 131 million for market sharing and price-fixing cartel (Jan. 28, 2009).

60. ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES 13–14 (2001).

61. Different jurisdictions have issued guidelines on merger review, vertical restraints, licensing, horizontal collaboration, and other topics. *See, e.g.*, Alden F. Abbott and Samuel N. Weinstein, *The New U.S. Horizontal Merger Guidelines and International Competition Policy Convergence,* ANTITRUST, Fall 2010, at 39 (explaining the role of the 2010 U.S. merger guidelines in fostering international convergence).

62. *See generally* Rachel Brandenburger, Special Advisor, U.S. Dep't of Justice, Transatlantic Antitrust: Past and Present, Remarks Prepared for St. Gallen International Competition Law Forum (May 21, 2010) (recapping the achievements of transatlantic antitrust over the past 20 years); Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, ANTITRUST, Summer 2005, at 25 (discussing the U.S.'s interest in convergence and the international dialogue conducted toward that end).

63. For example, critics have sharply questioned the EU's disapproval of the proposed GE acquisition of Honeywell and the proposed Coca-Cola acquisition of Huiyuan Juice Group, a Chinese juice maker, wondering whether political motives played a role. *See, e.g.*, Fox, *supra* note 55, 43 VA. J. INT'L L. at 923 (noting the "perceived illegitimacy" of the EU's decision to enjoin the merger between GE and Honeywell); *Hard to Swallow: China Indicates the Real Targets of its Anti-monopoly Law: Outsiders*, ECONOMIST, March 19, 2009, at 75 (suggesting that the Coca-Cola decision signals Chinese anti-monopoly law really may be intended to create barriers for foreign companies).

convergence and less to criticize. Although there continue to be differences, convergence has been growing stronger.

V. THE ECONOMY IS MORE PRODUCTIVE WITH LIMITS ON ANTICOMPETITIVE BULLYING AND GANGING UP

Naturally, convergence itself is not a desirable objective unless there is convergence on a rule that benefits society. The law must prohibit undesirable activity—here, anticompetitive activity—without prohibiting desirable activity—here, efficient, pro-competitive or competitively neutral conduct. Additionally, the law must be clear enough so that those responsible for administering it are reliably able to distinguish what is desirable and permissible from what is not.

In an environment in which some observers find contemporary antitrust law both unfathomable and arbitrary, critics have called for abridgment of antitrust enforcement or outright repeal of the antitrust laws,[64] allowing firms to compete as they wish. Antitrust enforcement has been derided for stifling innovation and undermining competitiveness,[65] raising questions about the very value of competition law. In the 1980s, Commerce Secretary Malcolm Baldrige remarked that the antitrust laws "place additional and unnecessary burdens on the ability of U.S. firms to compete."[66] Economist Lester Thurow advised that "America should abolish its antitrust laws" because "[a]n economy where growth is stopped

64. *E.g.*, Edwin S. Rockefeller, Letter to the Editor, *Time for Antitrust to Bite the Dust*, WALL ST. J., Aug. 19, 2010, at A16 ("Antitrust . . . is unsound as law because it provides no coherent set of ascertainable rules to guide conduct," enabling government "to interfere whimsically with freedom of contract, frequently on behalf of losers."); EDWIN S. ROCKEFELLER, THE ANTITRUST RELIGION (2007) (positing that antitrust is a religion and not law because "enforcement is arbitrary, political regulation of commercial activity and not enforcement of a coherent set of rules...."); D.T. ARMENTANO, ANTITRUST POLICY, THE CASE FOR REPEAL x–xi (1986) ("[T]he case against antitrust is strong enough to justify the complete repeal of all of the antitrust laws."); *See* Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, J. ECON. PERSPECTIVES, Fall 2003, at 3 (arguing that whether enforcement creates a social benefit has not been established); Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L. J. 483, 508 n.95, 514 n.114 (2006) (collecting additional sources); Jonathan B. Baker, *Preserving a Political Bargain: The Political Economy of the Non-Interventionist Challenged to Monopolization Enforcement*, 76 ANTITRUST L. J. 605, 640–41 n.156 (2010) (collecting additional sources).

65. *E.g.*, Rick Rule, *The Case Against the Case Against Microsoft: Why the Justice Department is Barking up the Wrong Operating System,* SLATE MAGAZINE, Nov. 13, 1997 (questioning whether "we really want antitrust lawyers and economists determining Internet standards"); Editorial, *Target: Intel, and Competition: Team Obama Adopts the European Model on Antitrust*, WALL ST. J., May 14, 2009, at A15 (criticizing the European approach to antitrust as pro-competitor instead of pro-consumer).

66. Malcolm Baldrige, Op-Ed., *Rx for Export Woes: Antitrust Relief*, WALL ST. J., Oct. 15, 1985, at 28.

and living standards are falling behind those of its competitors cannot afford a legal system that cripples its industrial future."[67] Does monopoly actually stifle innovation or does it encourage even greater innovation? Does greater concentration really result in appreciably less competition? Is the benefit of detecting and challenging monopolization and cartels worth the cost? The empirical work on this issue is incomplete, though certainly spirited.[68]

Unfortunately, the compendium of misguided antitrust decisions is long enough to substantiate much of the criticism.[69] When the Supreme Court reverses its own rulings and Congress repeals its own laws—as has happened more than once[70]—it becomes apparent that at least some antitrust enforcement (take your pick as to which) has been counterproductive. The issue, however, is not whether mistakes have been made but whether the economy would be better served with laissez-faire and self-correction or with limits on anticompetitive activity. The reversal of prior rulings and the repeal of earlier laws do not mean that the economy would be better off without any antitrust enforcement at all. The critics may be correct with respect to instances of misguided or miscalibrated enforcement, but not with respect to deterring the misuse of monopoly power and conspiracies to raise prices or cut output. There is ample evidence of the savings achieved by preventing and eliminating cartels.[71] Agreements to raise prices or reduce output, except in the most unusual circumstances, make markets less efficient and the economy worse off.[72] The evidence is more mixed with regard to the benefits associated with

67. Lester C. Thurow, Op-Ed., *Let's Abolish the Antitrust Laws*, N.Y. TIMES, October 19, 1980, at F2.

68. ABA SECTION OF ANTITRUST LAW, REPORT ON REMEDIES (2004); Crandall & Winston, *supra* note 64.

69. *See supra*, notes 39–46.

70. *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977) (overturning the per se rule in United States v. Arnold, Schwinn & Co. 388 U.S. 365 (1967)); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881–82 (2007) (overturning the per se rule against manufacturers working with its distributors to set a minimum price for its goods enunciated in Dr. Miles Med. Co. v. John D. Park & Sons Co. 220 U.S. 373 (1911)); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 31 (2006) (overturning the previously established rule that "if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power," Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984)); Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (repealing the Fair Trade exemption established under Miller-Tydings Amendment (1937) and McGuire Amendment (1952) to the F.T.C. Act).

71. Jonathan B. Baker, *The Case for Antitrust Enforcement*, J. ECON. PERSPECTIVES, Fall 2003, at 27 (2003); John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 537–46 (2005).

72. Richard M. Steuer & Peter A. Barile III, *Antitrust in Wartime*, ANTITRUST, Spring 2002, at 71–75 (explaining wartime exceptions).

preventing and eliminating monopolization, but there is evidence of benefits in many, if not all, instances.[73] For example, there is ample evidence that the acquisition, or maintenance of, monopoly power through the use of dirty tricks or by raising rivals' costs without creating any efficiencies, makes markets less efficient and the overall economy worse off.[74] In contrast, there is little empirical evidence indicating that economies are more productive where monopolization goes unchecked and anticompetitive collusion is tolerated.[75]

The answer is not to eliminate antitrust law root and branch. Rather, it is to confine antitrust law to addressing anticompetitive bullying and ganging up, and to provide enough clarity to make the right outcomes easier to perceive. The economy is better off with antitrust than without it, as long as the limits are observed.

73. *See* Baker, *Preserving a Political Bargain*, *supra* note 64, at 616–20 (describing both sides of the debate); Baker, *supra* note 71, at 33–35 (noting that prices fell for some services offered by companies subject to antitrust litigation while acknowledging that there were still impediments to competition). *But see*, Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 522 (1998) (noting that network effects in various industries may create a variety of competition scenarios that do not always require antitrust intervention).

74. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596–98 (1985); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L. J. 209, 214 (1986); Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L. J. 975, 983–87 (2005); *cf.* Tim Wu, *In the Grip of the New Monopolists*, WALL ST. J., Nov. 13, 2010, at C3 (noting that monopolies developed by information industries are often tolerated by government regulators despite frequently stifling innovation in the long term).

75. Michael Porter concluded, after a four-year study of competitiveness, that "[i]n global competition, successful firms compete vigorously at home and pressure each other to improve and innovate." MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS, 117 (1990). He found that when active rivalry is maintained in an industry, and when there is an interchange of information among competitors about needs and technology, "the conditions for competitive advantage are the most fertile." *Id.* at 152. In contrast, he found that "[o]ne of the most common, and often the most fatal, causes of lost national advantage is the ebbing of domestic rivalry, since pressure to improve and adjust is often lost with it." *Id.* at 169. *See also* F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, 438 (2d ed. 1980) (noting that high industrial concentration "is apt to retard progress by restricting the number of independent sources of initiative and by dampening firms' incentive to gain market position through accelerated research and development."); WALTER ADAMS & JAMES W. BROCK, THE BIGNESS COMPLEX, 48–64 (1986) (discussing the role of big corporations in technological innovation); Ken Ohmae, *Japan vs. Japan: Only the Strong Survive*, WALL ST. J., Jan. 26, 1981, at 20 ("Japanese companies do not do so well on world markets in industries . . . where one firm accounts for more than 50% of the Japanese market."); Baker, *supra* note 71; Willow A. Sheremata, *Barriers to innovation: a monopoly, network externalities, and the speed of innovation*, 42 ANTITRUST BULLETIN937, 971–72 (Winter 1997) (stating that network externalities provide a monopolist with barriers to entry, securing the monopolist's position and reducing the incentives for all firms in the industry to innovate).

VI. SIMPLE RULES FACILITATE COMPLIANCE, ENFORCEMENT, AND PUBLIC SUPPORT

Fortunately, the growing sophistication of antitrust analysis, both legal and economic, has made decision-makers better equipped to reach the right determinations—if they can maintain the right focus. The cause of rogue decisions seldom has been defective rules or tools, but rather a misunderstanding of the principles behind the rules. If judges, enforcement officials, and lawyers confine their focus to unilateral and collective activity that threatens serious harm to competition, the proper application of the legal and economic principles and tools will become clearer. To a large degree, the backlash against antitrust enforcement is in reaction to the complexity, and resulting confusion, that has fostered bad policy decisions, bad enforcement decisions, and bad judicial decisions. Once antitrust becomes too complicated to explain on an elevator ride, it is in danger of being misinterpreted by courts and losing widespread support.

How does one reconcile the benefits of greater sophistication against the capacity to foster confusion and chaos? There is no need to rewrite the laws, which are simple enough. There generally is no need to rewrite the many guidelines either, although several might benefit from some clarification. It would suffice for counselors, enforcers, and judges to understand that the beacon of antitrust and competition law is not just maximizing consumer welfare and economic efficiency, but achieving that goal by confining enforcement to preventing bullying and ganging up that seriously threatens competition. When decision-makers train the weapons of the antitrust arsenal on other practices, they run the risk of both reaching the wrong results and losing public support. When their aim is true, everyone is better off.

Innate as they are, anticompetitive bullying and ganging up are not about to disappear any time soon, as demonstrated year after year by the single-firm misconduct that continues to surface and the cartels that continue to be exposed. The challenge is to foster a competitive economy in the face of our baser instincts through intelligent application of the law.

Antitrust is not that complicated. Once this is appreciated, both the direction and the value of antitrust become easier to comprehend, apply, and explain: Don't put up with bullies who stifle competition. Don't permit ganging up to diminish competition. Then, let competition sort out the winners and losers, and may the best competitors win.