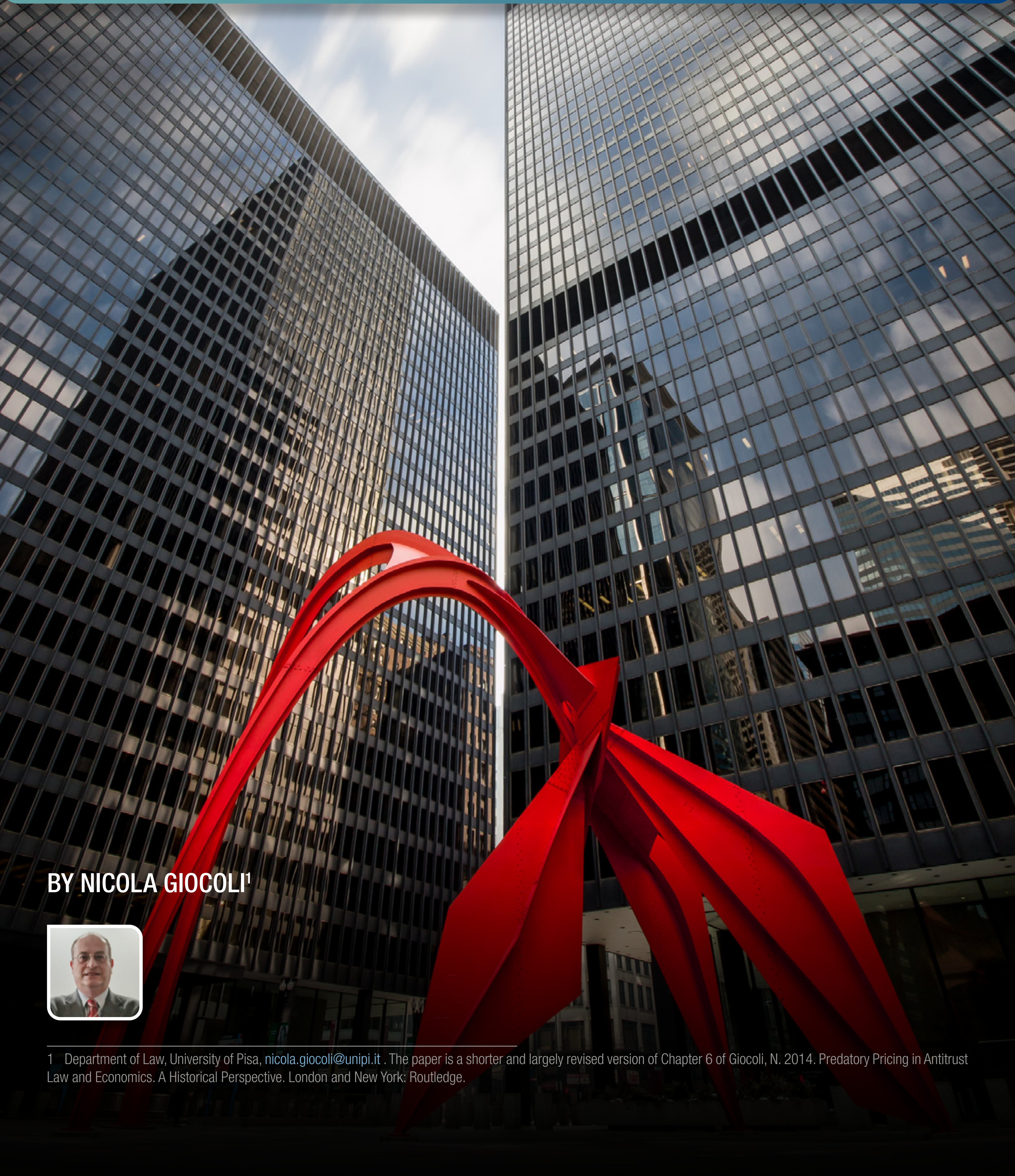
THE CHICAGO SCHOOL AND THE IRRELEVANCE OF PREDATION



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The Chicago School and the Irrelevance of Predation

By Nicola Giocoli

Everybody knows that Chicago scholars dismissed predatory pricing as a practice of concern for antitrust law due to its alleged unprofitability, both relative and absolute. Many know that the dismissal dates back to the early years of the Chicago revolution in antitrust and has been reiterated ever since. What is less known is why those scholars focused so much on that specific unilateral practice. The paper shows that, from Aaron Director in the mid-1950s to, among others, John McGee (1958) and Robert Bork (1978), demolishing the traditional story about predatory behavior has always been a strictly necessary component of the Chicago School's broader assault against established Section 2 case law.

I. INTRODUCTION

In a famous 1963 article in Fortune magazine, later expanded in the 1965 *Columbia Law Review*, Robert H. Bork & Ward S. Bowman, two Yale professors with close connections to the Chicago School, argued that long-standing contradictions had brought antitrust doctrine to a state of crisis. While enforcement had long oscillated between protecting competition and protecting competitors, the latter had ultimately prevailed: "*Anti-free-market forces now have the upper hand and are steadily broadening and consolidating their victory. The continued acceptance and expansion of their doctrine […] threaten within the foreseeable future to destroy the antitrust laws as guarantors of a competitive economy*" (Bork & Bowman 1965, 364).[2] While shared by courts, enforcement agencies and Congress, in their view that misconception was above all the Supreme Court's responsibility, on account of its deliberate pursuit of a "*predominantly anticompetitive*" social policy and ever more frequent "extreme anticompetitive positions" (375).

Among the fallacious theories that provided the logical underpinnings of the recent "dismal record" on antitrust, Bork & Bowman singled out the theory of exclusionary practices (366). Playing a tune that in the following decades would become a cliché of the Chicago approach to antitrust, they argued that practices labeled by courts as "exclusionary," like price predation or vertical agreements, were competitive profit-maximizing actions. Calling those practices anti-competitive meant assuming that they were deliberately loss-making operations, that by adopting them "*a competitor can impose greater costs upon his rivals than upon himself*" and that some unspecified "*imperfections in or difficulties of access to the capital market*" denied rivals the funding necessary to resist them (367). Yet, the fallacies were not just theoretical. The current notion of exclusionary practices was "*remarkably lacking of factual support*," the product of "*an elaborate mythology, that […] has operated for years on hearsay and legends rather than on reality*" (ibid.). For Bork & Bowman, the mythology dated back to the famous *Standard Oil* decision of 1911, the landmark for all subsequent exclusionary cases.

Published in a popular outlet such as *Fortune*, Bork & Bowman's tirade against contemporary antitrust law was one of the earliest public episodes of the Chicago war against, and eventual conquer of, the American antitrust citadel. Remarkably, their opening salvo relied on just two authorities, both from the Chicago School, Aaron Director & John S. McGee. While that selection was, in general terms, unsurprising, what is less known is why a few years earlier those very authorities had picked, among several exclusionary practices, predatory pricing as the ideal battlefield to run their first assault to that citadel. Indeed, the same reason would later lead Bork to spotlight price predation in central chapter of his *The Antitrust Paradox*. Challenging the received theory of predatory behavior thus looks like a methodological red thread connecting some foundational works of the Chicago approach to antitrust.

II. THE DIRECTOR'S CUT

Aaron Director's role as the intellectual leader and operative engine of the modern Chicago School of law and economics is widely recognized.[3] His specific interest in antitrust began soon after he replaced Henry Simons after the latter's tragic death in 1946, taking on his price theory course at the Law School, which he then held for almost two decades. Law professor Edward Levi invited Director to also collaborate in the teaching of his antitrust course. As the story goes (Kitch 1983, 183), Levi would teach traditional antitrust four days each week; Director would then come in on the fifth day and apply price theory to show that the traditional legal approach could not stand up to rigorous economics.[4] The method worked particularly well for exclusionary practices. Director would ask whether a specific practice was consistent with monopolistic profit maximization and, in the negative case, would conclude that the practice ought to have some legitimate rationale. It is no exaggeration to say that the Chicago approach to antitrust came out of that course. As Bork recalled, many of those who took Director's course "underwent what can only be called a religious conversion. It changed our view of the entire world" (*ibid.*).

The scientific manifesto of the new approach was Director & Levi (1956).[5] In that essay Director & Levi undertook a meticulous critique of standard antitrust doctrines. Writing at the dawn of the Warren Court era, they envisaged what the Court had in the pipeline, namely, using

2 Bork, R. H. & Bowman W. S. Jr. 1965. "The Crisis in Antitrust." *Columbia Law Review* 65 (3): 363-376.

3 On Director's key role within the Chicago School, see e.g. Kitch, E. W. 1983. "The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970." Journal of Law and Economics 26 (1): 163-234.; Van Horn, R. 2010. "Aaron Director." In The Elgar Companion to the Chicago School of Economics, edited by R. Emmett, 265-269. Cheltenham and Northampton: Edward Elgar; and Medema, S. 2011. "Chicago Price Theory and Chicago Law and Economics. A Tale of Two Transitions." In Building Chicago Economics. New Perspectives on the History of America's Most Powerful Economics Program, edited by R. Van Horn, P. Mirowski & T. A. Stapleford, 151-179. Cambridge: Cambridge University Press.

4 Kitch, E. W. 1983. "The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970." Journal of Law and Economics 26 (1): 163-234.

5 Director, A. & E. H. Levi. 1956. "Law and the Future: Trade Regulation." Northwestern University Law Review 51: 281-296.

antitrust law to promote a specific social agenda. Fostering economic welfare by protecting the free working of competition no longer seemed the Court's main goal, as the emphasis was shifting from economic to socio-political themes. Issues of power, fairness, equality of opportunities, and democracy – "*which may have nothing whatever to do with economics*" (Director & Levi 1956, 282) – topped the Court's agenda.

These were the same themes classical liberals à la Henry Simons cared the most about. Their prominence among the possible goals of antitrust was hardly a novelty, as several courts, and Congress itself, had openly recognized since 1890. However, a consensus had existed until then that those goals had to be pursued only *indirectly*, applying to concrete cases the most up-to-date version of economic analysis, and then drawing from that the necessary policy implications. While many agreed that monopoly had to be fought first and foremost because of its socio-political consequences than because of its economic effects, still monopoly had to be defined, recognized, measured, and possibly eliminated using economic tools. Such an analytical orientation was the reason commentators of different political orientations had for instance welcomed the landmark *Alcoa* decision.[6] There the Second Circuit had explicitly employed microeconomic tools to defend competition and, because of that defense, achieve broader socio-political aims.

Now, the authors complained (*ibid.*), the Warren Court aimed at something different – that is, at pursuing its socio-political agenda via an opportunistic exploitation of economic ideas, regardless of their intrinsic correctness or mutual consistency. An ad hoc application of dubious economics for extra-economic goals was more dangerous for the future of antitrust than any argument – correct or not – made within a purely economic framework. The latter could always be amended by applying good economics,[7] but the former would be invulnerable to analytical critique because its validity could only be assessed in a different sphere.

The same *Alcoa* decision was exemplar of the threat this new approach to antitrust law could bring to the American economy – not because of the decision itself,[8] but for fear of what other courts might do with it. Right or wrong, *Alcoa* had been grounded on basic market share analysis, the new doctrine being that size sufficed for §2 liability. But what to do in the case of a big firm with less than monopoly power – that is, of a firm whose sheer size "mandated" condemnation, but that did not partake of Alcoa's almost absolute market power? An additional criterion was required for liability.

This, Director & Levi argued (289), amounted to identifying some business practices (like vertical restraints, tying, or predation) as abusive, i.e. as exclusionary devices aimed at reaching monopoly. Far from being supplanted by the *Alcoa* doctrine, the traditional "abuse approach" to §2 case law – the approach epitomized by the *Standard Oil* decision[9] – had to be summoned back in all those cases where condemnation was motivated by size, but where, absent complete monopoly, the *Alcoa* catchphrase "size destroys competition" would not resist scrutiny.

Unfortunately, according to Director & Levi the abuse approach as applied until then by American courts was seriously flawed. A hodgepodge of ad hoc notions aimed at corroborating decisions taken on different grounds, it rested on faulty economic basis. Although the Clayton, FTC and Robinson-Patman Acts had introduced "a certain automaticity into the law" against specific business practices, by making "unnecessary [a] separate inquiry in each of the cases as to [their] effects, advantages, or disadvantages," the fact remained that "no one of the special statutes is completely insulated from a pervasive concern with the doctrines of economics in the field of competition and monopoly" (289-90). Correct economic reasoning did, and should, matter in antitrust in general, and in §2 case law in particular. Director, Levi and their Chicago colleagues and disciples were determined to affirm it, as the only way to prevent the disruption of antitrust enforcement that, in their view the *Alcoa* doctrine and the Warren Court would bring.

Their criticism targeted one decision in particular. The pivotal role of *Standard Oil* in granting "substance and historical veracity" (Bork and Bowman 1965, 367) to the abuse theory of monopolization made the case a stumbling block on the way to a Chicago-style rebuilding of antitrust law. Director and Levi attacked it directly. With its loose blend of a size-based presumption plus a superficial account of alleged abuses *Standard Oil* was deemed exemplary of a shallow treatment of allegedly abusive practices, unconstrained by rigorous economics and blind to possible efficiency justifications. Worse, the 1911 precedent had legitimized the above-mentioned procedure, where a court would *first* make up its mind looking just at a business's size and *then*, having decided that the business deserved condemnation because of its size, would search within the list of allegedly abusive behaviors a rationale for its decision – that is, the seemingly abuse-based, but in practice size-based approach to monopolization that loomed over post-*Alcoa* antitrust.

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6 *United States v. Aluminum Corporation of America*, 148 F.2d 416 (2d Cir., 1945).

7 Which to Chicago scholars was, and has always been until very recently, synonymous with price theory. On the peculiarities of Chicago's price theory see Hammond et al. 2013.

8 The *Alcoa* court had embraced one of the two approaches to monopoly the authors themselves recognized as equally legitimate: monopoly as abuse or combination and monopoly as sheer size. See Director & Levi 1956, 287.

9 *Standard Oil Co. v. United States*, 221 US 1 (1911).

Attacking *Standard Oil* was therefore a core element of Chicago's game plan. This might *prima facie* seem odd because, by establishing the rule of reason, that very decision was still a bulwark against the proliferation of *per se* prohibitions. Still, if Chicago aimed at bringing antitrust law back on track – the track of rigorous economic analysis – *Standard Oil* had to go. And given that the main monopolizing practice ascribed by the White Court to Rockefeller's behemoth had been predatory pricing, the attack would inevitably require questioning the existence and plausibility of anticompetitive below-cost pricing. Chicago economist and Director's protégé John McGee delivered with a vengeance.

III. A PRICE-THEORETIC REBUTTAL: MCGEE 1958

The importance of McGee's "Predatory price cutting: the Standard Oil (N.J.) case" cannot be exaggerated.[10] Published in the first volume of the *Journal of Law and Economics*, it is simply one of the most influential antitrust articles ever[11] and, under several respects, the real academic breakthrough of Chicago antitrust.

Writing under Director's impulse, McGee attacked the Holy Grail of antitrust case law, *Standard Oil*, and established two key results. First, that the traditional legal standard for predatory pricing was untenable in terms of standard price theory. Second, that a price-theoretic assessment of factual evidence refuted the Supreme Court's decision convicting Rockefeller's trust for predatory behavior.[12] The latter result disposed of the Holy Grail, but it was the former that satisfied the theoretical urge behind the paper. As McGee acknowledged in a footnote, the essay had been written to validate Director's own intuition – namely, that price theory could be harnessed to show that Standard Oil had neither achieved nor maintained its monopoly position via predatory pricing (McGee 1958, 138, n.2). In the spirit of Director & Levi's manifesto, it was a theoretical argument – an analytical point in price theory – that sparked the fire. The incineration of bad case law was just the (much appreciated) result.

McGee performed a meticulous case study, drawing directly from the 1911 trial record. Yet what his paper became famous for was the Director-inspired second section where he applied price theory to demolish the basic predatory pricing story (138-43). Curiously, what can actually be found in this section is far less than one might expect given the legendary aura of the paper. Several of the standard story's weaknesses were not even mentioned by McGee, who basically made two points, one more forcefully than the other, although that which received less attention in the paper would eventually become the most important.[13]

McGee's main theoretical point was that acquiring the rival firm was always a more profitable strategy for the would-be monopolist than predation (139-40). Predatory pricing would cause both firms – predator and prey – some unnecessary losses that could be avoided in case of immediate takeover. To purchase its competitor, the predator could offer a sum up to the discounted value of the full monopoly profits. This would be the maximum bid price, but any price above the prey's market value (i.e. above the present discounted value of its future profits) would suffice for the takeover to be *mutually* beneficial. By replacing predation with direct acquisition, the buyer would immediately earn full monopoly profits, without delaying them to the post-predation recoupment period and, above all, without incurring the (potentially large) losses of a price war. Part of the latter amount could then be offered to the rival "as a bonus" (140) beyond its market value.[14]

What remained to be proven was that the costs incurred by the predator during the price war could never be less than those necessary to directly purchase the rival. This possibility was refuted by McGee's second, and most famous, thesis – namely, that predatory pricing was generally unprofitable even in an absolute sense (140-2).

10 McGee, J. S. 1958. "Predatory Price Cutting: The Standard Oil (N.J.) Case." Journal of Law and Economics 1: 137-169.

11 Even modern critics of its factual and theoretical analysis recognize the article's impact on modern antitrust law and economics: see Dalton, J. A. & Esposito, L. 2007. "Predatory Price Cutting and the Standard Oil: a Re-examination of the Trial Record." In Research in Law and Economics, edited by R. O. Zerbe & J. B. Kirkwood, 22: 155-205. Significantly, Leeman (1956), a paper in the Journal of Political Economy that foreran some of McGee's most famous points, went almost undetected in the literature. See Leeman, W.E. 1956. "The Limitations of Local Price-cutting as a Barrier to Entry." Journal of Political Economy, 64 (4): 329-334.

12 McGee carefully avoided claiming that Standard Oil deserved acquittal. His point was just that its monopoly position had not been gained, or defended, using predatory pricing. See McGee 1958, 168-9.

13 Also curious is the circumstance that, despite the hundreds of authors who quoted, either favorably or unfavorably, McGee's paper, for decades none questioned the robustness of his case study. Only recently has the latter been re-examined, with the conclusion that, regardless of the validity of his analytical argument, McGee's factual analysis was blurred by a series of mistakes and omissions: see Dalton & Esposito 2007.

14 The point will be fully developed by another Chicago scholar: see Telser 1966.

The argument is well known to students of introductory IO courses. First, a predator wishing to "lure customers away" from the prey ought to have spare capacity to serve them, but this extra capacity did not come for free. Provided the predator could sell more, it would, but then, given its already larger market share, it would inevitably lose more – potentially much more – than the prey (140).

Further, predation might well be unprofitable whenever the recoupment phase was delayed, shortened or, possibly, non-existent. This in turn might happen whenever the predator's efforts to get rid of competitors ran into trouble. Several things might go wrong. The rival, foreseeing the price would soon rise again, might simply shut down production, rather than exit the market, and resume operations as soon as the price increased. Alternatively, the rival's plant might be purchased by "some opportunist" or "wise men," who aimed at re-selling it to the monopolist at the maximum affordable price.

Finally, McGee evoked a perennial friend of antitrust skeptics, potential competition: "Obstacles to entry are necessary conditions for [predatory pricing] success. Entry is the nemesis of monopoly" (142). Absent significant barriers to entry, the monopoly profits gained during the recoupment period would always induce rivals to enter (or re-enter) the market. The latter claim would be the most significant one for later antitrust courts: the existence of entry barriers making recoupment possible would become a necessary requirement for proving predatory pricing violations, and a distinctive trait of the Chicago approach to exclusionary behavior.

McGee's case study in the rest of the paper was consistent with his theoretical analysis. He found evidence in the trial record that Standard Oil achieved and maintained its monopoly in oil refining via mergers and acquisitions, not predation. From Rockefeller's point of view, this was just rational, because using local price cutting to reduce competition "would have been foolish" (168). Provocatively, McGee noted that consumers would have actually benefited had Standard Oil's monopoly really been achieved via predation, rather than mergers: at least during the predatory phase oil prices would in fact have been lower.

The paper ended with another key claim, again in line with Director & Levi's skepticism about exclusionary abuses: "If the popular interpretation of the *Standard Oil* case is at all responsible for the emphasis that antitrust policy places on 'unfair' and 'monopolizing' business practices, that emphasis is misplaced. This limited study suggests that what businessmen do to one another is much less significant to monopoly than what they find it useful to do together to serve their common interest" (169, original emphasis). Not only did the Holy Grail of antitrust not even deserve being a key precedent for §2 case law – it actually showed that enforcers should focus on collusion and mergers to monopoly, rather than unilateral behavior.

Such a drastic conclusion was, as we said, the main goal of McGee's contribution to the newly-launched Chicago assault against contemporary antitrust. Still, even on the more specific issue of predatory behavior, his readers were led to a sweeping result. Given that predatory pricing was *rarely* profitable, and given that even when profitable it was *always* less so than the alternative takeover strategy, it followed that predatory pricing was *never* rational behavior.

Predatory attempts (let alone successful ones) should therefore be considered *very* uncommon in real markets.[15] The implication for antitrust enforcement was straightforward: if predatory pricing was *de facto* impossible, observed price cuts should be always considered evidence of normal competitive behavior, beneficial to consumers and, thus, not a matter of antitrust concern. In short, *The Antitrust Paradox*, Chapter 7 (Bork 1978, 144 ff.) – only twenty years before Bork himself.[16]

IV. REFINING MCGEE, WAITING FOR THE COURT

Given that the demolition of the basic predatory pricing story was not his primary goal, it is unsurprising that McGee left the task incomplete. Yet, his display of the power of price theory made it easy for other Chicago scholars to step in and finesse the argument. For example, a major weakness in the standard, deep-pocket story of predation was the requirement that the predator enjoyed greater financial strength than its rival(s). Absent such financial edge, predatory pricing could never be a profitable strategy.

15 As McGee himself would proclaim in a later paper, predatory attempts "have been rare, and […] successful attempts will be found to be still rarer" (McGee 1980, 292). This phrase would become a mantra of Chicago antitrust, especially after its quasi verbatim reproduction by the Supreme Court: "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful" (*Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 US 574, 1986, at 589, quoting *inter alia* McGee 1958).

16 Bork, R. H. 1978. *The Antitrust Paradox. A Policy at War with Itself*. New York: Free Press.

Curiously, McGee himself has been credited with the observation that the requirement would never be satisfied if the prey could find in capital markets the means to withstand the losses. Though this observation was not in the 1958 paper,[17] it fit so nicely with its logic that it quickly became one of the major themes of debate.

The idea was simply that the availability of financial help for the prey would prolong the predation phase beyond its maximum possible length, with the latter being defined by the condition that the monopoly profits of the recoupment phase outweigh (in present value) the losses suffered during the price war. But why should capital markets help the prey? The answer was that if the prey's market value was positive, there would always be a creditor ready to lend against such a positive value all the money required to survive predation. In short, unlimited borrowing possibilities guaranteed by *well-functioning* capital markets made predatory pricing unprofitable.[18]

On the empirical side, a couple of works in the early 1970s brought support to McGee's thesis. In 1970 Kenneth Elzinga showed that the decision in another famous §2 case, *Gunpowder Trust*,[19] was also unfounded. Of the 14 companies allegedly preyed upon by the trust, evidence of predation could be found in only two cases, and even there it was hardly conclusive (Elzinga 1970, 236). One year later Roland Koller published the first attempt at an empirical analysis of the "123 federal antitrust cases since the passage of the Sherman Act in 1890 in which it was alleged that behavior generally resembling predation had played a significant role in the matter complained of" (Koller 1971, 110).[20] Out of the 95 cases that had resulted in convictions, Koller concluded that predation had actually been attempted just in seven cases and had succeeded only in four (111-12). The result stroke a decisive blow against existing case law. Four cases in eight decades seemed to validate McGee's thesis that predatory pricing was very rare and undeserving of enforcers' attention.[21]

Though fact-based at its core, McGee's paper exercised the utmost influence on theoretical matters. Armed with price theory, the Chicago School showed that both the standard legal narrative and the basic economic story of predation were logically untenable. Predatory pricing could hardly be rational behavior because it would often be an unprofitable – and, in any case, never the most profitable – strategy. Economic analysis provided no grounds for predatory pricing charges unless, at the minimum, the predator's "deep pockets" *and* the impossibility of the victim finding support in capital markets *and* the existence of entry barriers protecting the predator's recoupment were *all* explicitly proved. Predatory intent should also be demonstrated (see next section), to avoid confusing lawful price rebates with anti-competitive behavior. Even more certainly, price theory legitimized no naïve deductions like those Director & Levi imputed to the Warren Court – namely, that *if* a firm had large market power, *then* the predatory character of its price cuts could be presumed.

Having discarded the basic story, Chicago authors proposed their own, alternative account, allegedly supported by a combination of hard facts and robust theory. In the Chicago story, absent strong reasons to believe otherwise, all price rebates were lawful business practices that fostered competition and consumer welfare. Indeed, one could even conclude that the Supreme Court should replace its price predation stories with a much simpler rule of *per se* legality of all price cuts.[22]

However, despite their theoretical success, the seeds cast by Director were slow to bring real-world fruit: the success of the Chicago approach in antitrust case law was neither immediate (it had to wait until the late 1970s) nor complete (*per se* legality of most unilateral practices was never affirmed by courts). In the case of predatory pricing the delay was even longer because McGee's argument did not conquer the Supreme Court until the mid-1980s.

17 See Telser 1966 and Stigler, G. J. 1967. "Imperfections in the Capital Market." Journal of Political Economy 75 (3): 287-292. A complete analysis of the so-called unlimited borrowing case was already in Shubik, M., 1959, Strategy and Market Structure. Competition, Oligopoly and the Theory of Games. New York: Wiley, , Ch.10, esp. 256-7.

18 As typical of Chicago, the argument's logic is simple and unassailable, but holds only as far as the (often hidden) assumptions underlying it. Here a key role is played by the hypothesis of well-functioning capital markets. In the presence of market imperfections, the prey could well be unable to borrow enough money to resist predation, making the latter once again a potentially profitable strategy. The unlimited borrowing case is, in methodological jargon, an idealization (i.e. it rests on an assumption about some parameter assuming an extreme value – typically zero or infinite – which is known to be unrealistic or at least very unlikely: For a recent overview, see Peruzzi, E., & Cevolani, G. 2021. "Defending De-idealization in Economic Modeling: A Case Study." Philosophy of the Social Sciences. December: 1-28 (doi:10.1177/00483931211049759).) This is instrumental to showing that predatory pricing cannot be rational behavior. Hence, the burden of proof should fall on those who make such an extreme hypothesis, in the sense of either proving that (a reasonable approximation to) unlimited borrowing actually exists in the real world or that their thesis (the irrationality of predation) is robust to de-idealization, i.e. to a weakening of the hypothesis itself. While George Stigler famously ridiculed the objection of imperfect capital markets, remarking that no convincing explanation existed of what the alleged imperfections amounted to (Stigler 1967, 287), it may be worth noting that Stigler's defense of the perfection postulate was, for once, not based on the usual, only-prediction-matters argument à la Friedman (1953). See Friedman, M. 1953. "The Methodology of Positive Economics." In Essays in Positive Economics, 3-43. Chicago: University of Chicago Press.

19 *United States v. E.I. Du Pont*, 188 F. 127 (C.C.D. Del. 1911). See Elzinga, K. G. 1970. "Predatory Pricing: the Case of the Gunpowder Trust." Journal of Law and Economics 13 (1): 223-240.

20 Koller, R. H. II 1971. "The Myth of Predatory Pricing: An Empirical Study." Antitrust Law & Economics Review 4: 105-124.

21 Re-examining Koller's sample, Zerbe & Cooper (1982) concluded that predatory pricing had occurred more often, at least in 27 cases. See Zerbe, R. O. & Cooper, D. S. 1982. "An Empirical and Theoretical Comparison of Alternative Predation Rules." Texas Law Review 61 (4): 655-715.

22 See e.g. Easterbrook, F. H. 1981. "Predatory Strategies and Counterstrategies." University of Chicago Law Review 48 (2), 336-7.

The topic in which Chicago had first hit hard was among the last in which its views won courtroom acceptance. Explaining such late reception would exceed the limits of this paper,[23] but there is little doubt that when reception eventually happened, it was complete and unconditional. When in 1993 the Supreme Court landed *Brooke*,[24] with its almost-impossible-to-satisfy recoupment test, it put nail in the coffin for the next three decades of allegations of predatory pricing in American antitrust law.

V. STICK TO THE PLAN: BORK 1978

The strategy devised by Director in the mid 1950s was still operational in the late 1970s. The above-mentioned Chapter 7 of *The Antitrust Paradox* offers a sophisticated example of its application. In those crucial pages, Bork did not merely demolish the traditional view of predatory pricing, but followed a line of reasoning that, like in McGee (1958), stemmed directly from Director's teaching and that, again as in McGee, promised to deliver a much bigger win to Team Chicago – this time, no less than the demise of the whole case law of exclusionary practices. Without downplaying Bork's fundamental role in persuading the Supreme Court to eventually endorse the Chicago view of predatory pricing,[25] it is important to recall that his true goal in that chapter was more ambitious than polishing McGee's thesis.

The would-be federal judge distinguished between two branches of the law of exclusionary practices (Bork 1978, 137). The theory of predation was in his view the less significant one; of much greater import was the other branch, which struck at practices (such as vertical mergers, exclusive dealing contracts and requirement contracts) said to *automatically* exclude rivals, without asking whether they excluded by efficiency or improperly, and without requiring a showing of wrongful intent.

Bork considered the notion of automatically exclusionary practices as the most important one in contemporary antitrust law, and thus as the main target of his critical endeavor. Automatic exclusion, he argued, was no real-world phenomenon: the notion could only be taken seriously as a "legal fiction" (142), based upon the judicial intuition that predatory practices were extremely common but very difficult to prove because of the intent requirement.[26]

As a kind of "prophylactic rule" (143), the courts had therefore dropped the element of wrongful intent and replaced it with a presumption of automatic exclusion. This reading of §2 case law offered Bork an easy target and a clear strategy: by showing that predatory practices were hardly common – indeed, extremely rare – he would destroy the rationale underlying the "legal fiction" of automatic exclusion. This was the very same strategy devised by Director & Levi (1956) against another legal fiction, namely, those abusive practices invoked by courts to justify condemnation of antitrust defendants whose only "fault" was bigness. Now as then Chicago price theory had to be put to work to dissolve the fiction.

Of course, by 1978 most of the work had already been done. Among the literature critical of the received view of predatory behavior, Bork highlighted the contributions by fellow Chicago scholars John McGee & Lester Telser.[27] Significantly, however, he added that even those key studies had limitations. In particular, they focused only on price predation, neglecting other, more effective predatory practices (145-6).

The latter remark was instrumental to Bork's biggest goal, namely, getting rid altogether of the theory of automatic exclusion. To do so, he devised a smart blueprint. First, he would show that exclusionary practices such as exclusive dealing contracts or other distributional arrangements were more than a legal proxy for predation. Indeed, these practices could not be deemed unlawful *unless they themselves were also predatory*. As he wrote in a key passage: "Antitrust should attack no practice or arrangement on the grounds that it is exclusionary or foreclosing unless deliberate predation can be proved" (160). Then, if he managed to show that predatory behavior, even when broadened to encompass these further practices, was still quite rare, it would be mission accomplished. Not only the theory of automatic exclusion would have been demolished, but a list of practices that the Warren Court had declared *per se* illegal would have been rehabilitated.

23 See Giocoli, N. 2011. "When Low is no Good: Predatory Pricing and U.S. Antitrust Law (1950–1980)." European Journal of the History of Economic Thought 18 (5): 777-806 and Giocoli, N. 2014. Predatory Pricing in Antitrust Law and Economics. A Historical Perspective. London and New York: Routledge (Chs. 7-8).

24 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

25 Bork himself argued the Brooke case in front of the Supreme Court. On his fundamental contribution to the rise of the Chicago approach to antitrust, see Elzinga, K. G., & Mills, D. E. 2014. "Antitrust Predation and The Antitrust Paradox." Journal of Law and Economics 57 (S3), The Contributions of Robert Bork to Antitrust Economics: S181-S200..

26 Together with the structural element of monopoly power, proof of intent was required at the time by U.S. courts to establish a §2 offense of monopolization. The explicit formulation of both requirements had been given by the Warren Court in *United States v. Grinnell Co.*, 384 US 563 (1966), at 570-1.

27 See Telser, L. G. 1966. "Cutthroat Competition and the Long Purse." Journal of Law and Economics 9: 259-277.

According to Bork, price theory showed beyond doubt that "predatory pricing is the most unlikely to exist" and that "attempts to outlaw it are likely to harm consumers more than would abandoning the effort." Still, other methods of predation existed, "which do not require the predator to expand output and incur disproportionately large costs" (155). He collected those "other methods" under the general heading of "disruptions of distribution patterns" (156-7). The general idea was that a firm might impose costs upon a rival by disturbing its optimal distribution policies.

Under specific conditions, these extra costs might occasionally be so high as to transform the disturbance into a full-blown predatory practice: forced out of its best distribution pattern, the rival could find itself unable to compete. So, Bork willingly admitted that even in the case of (to his view) usually pro-efficiency exclusive dealing contracts, it could not be "entirely excluded on theoretical grounds" that they might turn into a predatory practice (157). And while the *Grinnell* Court required evidence of predatory intent as well as of a large market share to find against such distributional predation, price theory should always have the final word as to what specific practices deserved scrutiny under the Grinnell criteria. If economic analysis showed that a given practice had a chance, "however slim it may be" (*ibid.*), to become predatory, so be it.

These words might seem surprising given Bork's fame as the keenest critic of pro-active antitrust. Indeed, Bork himself emphasized that admitting the possibility of distributional predation or other non-price predatory practices could harm genuine competition: "The real danger for the law is less that predation will be missed than that normal competitive behavior will be wrongly classified as predatory and suppressed" (*ibid.*). So why was he willing to bring courts to pursue such unlikely violations? Why give them another opportunity to turn antitrust law against pro-efficiency practices?

The answer is: for the very same reason Director (and McGee) had targeted *Standard Oil*. Armed with price theory, Bork had demonstrated that at least some of the practices courts had declared "automatically exclusionary" as a shortcut for condemning defendants when ordinary predatory intent was too difficult to prove could themselves be predatory under rigorous economic analysis. This invalidated the shortcut itself and, as a consequence, should force courts to apply to those very practices the same demanding standards of price-theoretic analysis and *Grinnell*-style predatory intent.

Bork was confident that, facing the task of demonstrating that, say, an exclusive dealing contract had been signed with a specific predatory intent, a court would recognize the task's impossibility and accept what "proper economics" showed, namely, the likely pro-efficiency nature of the contract. That price theory could be used not only to formally elucidate the efficiency of some allegedly exclusionary business practices, but also to induce potentially hostile courts *to acknowledge such efficiency* in real-world cases, was perhaps the most effective intuition in the 1978 book. For sure, it was another display of the internal consistency of the Chicago game plan against §2 case law, as originally devised by Aaron Director.

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