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BOOK REVIEWS

THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF, by Robert H. Bork. New York: Basic Books, 1978. Pp. xi, 462. $18.00.

Reviewed by Wesley J. Liebeler†

Professor Bork writes in preface that the first draft of this book was completed in 1969. Its appearance was delayed by a series of unexpected events including campus unrest and his appointment as United States Solicitor General. That delay was unfortunate; more of the book's message would have been news to the antitrust student in 1971 than it is in 1978. Aside from discussion of Oliver Williamson's work on antitrust theory, a chapter on barriers to entry, one on predation through government processes, and a brief discussion of oligopoly, there is not a great deal in the book that was not developed or at least implicit in work that Bork had completed by 1966.[1] In addition, the book suffers from the author's impatience with competing theorists. Bork often leaves the impression that he believes anyone who disagrees with him to be either not in his right mind or so mentally crippled that he should be committed to teaching antitrust at Columbia University. While some of this is pardonable as sport to enliven an otherwise drab calling, Bork has let the matter get out of hand.

This is not to say, however, that the book is not head and shoulders above most other work that passes for antitrust analysis. Despite stylistic problems and the fact that portions of the book are dated, there is no work of comparable quality in the field, except for Richard Posner's *Antitrust Law*.[2]

Having both damned and praised in general terms, I turn to specifics. Bork views antitrust law primarily from an economic perspective. While others might disagree with this approach, I do not. From an economic standpoint, the goal of antitrust law is to balance allocative efficiency and productive efficiency in an attempt to maximize the total wealth of society. As I have put it elsewhere, "[A]ntitrust should permit

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1. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1-2), 74-75 YALE L.J. 775, 373 (1965-1966).

2. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

maximization of the sum of consumer and producer surplus."[3]

It would be easy to balance the allocative efficiency and the productive efficiency effects of various transactions if we could generate information for the economic models as easily as it is done in the model of perfect competition—simply by assuming it. Since information is costly in the real world, however, we must develop proxies or general rules, formed with the guidance of economic analysis, that seem likely to produce more good than harm as the law is applied to various kinds of business arrangements. The main thrust of Bork's book is to develop and justify a set of such proxies. To do this he discusses the legislative history of the Sherman Act and examines the role and capabilities of the institutions that decide antitrust cases. He then develops an economic analysis of antitrust and applies it to a wide range of different types of transactions and arrangements that make up the main grist for the antitrust mill.

I basically agree with Bork's approach, with most of his analysis, and with the main body of his conclusions. Perhaps one should not review a book with which he is in such basic agreement. I proceed, nonetheless, by attempting to extend Bork's basic analysis in certain areas, criticizing it with moderation in others, and by suggesting some different ways of looking at some of the issues and cases that he did discuss.

I

THE IMPORTANCE OF PRODUCTIVE EFFICIENCY

In developing his proxies for the costly and largely unavailable information needed to balance allocative and productive efficiency, Bork argues that all transactions that do not seem capable of restricting output (decreasing allocative efficiency) should be left alone, without regard to whether they seem capable of creating or increasing productive efficiency.[4] While he believes that it is possible and desirable to go further and specify the nature of the productive efficiencies created or intended by various business activities, Bork argues that it is not logically necessary to do so.

Even though it is technically correct, I have two problems with this general approach. The first relates to the doctrine of ancillary restraints; the second, to the usefulness of asking questions about productive efficiency. First, Bork's approach does not at all describe the law of ancillary restraints, the principal means by which the law distin-

3. Liebeler, *Market Power and Competitive Superiority in Concentrated Markets*, 25 U.C.L.A. L. REV. 1231, 1231 (1978).

4. R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 122 (1978).

guishes arrangements that should be subjected to the per se rule from those to be governed by the rule of reason. That doctrine, of which Bork in other places thoroughly approves,[5] looks first to the efficiency-creating potential of an arrangement. It does this by asking if there is a main, legitimate purpose to the agreement to which the elimination of competition may be ancillary. If there is no such efficiency-creating potential the per se rule will be applied, whether or not output restriction is possible.

It is usually not much justification for an antitrust rule to state that it is, in fact, the law, but that is not true for the ancillary restraints doctrine. Bork seems to agree that, properly understood and sensitively applied, the doctrine seems adequate to make economic sense out of the antitrust law. In spite of this early argument that all arrangements that seem incapable of restricting output should be left alone, he does not propose changes in the basic structure of the ancillary restraints doctrine or the per se rule.

My second problem is that Bork's suggested approach does not focus sufficient attention on productive efficiency. In part this is simply a question of tactics: One is likely to be more successful in convincing another that a particular arrangement is not output restricting if he can plausibly suggest how it enhances efficiency. But the problem cuts deeper. Economists and antitrust enforcement officials are notoriously clever at finding monopoly explanations for almost every business arrangement that is even slightly out of the ordinary.[6] This propensity and ability goes a long way toward explaining the present unsatisfactory state of the law. As a result, too little attention has been given to the question of how these "odd looking" arrangements may create or increase efficiency. Anything that would increase that attention would be welcome.[7]

The results of inquiring into the efficiency-creating potential of challenged arrangements sometimes can be startling. Take, for example, the leasing arrangements in *United States v. United Shoe Machinery Corp.*[8] Although Bork correctly criticizes Judge Wyzanski (who was assisted in that case by a certified economist) for not examining the

5. *See, e.g., id.*

6. *See* Coase, *Industrial Organization: A Proposal for Research*, in POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 67 (V. Fuchs cd. 1972). Elsewhere, I have called this propensity to believe monopoly ubiquitous as the "Coase Syndrome." Liebeler, *supra* note 3, at 1281.

7. I have argued that in evaluating so-called predatory or exclusionary practices the antitrust enforcement agencies should make, at least within the agency itself, the strongest argument possible that such practices are efficiency-creating. If that argument can then be refuted, action against the practices may be appropriate. *Id.* at 1282.

8. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

possibility that United's leasing system was efficiency-creating,[9] Bork is almost equally guilty. He spills considerable ink to convince us that the leasing and other arrangements used by United were not predatory, exclusionary, or otherwise output restricting in naturc,[10] but he never addresses the basic question of what efficiencies United was trying to achieve by leasing rather than selling its shoe manufacturing machines.

In this respect *United Shoe* seems to be quite like *United States v. American Can Co.*[11] There the government attacked below-cost leases of can-closing machines that had been tied to requirements contracts for cans. The court required the can producers to limit the requirements contracts to one year and to offer the closing machines for sale at attractive prices. The supposed purpose was to rid the market of foreclosure—the same problem perceived in United's machine leases—and thereby increase economic welfare.

The *American Can* arrangements seem designed to create efficiency, however, by shifting risk from the packers to the can producers. One risk shifted is that of bearing the capital cost of an expensive can closing machine in a season of short crops, when it will be little used. If payment for the machine is through the purchase of cans, lower payments will be made in a lean year. Payments will be made up when crops are good and many cans are bought. The can producers appear to be able to deal with the risk of crop fluctuations more cheaply than individual packers because the former typically will cover wider geographic areas and broader crop lines than the latter. The diversity in yields as between different areas and different crops makes this "insurance" scheme feasible to the can producers. As we shall see below, the same type of scheme may have been involvcd in the *United Shoe* leases.

The *American Can* analysis produccs at lcast two testable propositions. First, we would not expect the leasing arrangements to be used in selling cans to those industries in which demand was more predictable and closing machines were used on a relatively steady basis. The risks involved in fluctuating use would not be present. This, in fact, appears to have been the case. Sales of cans to industries such as beer, petroleum products, and dog food did not involve a lease of the closing machines tied to requirements contracts for cans.[12]

9. R. BORK, *supra* note 4, at 138, 171.

10. *Id.* at 138-41, 170-73, 325-28.

11. 87 F. Supp. 18 (N.D. Cal. 1949).

12. *See* D. Flath, *United States v. American Can Company*: Ecouomic Analysis of an Antitrust Case (unpublished doctoral dissertaion on file with the UCLA Economics Department). My analysis of *American Can* in terms of risk shifting is not original. *See* United States v. American Can Co., 230 F. 859, 896 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921); 2 S. WHITNEY, ANTITRUST POLICIES 202 (1958). *See also* Burstein, *A Theory of Full-Line Forcing*, 55 NW. U.L.

The second testable proposition generated by this analysis is that the smaller packers, the ones least able to handle the risk described, would be quite unhappy with the result of *American Can*. In fact, within a few years after the decree those smaller firms were complaining that the requirement of the decree that machine rentals be fully compensatory was driving them out of business. The court remarked in *Continental Can*, rather plaintively I would like to believe, that it "never intended to work an unconscionable or oppressive condition on any class of canner, large or small, particularly mindful of the marginal or seasonal canner."[13] The response of these canners to *American Can* seems quite unlike that which we would expect from those so recently freed from the oppressive yoke of monopoly. It seems more likely that that case made it more costly for the smaller canners to buy "insurance" from the can manufacturers—so much more costly that those canners petitioned the court to undo at least part of the mischief that it had wrought in the original decree.

There are interesting parallels between *American Can* and *United Shoe* that lead me to suspect that the basic efficiency created by United's leasing system also was the shifting of risk from shoe manufacturers to United. Since shoemakers made lease payments on United's machines largely as a function of the number of operations performed by each machine,[14] the same effect was present as was present in *American Can*. Lessees paid for machines as, and if, they used them. If the machines were used more in any given period, the payments were higher during that time; if used less, they were lower. The only difference between the two cases in this respect is that canners

REV. 62, 71 (1960). The analysis seems to have been overlooked in the second American Can case, however, and by most commentators on it. *See* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 320 (1970).

13. 128 F. Supp. 932, 936 (N.D. Cal. 1955). It might be thought that the lease and tying arrangements in *American Can* were designed to facilitate price discrimination in can closing machines. *See* Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 23-24 (1967). It also might be thought that the reaction of the small canners to the decree that made such discrimination impossible could be explained on the theory that such discrimination favored them over the larger canners. But such discrimination is a function of the *intensity of use* of each individual machine, not of the *total number of machines* used by each canner. Small firms may use their machines as intensively as large firms. If so, the smaller firms would not be favored by price discrimination and their reaction to the decree cannot be explained in terms of such discrimination. Indeed, the price discrimination explanation of tying in variable proportions situations loses much of its force when each user uses many machines. This will be the case, in any event, where all machines except the one at the margin are used up to capacity, a result the machine manufacturer has every reason to desire. The price discrimination "explanation" is not applicable to *American Can* in any event, since there were can closing machine manufacturers in the market in addition to American and Continental and the machines were not protected by important patents. It is more plausible in *United Shoe* because there was no comparable competition there, at least in certain basic machines.

14. *See* S. WHITNEY, *supra* note 12, at 121.

paid for the closing machines by buying more cans while the shoe manufacturers paid directly as their use of machines increased.

Some shoe manufacturers also appear to have been subject to risks very much like those that seem to have been present in the canning industry. United seems to have been in a position to deal with those risks at a lower cost than any single shoemaker. The risk in the shoe manufacturing industry is probably a function of consumer reaction to style changes. A shoe manufacturer who has committed himself to making a style of shoe that turns out to be as popular as the Edsel is not unlike a canner whose suppliers have suffered a crop failure. Both have expensive machines and nothing to do. They would both be happy to defer payment to a later time. The requirements contracts and machine leases in *American Can* permitted this, as did the leases in *United Shoe*.

If demand for one shoemaker's output declined because consumers did not like that style, the output of some other shoemaker, who likely also leased United machines, probably would rise. It therefore may have been economically feasible for United, as it seems to have been with the can manufacturers, to sell "insurance" to the users of its machines.

It is fascinating to speculate what individual shoe manufacturers might do after *United Shoe*. If the leasing system effectively shifted risk from individual shoe manufacturers to United, its destruction probably would prompt shoe manufacturers to attempt to find other ways of dealing with that risk. One possible response is horizontal mergers to create broader lines of shoes. That technique spreads the risk that one line might be badly received. Another possible response may be found in various means of vertical integration into the retail level. Such an approach might reduce the risk of a bad reception by producing better information about styles likely to be successful.

We know, of course, primarily because of the attention which the antitrust enforcement agencies have given to the Brown Shoe Company,[15] that this is exactly what happened in the shoe manufacturing industry. There was both a decline in the number of firms in that industry and an increase of vertical integration into retailing. While both of these "trends" appear to have antedated *United Shoe* slightly, there is good reason to suspect that the shoe industry's structural changes that were so strenuously resisted by both the Justice Department and the Federal Trade Commission may have been related to the former's "success" in *United Shoe*. This suspicion is supported by inquiring into

15. FTC v. Brown Shoe Co., 384 U.S. 316 (1966); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

the kind of efficiencies United was trying to create by its leasing system, and the changes in the environment of the shoe manufacturing industry that might have been related to the horizontal merger and vertical integration tendencies that emerged there during the mid-1950's.

Professor Bork did not really address this. He confined himself instead to an argument that the arrangements in *United Shoe* did not contribute to output restriction and to a well-deserved general excoriation of *Brown Shoe*.[16] But if one shares Bork's view, as I do in general, that the present state of antitrust law leaves much to be desired, how much better to be able to show not only that the *Brown Shoe* cases make no sense on their own terms, but that the events that prompted them probably were caused by an earlier antitrust foray, which was, if possible, even more misconceived than the latter two. As I have said, we are led to such suspicions by focusing on the efficiency considerations that may be associated with the arrangements or structural changes against which those forays have been made.

II

PRODUCTIVE EFFICIENCY AND REFUSALS TO DEAL

Insufficient attention to productive efficiency considerations also has led Bork to an incomplete analysis of two important boycott cases. That incompleteness leads in turn to a failure to assimilate certain types of refusals to deal with other more obviously beneficial business arrangements and, more importantly, to a significant body of intelligence that can inform us about the efficiency-creating possibilities of these refusals to deal. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[17] a number of The Broadway's suppliers of household appliances (in response to The Broadway's request) refused to deal with Klor's—a retail operation located next door to The Broadway in San Francisco. Bork writes about the case:

> If the decision is to find justification in antitrust terms, it must be because the boycott contained, so far as we can tell, no possibility of efficiency and did deprive consumers of an outlet they had shown they wanted. To remove Klor's artificially was to move the distribution pattern further from the optimal. The decision can thus perhaps be defended on consumer welfare grounds.[18]

Bork then inserts a footnote which suggests that an alternative explanation casting doubt on the decision might involve the "free rider" problem. The Broadway might have been providing product information at the local level while Klor's provided none. Klor's might have used its

16. R. BORK, *supra* note 4, at 198, 302.
17. 359 U.S. 207 (1959).
18. R. BORK, *supra* note 4, at 332.

position next door to The Broadway to display lower prices and attract customers to whom The Broadway already had provided information.

I developed this point in an earlier article, suggesting that when refusals to deal of the type involved in *Klor's* are analyzed in terms of their likely business purpose they appear to be much the same economic phenomenon as certain types of price "discrimination," franchises, dealer location arrangements, vertical territorial and customer limitations, and resale price maintenance.[19] This is much more than a matter of "academic" interest. To the extent that *Klor's*-type refusals to deal are economically equivalent to vertical restrictions of the type in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[20] a rule of reason approach to such boycotts would seem to be indicated, rather than the per se approach that actually was used in *Klor's*. A brief description of *GTE Sylvania* will facilitate our discussion of *Klor's*.

GTE Sylvania was a private action by Continental, a former retailer of Sylvania television sets in San Francisco. When Sylvania franchised an additional retailer in San Francisco, Continental began selling Sylvania televisions in Sacramento, where Sylvania already had a highly successful retail operation. The action was based on the theory that Sylvania had violated section 1 of the Sherman Act by making and enforcing franchise agreements that prohibited the sale of its products other than from specified locations. Justice Clark, sitting as district court judge, relied on *United States v. Arnold, Schwinn & Co.*[21] to instruct the jury that Sylvania had committed a per se violation of section 1 if it had contracted with one or more of its dealers to restrict outlets or store locations from which such dealers could sell products from which title and risk of loss had passed from Sylvania. The jury under the circumstances had no choice but to find for the plaintiff.

The court of appeals attempted to distinguish *Schwinn*, but the Supreme Court overruled that case, concluding that the legality of nonprice vertical restrictions should be determined under the rule of reason. The Court thought that antitrust policy could not be divorced from market considerations, that the primary concern of antitrust was *interbrand* as distinguished from *intrabrand* competition, and that vertical (or intrabrand) restrictions could increase efficiency in several ways. In discussing these efficiencies, the Court said:

> Established manufacturers can use them [vertical restrictions] to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.

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19. Liebeler, *Integration and Competition*, in VERTICAL INTEGRATION IN THE OIL INDUSTRY 13 (E. Mitchell ed. 1976).

20. 433 U.S. 36 (1977).

21. 388 U.S. 365 (1967).

> Service and repair are vital for many products, such as automobiles *and major household appliances.* The availability of and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.[22]

If both Sylvania and the manufacturer(s) involved in *Klor's* were trying to overcome the free rider problem, it is hard to see why future *Klor's*-type situations would not be governed by *GTE Sylvania*. This is particularly so because the *GTE Sylvania* Court indicated that future departures from the rule of reason in this area would be based on demonstrable economic effect and not on the form of the transaction.[23] Indeed, the transactions are not really different in form; both cases involved an agreement between a manufacturer and its retailer(s) not to deal with another retailer.[24] The principal question is whether the transactions in *GTE Sylvania* and in *Klor's* had similar economic purposes and effects; specifically, whether the arrangements in *Klor's* were designed to deal with a free rider problem.

To develop this issue, suppose that we manufacture refrigerators that we wish to sell through independent retailers. We provide information about our product in various national advertising media. But information must also be supplied, models displayed, and so on, at the retail level. In our distribution efforts we induce, among others, a chain of department stores such as The Broadway to stock and to show our products in its stores. We train its salespersons to do a competent job. It advertises our line of goods, places them on display in its stores and begins to sell them. Our average price to The Broadway per refrigerator is $500. Its average retail price, which covers the cost of providing the level of local sales effort (information) which it and we guess to be "correct," is $600.

All goes well for a time, until Klor's opens a small storefront operation next door that has nothing in it but catalogs, which include the model numbers and brief descriptions of our refrigerators. Klor's charges an average price of $550. Before long The Broadway's sales of our product have dwindled to almost nothing, although the refrigerator department still seems to be as populated as ever with "customers."

22. 433 U.S. at 55 (emphasis added).

23. *Id.* at 58 & n.9, 59.

24. The only difference is that there was more than one manufacturer involved in *Klor's*. This introduces a possible element of interbrand competition that was not present in *GTE Sylvania*. From an economic standpoint the basic question in *Klor's* was whether or not the refusals to deal had the purpose or effect of restricting output, an almost impossible conclusion to reach given the circumstances of that case.

Klor's is selling about the same number of our refrigerators as The Broadway had been selling before, and perhaps a few more. The Broadway informs us that its refrigerator department is showing a substantial loss because, even though it is crowded and apparently busy, it sells few refrigerators. It advises that it can no longer devote space and sales personnel to our product. What do we do now?

We might charge Klor's $50 more for our refrigerators than we charge The Broadway, thus giving the latter a cushion to cover its costs of providing information about our refrigerators. But this would open us to charges of price "discrimination" under the Robinson-Patman Act. In addition, Klor's might not be getting its refrigerators directly from us. It may be getting them on a "bootleg" basis from some wholesaler or large retailer other than The Broadway. The problems raised by this possibility, of course, are similar to those that were involved in *Schwinn* and, more recently, in *GTE Sylvania*.

We might give The Broadway an exclusive territory in which it is our only retailer. If the nature of the product were such that we could get by with only one reseller in a geographical area large enough to discourage free riding, this could be workable. Refrigerators do not seem to fit into such a category, however, because sales probably would be affected significantly by the number of retailers in a particular area. Division of territories is better suited to a product like heavy-duty trucks, where one dealer in San Francisco could be enough. The point is, of course, that market division can be used for at least some products to achieve the same economic ends that can be achieved by price "discrimination."

Resale price maintenance also can be used to accomplish that same economic objective—the specification and protection of property rights in information produced by the protected reseller. It may be most effective when we need a large number of retail outlets to cover an area effectively. We could set the resale price of our refrigerators at about the same price The Broadway had been charging. This would be high enough to cover its costs of providing the information that we want supplied at the retail level, yet not so high as to provide any comparably efficient reseller with windfall profits at our expense or to reduce our sales appreciably below the level that would have obtained in the absence of the free rider problem. Since Klor's would not be able to cut prices below $600 on average—the same average price being charged by The Broadway—consumers would have no incentive to buy from Klor's after getting their information at The Broadway. This should end the free rider problem and make it possible for us to get the "appropriate" amonnt of information about our product produced at the retail level.

Each of these three forms of business arrangement—price discrimination, market division, and resale price maintenance—serves the same economic purpose, but only the various forms of market division involve a total refusal to deal. These refusals to deal are, in any practical sense of the word, "concerted." There is at least an implicit understanding with any franchisee, for example, that another person will not be franchised to operate next door. Such refusals to deal were involved in *White Motor Co. v. United States*,[25] in *Schwinn*, and most importantly, in *GTE Sylvania.*

Bork has had no difficulty perceiving how the refusals to deal in those cases created efficiencies. His failure to connect *Klor's* to those cases appears to reflect a greater reliance on the way in which the arrangements in those cases were characterized and on the way in which the legal issues were framed than on the underlying economic realities. I cannot see any economic difference between a case in which Sylvania agrees with its Sacramento retailer to refuse to sell television sets to Continental for resale in Sacramento, in order to prevent Continental from "free riding" on the existing Sacramento retailer, and one in which General Electric refuses to sell refrigerators to Klor's for resale next door to The Broadway in order to prevent Klor's from "free riding" on The Broadway. Nor is it clear that matters are at all changed by the fact that other suppliers of The Broadway did the same thing. That is exactly what we would expect. If GE finds it efficient to protect The Broadway's property rights in locally produced information about GE products, it should come as no surprise that other suppliers would have the same incentive as to similar products of their own. While an interbrand restriction of competition between GE and makers of other brands of refrigerators could be a matter of concern in cases which appear to involve a manufacturer's cartel, that could not conceivably have been involved in *Klor's* because the boycott there eliminated only one small retailer adjacent to The Broadway.

It is not only false, as Bork states in his text, that *Klor's* involved "no possibility of efficiency," but the efficiency involved is exactly like that which is present in the price fixing and market division cases that Bork treats so well in his earlier articles and elsewhere in his book.[26] Once this is seen, the relevance of *GTE Sylvania* to the *Klor's*-type situation—a point not mentioned by Bork—becomes clear. If *GTE Sylvania* does not overrule *Klor's*—and it could be argued that it does not, because of the horizontal agreement alleged in *Klor's*—it certainly provides discerning counsel with new and powerful arguments against attacks on refusals to deal of the type involved in *Klor's*.

25. 372 U.S. 253 (1963).

26. R. BORK, *supra* note 4, at 263; Bork, *supra* note 1.

I also have trouble with the way Bork handles *Fashion Originators' Guild of America v. FTC*,[27] which involved a women's garment industry trade organization. Some of its members designed, made, sold or distributed garments while others dealt in the textiles from which those garments were made. The garment manufacturers claimed to be creators of original dress designs; the textile makers made the same claim as to textiles. Nonmembers of the guild systematically copied these designs and sold their copied dresses at lower prices. Guild members agreed to boycott retail stores that sold copies.

The FTC and the Supreme Court both viewed the boycott as an attempt to suppress the competition of the copiers, which it clearly was—just as the refusals to deal in *White Motor, Schwinn, GTE Sylvania*, and *Klor's* involved attempts to suppress competition. The question remains, of course, whether this suppression contributed to the restriction of output or the creation of efficiency, a question which Bork correctly urges should not be suppressed simply because a refusal to deal may be involved. Restriction of output seems improbable. There were 176 different garment manufacturing firms in the guild, and these firms, according to the Supreme Court, continued to compete with each other in many ways. In addition, they faced competition from others: in 1936 the guild sold only 60% of all ladies garments wholesaling for $10.75 or more. Effective collusion under such circumstances does not seem likely.

But if output restriction was not the principal purpose or effect of the boycott, what was? Bork advances an efficiency theory in suggesting that guild members were trying to prevent the copiers from free riding on product information produced at the retail level. They did this by pressuring retailers to keep copies out of stores in which originals were sold. Exclusive dealing would force retailers to promote garments produced by guild members and prevent copiers from free riding on sales efforts by the resellers.

Bork conjectures that collective exclusive dealing with guild members, instead of with only one of them, may have been necessary because no one manufacturer could offer a sufficiently complete line of garments to enable retailers to deal exclusively with them. In this view, the guild members are the equivalent of a contract firm with respect to distribution activities. The boycott is, thus, an attempt to specify property rights in locally produced product information and is not unlike *Klor's*, or at least the view of *Klor's* that I have outlined above. As Bork puts it:

> The insistence of the group that copies not be sold by their retailers

27. 312 U.S. 457 (1941); R. BORK, *supra* note 4, at 338.

> may look like predation directed at the copyists, but it may be nothing more than an attempt to gain the efficiencies of advertising and promotion that lead to exclusive dealing in many industries.[28]

This seems improbable. First, there is no obvious reason why an integration of 176 firms was necessary to obtain a sufficiently full line of garments to permit exclusive dealing. One would suppose that cooperative arrangements among many fewer firms would have been adequate to achieve this goal.

Additionally, there is no real mystery about what the guild members were trying to accomplish with the boycott. They stated a coherent explanation in their defense, which the FTC typically refused to credit. In fact, the FTC excluded most of the proffered evidence on the issue. The guild claimed that it was trying "to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four."[29] They were, in more formal terms, attempting to create a system of property rights in the designs themselves by raising the costs that the copiers had to incur to copy effectively.

There was, to be sure, not a complete specification of such property rights, since the copiers were not prevented from copying and still could sell their copies in other stores. But to the extent that consumers would have to incur search and other transaction costs in order to locate and obtain copies there was a more complete specification of property rights in the original dress designs. Since there was no real possibility of market monopoly involved, it would seem that the principal (or only) effect of the boycott would be to increase the extent to which the benefits of investment in original dress designs could be internalized (*i.e.*, captured by the investor) thereby moving such investment to more optimum levels compared to what they would have been absent the boycott.

It could, of course, be objected that the scope and nature of property rights in "original" dress designs and the like is the proper domain of the federal patent and copyright laws and should not concern the antitrust law. This objection would not be well taken even from a strictly legal standpoint; it has even less basis on economic or policy grounds. Issues of property rights in "original" designs and ideas arise and are decided as a matter of course in unfair competition cases.[30] There is no obvious reason why they can or should not be handled in antitrust cases as well, and indeed they are, although that fact is not widely recognized. It is often thought that the purposes of antitrust law

28. R. BORK, *supra* note 4, at 339.
29. 312 U.S. at 467.
30. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974).

and of unfair competition law generally conflict. It is said that the thrust of antitrust law is to prevent restraints of competition while the purpose of the law of unfair competition is to impose them.[31] On a more basic level, however, the purposes of these two branches of the law are the same. Properly construed, they both aim (or should aim) at the creation of a property rights system that enables the market to operate more efficiently than would any alternative specification of property rights.

In fact, the antitrust cases have been involved in specifying property rights from the beginning. Judge Taft explicated the doctrine of ancillary restraints, using as examples agreements by sellers and buyers of property not to compete with their buyers and sellers, respectively; agreements of retiring partners not to compete with the partnership; and agreements of partners not to compete with the partnership while they are members of the firm. According to Taft, the common law at first refused to recognize the validity of any of these agreements, but changed over time to recognize that "it was in the interest of trade" that such agreements be generally upheld as valid if ancillary to a main transaction and if monopoly was not involved.[32]

The issue in one of Taft's examples is whether a seller lawfully may bind himself not to compete with the buyer of his business, in order to create a transferable property right in the "good will" of that business. Recognizing and enforcing such a property right enables such sellers to obtain in a sale the benefits of their previous efforts and investment, and thereby changes the incentive structure to engage in that activity. Resolving this question involves at least an implicit cost-benefit analysis no different in principle from that involved in the decision to adopt a patent law. The decision to recognize a property right in a seller's goodwill or in a partnership's right to be free from the competition of its members is based on a judgment that the increased productive efficiency outweighs the possible resulting reduction in allocative efficiency. The economic issues in Taft's examples are no different from those in *FOGA*. Neither can be resolved without engaging in a rough cost-benefit analysis, which should be the main thrust of the rule of reason. If the issues involved in Taft's examples are appropriate for decision in antitrust cases, there is no obvious reason why the same is not true for the issues in *FOGA*.

This analysis of the efficiency-creating potential in *FOGA*—an attempt to create a property rights system in the original designs of guild members—seems more probably correct than that offered by Bork.

31. Northwest Power Products, Inc. v. Omark Indus. Inc. 576 F.2d 83, 88 (5th Cir. 1978).

32. *See* United States v. Addyston Pipe & Steel Co., 85 F.271, 280-82 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

Developing this point seems worthwhile because it raises interesting questions about the test (basically the ancillary restraints test) which Bork suggests might be used to distinguish predatory boycotts, to which the per se rule should be applied, from those which may be efficiency-creating and, therefore, governed by the rule of reason. That test turns on the presence or absence of "other joint economic activity" to which the elimination of competition involved may be ancillary. It is hard to see such activity in *FOGA*, and yet it seems that the per se rule should not have been applied in that case.

In suggesting his test for distinguishing predatory boycotts from those which may create efficiencies, Bork says:

> A comparison of *Klor's* and [*National Trailer Rental Service*] suggests that boycotts are likely to be predatory when the parties are engaged in no other joint economic activity, and may be efficiency-creating when they are.[33]

NTRS involved an organization of trailer rental operators created to facilitate the movement of trailers rented for one-way trips between cities. There was extensive integration of productive activities of the members of the system—they were really partners in the intercity trailer rental business. Their refusal to admit other firms into the association, nevertheless, was held a per se violation of section 1.

Bork uses *NTRS* as an example of a case in which there was an integration of productive facilities to which the elimination of competition could be ancillary, and *Klor's* as an example of a case in which there was not. I have already suggested that this view of *Klor's* is incorrect; the vendor-vendee relations involved there created an integration just as it does, as Bork notes, in any vertical case.[34] Although Bork's use of *Klor's* as an example of a case in which there was no integration of productive facilities is, therefore, inapposite, let us see how the test he proposes in comparing *NTRS* and *Klor's* works when applied to my view of the efficiency-creating potential in *FOGA*.

The "other joint economic activity" of the FOGA members to which their boycott may have been ancillary—thus bringing the rule of reason into play—is much harder to discern than it is in either *NTRS* or *Klor's*. There was in *FOGA*, to use Taft's language from *United States v. Addyston Pipe & Steel Co.*, "no relation of partnership, or of vendor and vendee, or of employer and employee."[35] Nor does the *FOGA* boycott seem to fit within the category of cases to which the rule

33. R. BORK, *supra* note 4, at 334 (discussing United States v. National Trailer Rental Systems, 156 F. Supp. 241 (D. Kan. 1957)).

34. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 373, 403 (1966).

35. 85 F. at 290.

of reason will be applied as described in the most recent Supreme Court pronouncement on the subject, *National Society of Professional Engineers v. United States*, in which Justice Stevens indicated that the rule of reason would be applied to eliminations of competition "which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business."[36] The garment makers were, to be sure, all members of the same trade association (FOGA) and as such did engage in certain joint activities. But none of them seem to be like the kind of joint economic activity to which restrictions on competition have been held ancillary in other cases.

It could be said that the FOGA members joined their efforts to create a more completely specified system of property rights in the original designs which they each supposedly created. Acceptance of this characterization would satisfy the requirement that there be present other joint eeonomic activity with a principal lawful purpose to avoid application of the per se rule.

I would not be surprised if many had difficulty accepting that characterization. Associating to create a property rights system to internalize more completely the benefits of investment in original designs seems a far cry from the more mundane association that we generally think about when we think of ancillary restraint cases. It does not seem at all like what Taft must have had in mind when he wrote of the case "when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community."[37] And yet, if my analysis of *FOGA* is correct, the elimination of competition attempted there may have increased the net wealth of the community by more accurately guiding investment in "original" dress designs in response to consumer demand. If so, there is as much justification for applying the rule of reason to the *FOGA* boycott as to agreements of partners not to compete with the partnership in Taft's hypothetical.

This result could be reached in either of two ways. As mentioned above, the attempt to create a more completely specified system of property rights could be accepted as joint activity sufficient to satisfy the ancillary restraints doctrine, thereby triggering a rule of reason analysis. Or it could be recognized that in some cases joint economic activity of the more traditional kind is not required to avoid the per se rule. In such cases, the court could simply pass over the joint economic activity requirement, which is simply a proxy for efficiency-creating potential, and focus directly on the basic issue: Is there any way in which

36. 435 U.S. 679, 689 (1978).

37. 85 F. at 280.

the arrangement involved could contribute to the possible creation of efficiency? Although this would require a slight modification of the traditional ancillary restraints doctrine, it has the advantage of reminding us that the requirement of other, legitimate, joint economic activity is nothing more than a proxy for underlying efficiency-creating potential.

Since the result would be the same under each alternative, it makes little difference which is adopted. Either could avoid the restrictions of the per se rule which might be applied if the requirement of "other joint economic activity" is taken too literally or viewed too narrowly. Bork certainly would not do this purposely. But his improbable view of the efficiency-creating potential in *FOGA* avoided the issue of how to handle an arrangement which, if not naked, surely is more scantily clad than the more traditional arrangements to which the ancillary restraints doctrine is applied. My analysis would avoid applying the per se rule to such arrangements, even though their efficiency-creating potential is more subtle than that of the ordinary partnership.

III

PRODUCTIVE EFFICIENCY, PRICE FIXING, AND MARKET DIVISION

Bork treats price fixing and market division more extensively than most other arrangements by drawing heavily on his earlier work on those subjects. Yet even here additional comment seems warranted. Take, for example, his discussion of *United States v. Sealy, Inc.*[38]

Sealy licensed certain mattress manufacturers, who in turn owned almost all of Sealy's outstanding shares, to make and sell products under the Sealy name. The shareholder-licensees, whose sales were limited to specific territories, paid Sealy royalties on their sale of Sealy mattresses.[39] Sealy and its licensees in turn set and policed the retail prices at which such mattresses could be sold by the retailers who purchased from the licensee-manufacturers. The lower court upheld the government's charge of illegal price fixing but refused to find that the market division constituted an unreasonable retraint of trade. The Supreme Court reversed, finding the market division to be illegal as part of an aggregation of trade restraints.

Bork argues that neither the price fixing nor the market division should have been held illegal because they could not have restricted

38. 388 U.S. 350 (1967); R. BORK, *supra* note 4, at 270.

39. Contrary to statements in *Sealy*, it appears that Sealy also collected royalties on all other mattresses manufactured by its licensees, whether they were identified as Sealy mattresses or not. *See* Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978).

output. He also outlines how those arrangements probably contributed to efficiency by preventing the Sealy licensees from taking free rides on each other's efforts to produce product information at the local level, thereby bringing investment in such product information closer to the optimal amount.

My principal problem is with Bork's statement that the control of Sealy by its licensees brought the Supreme Court to decide "without doubt correctly, that the restraints could not be classified as vertically imposed but were horizontal restraints between the controlling manufacturer-licensees."[40] Bork's view that the price fixing and market division were horizontal led him to rely on the relatively small size of Sealy's market share to conclude that output restriction could not have resulted from those arrangements, and in turn to argue that the Court should have remanded so that their legality could be determined after a trial on the issue of whether Sealy's size gave it market power. This would have been an appropriate disposition of a case in which the government attacked the creation of the Sealy "contract firm" itself. But *Sealy* was not such a case. The case before the Court was limited to the market division arrangements and, at least in the court below, the price fixing. The legality of Sealy's existence as a firm was never questioned.

To play the game first on the characterization issue, Professor Bork, Professor Posner, and the *Sealy* Court[41] seem wrong to treat these restraints as horizontal. Mr. Justice Harlan correctly regarded them as vertical, although neither he, nor anyone else as far as I know, reached that conclusion using correct analysis. If the price fixing and market division really are vertical, the question of market share—under Bork's view of vertical arrangements at any rate—becomes irrelevant.[42] There was no need to remand for trial on the issue of market share to conclude that the price fixing and market division were legal.

This conclusion readily follows from Bork's own analysis of verti-

40. R. BORK, *supra* note 4, at 270 (discussing United States v. Sealy, Inc., 388 U.S. 350 (1967)).

41. 388 U.S. at 352. Posner states: "The Court was quite right in stating that, in substance, the territorial restrictions were horizontal. That is, they were imposed by the Sealy licensees themselves . . . ." R. POSNER, ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS 226 (1974). The statement that someone "imposed" something is not a meaningful statement in economic terms, and, in addition, is a poor way to determine whether an arrangement is horizontal or vertical. Bork occasionally makes the same error, *see, e.g.*, BORK, *supra* note 4, at 288, and in fact did so in his analysis of *Sealy, id.* at 270. A more relevant inquiry is whether an arrangement has the potential to restrict output. Those that do should be called horizontal. What one calls the rest is largely a matter of taste as far as I can see. Since the explicit eliminations of competition in *Sealy* did not have the potential to restrict output beyond what could have been accomplished simply by setting royalty rates, they were not horizontal.

42. This follows, of course, from the fact that Bork believes that all vertical arrangements should be lawful. R. BORK, *supra* note 4, at 297.

cal arrangements. He argues that all truly vertical arrangements should be legal because no single firm can use them as an output-restricting device. A firm such as White Motor can extract the fruits of whatever market power it might have by restricting the output of trucks at the manufacturing level, without becoming involved in any direct limitation on competition between its resellers. Any such limitation of competition between resellers will be vertical in nature; it will neither increase horizontal market share, nor the manufacturer's ability to restrict output.[43]

The price fixing and market division in *Sealy*, therefore, might be considered vertical, although the terms "vertical" and "horizontal" should be replaced for clarity with "intrabrand" and "interbrand," respectively. The use of price fixing and market division by Sealy—even if Sealy is regarded as the "mere instrumentality" of its manufacturer-owners—would not add to the ability of Sealy, or of those owners, to restrict output. That ability (if and to the extent it is at all possible given market constraints) is ensured because each manufacturer-owner is required to pay Sealy a royalty on each Sealy mattress sold. Just as White Motor could extract the fruits of its market power (if any) by setting the price of trucks at the manufacturing level, Sealy could do the same for mattresses by setting the royalty rate to each of its manufacturer-owners. In the same sense that the market division in *White Motor* could not contribute to the restriction of output, no matter what share of the market White Motor held, neither could the market division and price fixing involved in *Sealy*.

The explicit restraints involved in a case such as *Sealy* therefore are not necessary to wield whatever market power the firm might have. The restraints thus should be deemed vertical, or intrabrand. This observation is important for at least three reasons. First, it focuses attention on the real issue in such cases: whether joining the formerly independent mattress makers with the trademark licensing program, *without regard to the price fixing and market division*, is a possible violation of the Sherman Act. In a case like *Sealy*, this question scarcely survives its asking. It seems improbable that, absent explicit price fixing and market division, it would ever have occurred to any antitrust enforcement official to challenge the Sealy operation.[44]

Second, the effects of explicit restraints are important in terms of

43. *Id.* at 288.

44. Ironically, the Justice Department approved a program under which Sealy and all or substantially all of its licensees would merge into a single firm. This was done in a letter issued February 8, 1973. *See* Brief for Defendants and Cross-Appellants, Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978). That such a merger would eliminate intrabrand competition among the Sealy licensees—the issue over which *United States v. Sealy* was fought—seemed not to be a problem.

the appropriate remedy should the arrangements ever appear to involve a serious attempt to form a cartel. In *Sealy*, for example, the Justice Department and the Court were pleased to eliminate the explicit price fixing and market division. But this remedy in no way would have affected Sealy's ability to form a cartel in the mattress industry, if that in fact had been involved. Sealy could have continued to do that by setting royalty rates, an ability that was never questioned. If a cartel had been involved, the entire Sealy organization should have been dissolved; an injunction against the explicit price fixing and market division would have been ineffective.

Third, the characterization of the explicit eliminations of competition in *Sealy* as vertical (intrabrand) is important because it clearly demonstrates the relevance of *GTE Sylvania*. My suggested analysis under *Sylvania* of the Sealy market division arrangements would be somewhat different from the horizontal analysis that Bork would apply, principally in that Sealy's market share would not be in issue.[45] We would both reach the same result—that the *Sealy* restrictions were legal—because Bork would, correctly, apply the ancillary restraints doctrine to the *Sealy* restrictions even though he views them as horizontal.

But the ability to characterize arrangements such as the explicit eliminations of competition in *Sealy* as "vertical" (intrabrand) nevertheless may be of considerable practical import. The courts are not nearly as sophisticated as Professor Bork when it comes to applying the rule of reason to "horizontal" restraints, or to distinguishing on sensible economic grounds as opposed to form, "vertical" from "horizontal" restrictions. An example of this lack of sophistication is the recent case in which an Ohio franchisee won a jury verdict against Sealy for an amount greater than Sealy's total net worth, on the ground that Sealy continued to violate the antitrust laws by enforcing a complex set of arrangements, including profit passovers, exclusive manufacturing territories, manufacturing location clauses, warranty repair charges, and a right of first refusal in Sealy in case any licensee were to sell his busi-

45. Under my analysis, the complaint in *United States v. Sealy* can be handled in three steps. First, the complaint did not raise any question as to the legality of Sealy's existence *as an issue separate and apart from the attack on the explicit price fixing and market division arrangements.* Second, given this and the fact that Sealy could legally fix royalty rates on the sale of Sealy mattresses by its licensees, any restrictions on competition within the Sealy organization were *intrabrand* restrictions, the legality of which should be governed by *GTE Sylvania*. Third, since the government made no attempt to show that these *intrabrand* restrictions had any affect on *interbrand* competition, either by establishing or reinforcing a manufacturer's or a reseller's cartel, the complaint should have been dismissed. If the government should challenge the trademark licensing program itself, the horizontal market share issue would arise. But that would be a different case and it would have nothing to do with the explicit price fixing and market division attacked by the case which the government actually brought.

ness.[46] These were designed to replace the exclusive territorial sales restrictions invalidated by *United States v. Sealy*. Upholding the judgment below, the Court of Appeals for the Seventh Circuit believed that it was "indisputably clear that any restraints applied to the independent businesses which are licensees result directly from the concerted action of their horizontal potential competitors. Accordingly . . . if Sealy's license agreement and its conduct thereunder amounted to substantial limitations on manufacturers' sales territories, a per se violation existed."[47]

After laying that foundation, the court thought itself free to ignore *GTE Sylvania*:

> *Sylvania* overruled . . . [*Schwinn*], and held, as had the *White Motor* case . . . decided only four years before *Schwinn*, that *vertically-imposed* territorial limitations must be judged not by a *per se* rule but by the Rule of Reason. Because the Court in *Sylvania* expressly reaffirmed the appropriateness of the *per se* rule for horizontal territorial limits . . . it is difficult to see how the decision advances Sealy's argument. It insists nonetheless that the very premise of the *Sylvania* decision is that restrictions on intrabrand competition may promote interbrand competition, thus making it impossible to say that such restraints have the requisite 'manifestly anticompetitive' nature to justify a *per se* rule of illegality . . . . In *United States v. Topco Associates, Inc.* . . ., however, the Court rejected exactly this argument in the context of horizontal restraints . . . and the *Sylvania* decision expressly reaffirmed that rejection.[48]

As a matter of "formalistic line drawing," the argument is impeccable: the *Sealy* restrictions are "horizontal"; *GTE Sylvania* applies only to "vertical" arrangements; therefore, *GTE Sylvania* does not apply to the *Sealy* restrictions. As a matter of "demonstrable economic effect,"[49] the argument leaves much to be desired. It is more than mildly disturbing that the Supreme Court did not see fit to grant certiorari in *Ohio-Sealy*, taking advantage of the opportunity to clarify some of the things that it said in *GTE Sylvania*.[50] While I cannot develop all or even a major part of the implications of *Sylvania* here, I will treat briefly the sources of the confusion that led the Seventh Circuit to the unfortunate result that it reached in *Ohio-Sealy*.

Perhaps the principal source of confusion lies in the fact that the legal categories of "horizontal" and "vertical" do not correspond with

46. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978). The trial judge cut the award in half after he discovered that he was required to treble it.

47. *Id.* at 827.

48. *Id.* at 830-31 (footnotes omitted).

49. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

50. The Supreme Court denied certiorari in *Ohio-Sealy*. *See* 902 ANTITRUST & TRADE REG. REP. (BNA) A-17 (Feb. 22, 1979).

any relevant economic concepts. If the Supreme Court is to abandon "formalistic line drawing" in favor of "demonstrable economic effect" or an antitrust policy based on market considerations, it will have to abandon or redefine the legal concepts of "horizontal" and "vertical," or extend the rule of reason treatment which it afforded to vertical arrangements by its *Sylvania* decision to certain kinds of horizontal arrangements. Let me develop this point by examining some of the basic economics implicit in *Sylvania.*

An antitrust policy based on market considerations should, as Bork argues, focus on two concerns: (1) the losses that result from output restriction; and (2) the gains that result from arrangements that enhance productive efficiency. Taking the first concern, what do firms do in order to create or increase their ability to restrict output? Reduced to elementals, they may merge or engage in other activities to become "monopolists," or they may collude with enough of their competitors so that their collective market share is of "monopolistic" proportions, to set price and other terms of trade.[51] Most economists would be concerned about (or at least interested in) an event that increased the market share of one firm to "monopolistic" levels, or that increased the probability that independent firms in the industry could successfully collude, *comparing in both cases the situation that existed prior to that event with the situation existing after it.* Any such event (*i.e.*, a merger or contract that increased the market share subject to the control of one actor beyond that which was so controlled prior to the event) can usefully be thought of from an economic standpoint as a horizontal event. Not all horizontal events will increase the potential for output restriction; indeed, very few of them probably will. It seems safe to say for present purposes, however, that unless an arrangement increases market share beyond that which already existed before hand, the arrangement almost certainly will not increase the potential for output restriction.[52]

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51. While I do not want to get into a detailed discussion of economic theory here, I must note that control of a "monopolistic" market share is merely a necessary condition of the ability to restrict output; it is not a sufficient condition.

52. I can think of only one situation in which this might not be true. If dealers who sell only the product of one manufacturer form a dealer cartel, if there is significant market power as to the product, and if for some reason the dealers and the manufacturer are not able to agree on a price and output which would maximize their joint profits (which would, of course, be the same price and output that existed prior to formation of the dealer cartel), output may be less and price higher than before the dealer cartel was formed. It is hard to imagine, however, that these conditions would exist very often, if ever, unless the law foolishly constrained the parties' freedom to contract. While the law has done exactly that, we may hope that such things will come to an end with the new era of economic sophistication that *GTE Sylvania* presumably portends. *See* Albrecht v. The Herald Co., 390 U.S. 145 (1968); Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977). *See also* Liebeler, *Toward a Consumer's Antitrust Law: The Federal Trade*

Let me try to make these points more concrete by applying them to the language of footnote 28 in *GTE Sylvania*:

> There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal *per se, see, e.g., United States v. General Motors Corp., . . . United States v. Topco Associates, Inc. . . .* , but we do not regard the problems of proof as sufficiently great to justify a *per se* rule.[53]

The Court here adopts a definition of "horizontal" that is quite different from mine, one based on form rather than on economic analysis. In the Court's definition an agreement is "horizontal" if it originates in agreements among the retailers. In my definition an agreement cannot be horizontal no matter how many retailers promote it, or to what extent, as long as the retailers do not sell products produced by other firms which compete with those subject to the restriction. While this condition exists, no agreement among the retailers or with the manufacturer and some or all of those retailers can increase market share beyond that which was held by the manufacturer before the restriction.[54]

My definition of "horizontal" makes it mean much the same as "interbrand." Life would be much simpler if we could all agree that the *Sylvania* Court meant that it would apply the rule of reason to (or ignore) all nonprice restrictions on *intrabrand* competition, particularly because the Court said in footnote 19 that *interbrand* competition was the primary concern of antitrust law.[55] But that is not the import of footnote 28, where the Court approved of two cases which held restrictions on *intrabrand* competition to be per se illegal.

One way to deal with the Seventh Circuit's *Ohio-Sealy* decision and to cut down on the inconsistencies in *GTE Sylvania* would be to recognize that, at least in this area of the law, "horizontal" means much the same as "interbrand," and "vertical" and "intrabrand" are essentially synonymous. This would have required the reversal of *Ohio-Sealy* and, sensibly, the dismissal of the complaint in that action, as well as the recognition that the statements in *Sylvania's* footnote 28 were mistaken. The only way to square *Ohio-Sealy* and footnote 28 with the Court's concern for interbrand competition, demonstrable eco-

Commission and Vertical Mergers in the Cement Industry, 15 U.C.L.A. L. REV. 1153, 1178 (1968). I will develop this point more fully in a forthcoming article on the implications of *GTE Sylvania*.

53. 433 U.S. at 59 n.28.

54. *See* note 52 *supra*. I suppose that market power also could be increased, without changing horizontal market share, if barriers to entry on the manufacturing level were somehow increased. I can see no way in which a cartel of the dealers of one manufacturer could do that.

55. 433 U.S. at 52 n.19.

nomic effect, and an antitrust policy based on market considerations is to engage in formalistic line drawing.

IV

GTE SYLVANIA AND TYING ARRANGEMENTS

GTE Sylvania strongly implies that any efficiency-creating business arrangement is legal. The form of the arrangement should be irrelevant. *Sylvania* is most obviously relevant to cases in which a single supplier terminates a reseller, whether or not at the request of another reseller. Such terminations may increase productive efficiency in a variety of ways, most obviously by enabling the remaining dealer(s) to recoup their investment in locally generated information about the supplier's product and to increase their incentives to provide essential services. It also is relevant to other arrangements used to accomplish that result. I have listed several of these methods in my discussion of *Klor's* above: price discrimination, franchises, location restrictions, intrabrand territorial and customer limitations, resale price maintenance, and exclusive dealing arrangements. And, as I have argued, *Sylvania* is inconsistent with *Topco* and *General Motors*, both of which involved restrictions on intrabrand competition of the type listed above. In each of these cases (*Klor's, Topco, General Motors*, as well as *Sealy*), the challenged arrangements were designed to prevent some members of an intrabrand integration from taking free rides on other members' efforts.

Sylvania also is relevant, although less obviously so, to tying arrangements such as that in *Fortner Enterprises, Inc. v. United States Steel Corp.*[56] In *Fortner*, a U.S. Steel subsidiary extended credit to Fortner, a Louisville real estate developer, on favorable terms conditioned upon Fortner's purchase of prefabricated steel homes from the steel company. If the credit had been extended without the tie, Fortner could have taken a free ride on U.S. Steel by using the funds to buy houses from another company or to do something unrelated to the housing transaction. U.S. Steel used the tie to create a property right in itself to control the use of the funds which it lent Fortner on terms that he could get nowhere else. It is hard to see why U.S. Steel could not do this if Sylvania legitimately could protect the property rights of its resellers in product information which they produced. No output restriction was possible in either case and both arrangements created obvious efficiencies.

56. 394 U.S. 495 (1969). The analysis in the text would also seem to apply to FTC v. Brown Shoe Co., 384 U.S. 316 (1966). The services provided by Brown there are analogous to the financing provided by U.S. Steel in *Fortner*. The partial exclusive dealing arrangements in *Brown Shoe* correspond to the tying arrangement in *Fortner*.

Fortner also could have been disposed of by applying the ancillary restraints doctrine set forth in *United States v. Addyston Pipe and Steel Co.*[57] The tie-in is ancillary to the legitimate contract integration between U.S. Steel and Fortner. This point seems obvious, but *Addyston* was not even mentioned by the U.S. Steel counsel at any point in the tortuous history of that case, in Bork's analysis of *Fortner*, or in by far the best law review commentary on that case.[58] Perhaps this is because Judge Taft never mentioned tie-ins or prefabricated steel houses in *Addyston*. The failure to recognize the relevance of *Addyston* to *Fortner* is a significant tribute to the power of formalism in antitrust.

V

HORIZONTAL MERGERS AND CONTRACT INTEGRATIONS

I close with several brief remarks on the rule which Bork proposes for horizontal mergers. This is an important subject because the horizontal merger rules should guide, if not determine, the legality under the rule of reason of horizontal contract integrations such as those in *Sealy*. It is important also because many of the considerations relevant to horizontal merger policy are relevant to how the antitrust law should handle concentrated industries. Bork couches his proposed horizontal merger rule entirely in terms of market share. He would be uneasily satisfied with a rule

> making presumptively lawful all horizontal mergers up to market shares that would allow for other mergers of similar size in the industry and still leave three significant companies. In a fragmented market, this would indicate a maximum share attainable by merger of about 40 percent. . . . [W]here one company already had 50 percent, it could not engage in any horizontal mergers, and no other company could create by merger a share above 30 percent (barring some exceptional circumstance, such as the imminent failure of one of the merger partners).[59]

Exclusive reliance on market share and concentration seems odd in view of Bork's earlier favorable quote of Harold Demsetz:

> [T]he asserted relationship between market concentration and competition cannot be derived from existing theoretical considerations and . . . is based largely on an incorrect understanding of the concept of competition or rivalry. . . .
>
> . . . *[W]e have no theory that allows us to deduce from the observable degree of concentration in a particular market whether or not price*

57. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

58. Dam, *Fortner Enterprises v. United States Steel: "Neither a Borrower, Nor a Lender Be,"* 1969 SUP. CT. REV. 1.

59. R. BORK, *supra* note 4, at 221-22.

and output are competitive.[60]

This seems odd because if we have no theory that permits us to relate the degree of concentration in an industry to the degree of its competitiveness then we have no theory by which we may presume about the legality of horizontal mergers based on market share and concentration, at least in those cases in which the number of postmerger firms is greater than one.

We cannot move directly from concentration ratios to estimates of competitiveness, of course, because the degree of competitiveness in any industry with more than one firm is a function of the extent to which the firms in that industry tacitly can collude—a consideration that depends on many factors in addition to industry concentration. Since horizontal mergers can injure consumer welfare only if they increase the probability of successful collusion in an industry, their legality should be a function of the extent to which they are likely to increase that probability. Their legality, in other words, should be a function of the many factors that appear to affect the ability of firms successfully to collude. Market concentration is only one factor and, in many cases, not even the most important.[61] Except in those cases where concentration is so low as to make successful collusion unlikely even if all other conditions were favorable, it surely is not enough on which to base even a presumption about the legality of horizontal mergers.

CONCLUSION

I do not mean any of this review to be taken as critical of the substance of Bork's work. It is easy enough to carp, and I do not mean to do so. This is not to say, however, that Bork's work is the last word, as he, indeed, would be the last to claim. Further advances in antitrust theory are possible and are in fact being made. I have tried in this review to make some modest suggestions to that end.

Bork's contributions to antitrust policy have been enormous. It is unfortunate that his influence in that field has not been greater by far than it has in fact been. We would all be poorer without him, particularly those who, like myself, think that economic analysis has much to contribute to the development of the law. He has written an excellent book. It should be required reading for every judge who presumes to opine on antitrust law and for every lawyer who presumes to practice it.

60. Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 59-60 (1968) (emphasis in original), *quoted in* R. BORK, *supra* note 4, at 221-22.

61. Other factors relevant to the ability of firms to collude even in concentrated industries and authorities discussing this subject are set forth in Liebeler, *supra* note 3, at 1252-54.

CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW, by Robert H. Mnookin. Boston: Little, Brown & Co., 1978. Pp. 838 $20.00.

Reviewed by Henry W. McGee, Jr. †

Child, Family and State[1] is more than the offspring of a marriage between family law and juvenile court casebooks. The content, organization, and central proposition of the book all serve to differentiate it from traditional family law casebooks which stress the husband-wife relationship and the dependent role of children in the family structure. Professor Mnookin's book is noteworthy for its emphasis on developments in the law by which children have been granted a panoply of important rights. In a section discussing constitutional sources of such rights, Mnookin sets forth his model succinctly. He first acknowledges the traditional conception embraced in the cases of the child as subject to the authority of parents and state. He then points to a principle appearing only in more recent cases: "Young people may have rights of their own, some of which are of constitutional dimension."[2] As Mnookin states, the remainder of the casebook examines the manner in which the legal system has reconciled the conflict between these principles.[3]

Mnookin's book reflects a concern generated in part by the political struggles of the sixties. Many courses which were rare before the emergence of the civil rights and antiwar movements, such as environmental or poverty law, are prominent in many law school curricula in the late seventies.[4] Like those of the poor and prisoners, the problems

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1. R. MNOOKIN, CHILD, FAMILY AND STATE (1978).

2. *Id.* at 107.

3. *Id.*

4. The Association of American Law Schools lists only three professors as having taught environmental law for more than ten years, but 62 as having taught the course from six to ten years and 244 for one to five years. ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 960-62 (1977). The directory reports that 25 professors have taught a course on law and poverty for six to ten years in contrast to 161 who have taught the course for one to five years. *Id.* at 998-99.

The proliferation of these and other innovative law school courses illustrates a distinguished educator's observation that a

> new radicalism is beginning to enter the mainstream of legal education, goaded not a little by the complicated phenomena and momentous events with which law must deal. Law schools search for a newer and more satisfying identity through curricular movements that espouse clinical training, public and policy oriented law, 'lawyering' emphasis, social science incorporation, and more.

Redmount, *A Conceptual View of the Legal Education Process*, 24 J. LEGAL EDUC. 129 (1972).

of children were scattered through different courses and casebooks.[5] The only significant body of materials on children and the law was usually found in family law casebooks. In particular, two family law casebooks, both published in the mid-1960's, provided a consideration of children in the context of the family. The more traditional of the two devoted a chapter to state intervention in the parent-child relationship, and included chapters on illegitimacy, adoption, and custody on divorce.[6] The other casebook treated in some depth state involvement in family affairs, focusing especially on the problems of custody and adoption.[7] Like other family law casebooks,[8] neither treated children's legal problems with the distinctive focus employed by Mnookin.[9]

The major structural changes that occurred in the organization of law schools in the wake of societal unrest are traced in Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 841-92.

5. Some attention is devoted to children in courses as diverse as family wealth transactions, contracts, and criminal law. *See, e.g.*, J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 56-91, 468-475 (2d ed. 1978) (considering distribution and guardianship); W. LAFAVE & A. SCOTT, HORNBOOK ON CRIMINAL LAW 351-55 (1972) (discussing the criminal liability of infants); A. MUELLER & A. ROSETT, CONTRACT LAW AND ITS APPLICATION 88-93 (2d ed. 1977) (considering capacity to contract).

Child labor laws, considered in Mnookin's chapter entitled "State Enforced Limitations on the Liberty of Minors," R. MNOOKIN, *supra* note 1, at 645, are sometimes covered in constitutional law. *See, e.g.*, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 261-68 (9th ed. 1975).

6. C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW (2d ed. 1976).

7. J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW (1965).

8. Family law casebooks have focused more on parents than children. In addition to the books cited in notes 6 and 7 *supra*, the following casebooks were published after 1960: J. AREEN, CASES AND MATERIALS ON FAMILY LAW (1978); H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS (2d ed. 1974); H. KRAUSE, FAMILY LAW (1977); M. PLOSCOWE, H. FOSTER & D. FREED, FAMILY LAW (2d ed. 1972); P. RYAN & D. GRANFIELD, DOMESTIC RELATIONS (1963); W. WADLINGTON & M. PAULSEN, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS (3d ed. 1978). Both Professor Areen and Professor Krause consider children at length. Indeed, the second half of Areen's book is entitled "Children, Parents and the State." Krause devotes more than one-third of his book to children's issues. However, with the exception of C. FOOTE, R. LEVY & F. SANDER, *supra* note 6, and J. GOLDSTEIN & J. KATZ, *supra* note 7, the other books concentrate on husband-wife relations, expecially marriage and divorce. Substantial portions of most of the books consider custody of children in the context of divorce litigation. Related topics, examined in part by Mnookin and covered by the other books, are: child placement, including custody and adoption; inheritance rights of legitimate and illegitimate children; the right to parental support; and various facets of the child-parent relationship. Of course the extent of coverage varies, but the family context is consistent.

Krause's book, as well as that of Goldstein and Katz, resembles Mnookin's casebook to some extent. Krause's work is similar to Mnookin's in that it does examine the issue of children's autonomy. Along with material common to all of the casebooks, Krause includes a discussion of the necessity of a minor's consent to medical treatment. He also considers the problem of cultural bias in the juvenile courts—an issue to which Mnookin does not devote sufficient attention—and discusses the courts' handling of child neglect. Goldstein and Katz discuss issues such as the determination of a religious faith for the child, the "child's best interest" rubric in foster care and adoption, and the importance of continuity of affection, blood-ties, name, and race in the custody determination.

9. The suggestion has been made that:

An examination of several key chapters of *Child, Family and State* demonstrates how its treatment of children and the law differs from that of traditional family law casebooks. Chapter One advances Mnookin's model of a triangular relationship between the state, the family, and the child, and lays the foundation for the consideration of specific legal problems within that framework in the remainder of the book. The chapter consists largely of constitutional law cases, interwoven with notes and questions.[10] Mnookin's book literally commences in the womb by considering the competing issues of female self-determination and the right to life in *Roe v. Wade*,[11] the Supreme Court's landmark abortion decision. The author then turns to the competition between state and parent for dominance over the child. The courts' allocation of power in this competition is developed through an examination of cases ranging from the Supreme Court's consideration of state authority to regulate teaching in the face of parental opposition in *Meyer v. Nebraska*[12] to the Court's delineation of parents' authority to maintain a unique cultural environment for their children in *Wisconsin v. Yoder*.[13] Having illustrated the traditional confrontation between parents and state for control over children, the author turns to a more innovative consideration of recent Supreme Court decisions in the last section of Chapter One, entitled "What Voice for the Child?" Mnookin first argues that *In re Gault*[14] granted novel rights to children.[15] He then presents other Supreme Court opinions which recognize that children possess other rights in a variety of contexts. The treatment of *Tinker v. Des Moines Independent Community School District*,[16] describing the free speech rights of children in the public schools, is particularly thought-provoking. Concluding the chapter by illustrating this trend in the sensitive area of procreative regulation, *Planned Parenthood of Central Missouri v. Danforth*[17] and *Bellotti v. Baird*[18] communicate graphically the book's concern with the emerging

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> it has become increasingly difficult to cover much material about children in a basic family law course. The questions of property, nonmarital relationships, pre-marital contracts and sex roles within marriage have become sufficiently difficult and controversial that they demand a substantial amount of coverage. In addition, many teachers use family law as an opportunity to teach interviewing and counselling skills not otherwise taught in law schools, thus it is often difficult to cover anything about children other than child custody questions following divorce.

Letter from Professor Michael S. Wald of Stanford Law School to author (October 12, 1978) (on file with author).

10. *See, e.g.*, R. MNOOKIN, *supra* note 1, at 17-20, 34-37, 67-68, 75-76, 134-37.
11. 410 U.S. 113 (1973), *reprinted in* R. MNOOKIN, *supra* note 1, at 4.
12. 262 U.S. 390 (1923), *reprinted in* R. MNOOKIN, *supra* note 1, at 29.
13. 406 U.S. 205 (1972), *reprinted in* R. MNOOKIN, *supra* note 1, at 43.
14. 387 U.S. 1 (1967), *reprinted in* R. MNOOKIN, *supra* note 1, at 77.
15. R. MNOOKIN, *supra* note 1, at 107.
16. 393 U.S. 503 (1969), *reprinted in* R. MNOOKIN, *supra* note 1, at 127.
17. 428 U.S. 52 (1976), *reprinted in* R. MNOOKIN, *supra* note 1, at 139.
18. 428 U.S. 132 (1976), *reprinted in* R. MNOOKIN, *supra* note 1, at 144.

rights of children.

Following the innovative and challenging inaugural chapter, the author applies the framework developed there to six substantive areas of children's law. The results are often novel and engaging. An example can be found in the stimulating chapter on medical treatment of children. Here Professor Mnookin's triangular model is presented in the context of a simultaneous revolution in medicine. Mnookin's discussion of the bilateral conflict between the state and parents over treatment of children appearing in the Jehovah's Witnesses blood transfusion cases[19] is followed by the California Supreme Court's opinion in *In re Roger S.*[20] in which a trilateral framework was recognized.

The California Supreme Court found in *In re Roger S.* that "the liberty interest of minors" poses a significant impediment to the power of parents to incarcerate children in mental hospitals.[21] The court argued that

> [t]he serious consequences attendant upon involuntary commitment of a minor as a mentally ill or disordered person, and the significant potential for error in diagnosis convinces us that a minor who is mature enough to participate intelligently in the decision to independently assert his right to due process in the commitment decision must be permitted to do so.[22]

Although the court justified this limitation on the authority of the parent in part by reference to the societal interest in supervising the welfare of the child, it ultimately concluded that "no interest of the state or of a parent sufficiently outweighs the liberty interest of a minor old enough to independently exercise his right to due process to permit the parent to deprive him of that right."[23] Thus the California decision exemplifies the thrust of the book and the focus of the chapter—the emerging recognition that children have rights in settings formerly marked by a struggle for dominance between parents and state.

Although Mnookin devotes much attention in this chapter to situations in which the child is ill, the most interesting aspect of the chapter is its analysis of the child's demand for autonomy in the context of experimental medicine. The "donation" of children as subjects for operations—frequently where no benefit inures to the child—is questioned through the use of problems, articles from medical journals, case

19. R. MNOOKIN *supra* note 1, at 359-61.

20. 19 Cal. 3d 921, 569 P.2d 1286, 141 Cal. Rptr. 298 (1977), *reprinted in* R. MNOOKIN, *supra* note 1, at 361.

21. *Id.* at 927, 569 P.2d at 1289, 141 Cal. Rptr. at 301, *reprinted in* R. MNOOKIN, *supra* note 1, at 363.

22. *Id.* at 929, 569 P.2d at 1291, 141 Cal. Rptr. at 303, *reprinted in* R. MNOOKIN, *supra* note 1, at 364.

23. *Id.* at 931, 569 P.2d at 1292, 141 Cal. Rptr. at 304, *reprinted in* R. MNOOKIN, *supra* note 1, at 365.

studies, and opinions. *Bonner v. Moran*[24] and *Hart v. Brown*[25] are presented to illustrate the unusual and difficult dilemmas such cases pose to courts. In *Bonner*, a fifteen-year-old child consented to a skin graft arranged by his aunt for the benefit of his cousin.[26] The child's parent had not consented.[27] The court held that such parental approval was necessary, despite the consent of the child.[28] *Hart v. Brown* raised the important question, not addressed in *Bonner*, whether the child's permission is necessary for nonbeneficial surgery. The child in *Hart* was seven years old and incapable of giving informed consent.[29] The court allowed the parents to consent on behalf of the child, emphasizing the special facts of the case: the child's court-appointed guardians had agreed with the parents' judgment, as had a clergyman and physician who had been consulted.[30] Though these opinions present, on balance, satisfactory judicial resolutions of the particular problems involved, Mnookin's notes and questions suggest the need for independent and effective representation of the child in the decisionmaking leading to nonbeneficial surgery. Making clear the difficult choices these hard cases force upon the legal system, Mnookin here raises issues that go beyond the book's central concern with the rights of children and explores the capacity of courts to resolve the fundamental ethical dilemmas posed by advancements in medical technology. The result is a chapter as stimulating as any in the book.[31]

Limitations on the liberty of children are considered in the sixth chapter of the book. In addition to examining such traditional regulations as minimnm age requirements for drinking and driving, Mnookin takes a fresh look at child labor laws.[32] With skillful manipulation of materials, Mnookin raises new questions about possible anachronisms caused by previous reforms. The section on child labor is an extended essay which explores statutory schemes originally designed to protect children from exploitation in the labor market. Mnookin's presenta-

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24. 126 F.2d 121 (D.C. Cir. 1941), *reprinted in* R. MNOOKIN, *supra* note 1, at 417.

25. 29 Conn. Supp. 368, 289 A.2d 386 (Super. Ct. 1972), *reprinted in* R. MNOOKIN, *supra* note 1, at 421.

26. 126 F.2d at 121 (D.C. Cir. 1941), *reprinted in* R. MNOOKIN, *supra* note 1, at 418.

27. *Id.*, *reprinted in* R. MNOOKIN, *supra* note 1, at 418.

28. *Id.* at 122, *reprinted in* R. MNOOKIN, *supra* note 1, at 419.

29. 29 Conn. Supp. at 370, 289 A.2d at 386, *reprinted in* R. MNOOKIN, *supra* note 1, at 421-25.

30. *Id.* at 375-76, 289 A.2d at 390-91, *reprinted in* R. MNOOKIN, *supra* note 1, at 424-25.

31. For additional discussion of medical experimentation with children, *see* Capron, *Legal Considerations Affecting Clinical Pharmacological Studies in Children*, CLINICAL RESEARCH 141 (1973); Curran & Beecher, *Experimentation in Children: A Re-examination of Legal Ethical Principles*, 10 J. AM. MED. ASSN. 77 (1969); Ingelfinger, *Ethics of Experiments on Children*, 288 NEW ENG. J. MED. 791 (1973); Katz, *Children, Privacy and Nontherapeutic Experimentation*, 45 AM. J. ORTHOPSYCHIATRY 802 (1975); Lowe, Alexander & Mishkin, *Nontherapeutic Research on Children: An Ethical Dilemma*, 84 J. PEDIATRICS 468 (1974).

32. R. MNOOKIN, *supra* note 1, at 646-68.

tion raises the question whether in today's world such regulations may impede the maturation and autonomy of children.[33] His exploration of the arguments underlying child labor laws and the proposals for reform of such laws is a high point of the volume.

The appearance of Professor Mnookin's casebook, with its striking emphasis on children's rights, raises interesting questions about the status of the child in contemporary society. Have the problems of children, isolated in such an illuminating manner by Mnookin, eclipsed those of the family unit? Are we witnessing a gradual but unmistakable process of children's liberation? Indeed, Mnookin's casebook does present a number of legal developments which reflect the increasing independence of the child.

An example can be found in Mnookin's discussion of the manner in which some states have responded to the problem of parent-child incompatibility. Family law casebooks typically devote considerable attention to incompatibilty between spouses. Mnookin's concern, however, is not with interspousal strife. Asking the provocative question whether children should be able to divorce their parents,[34] Mnookin presents a recent opinion which gives an affirmative answer. In *In re Snyder*,[35] the parents of sixteen-year-old Cynthia Nell Snyder sought her return from a foster home. The daughter had been placed in the home after arguing successfully to a juvenile court that her relations with her parents had so deteriorated as to qualify her as "incorrigible."[36] The finding of incorrigibility allowed the child to leave her parents. The Washington Supreme Court upheld the placement of the child in a foster home. The court accepted the argument that parent-child incompatibility, based in large part upon the child's antipathy toward her parents, was sufficient grounds for allowing the child to replace her parents with state-selected guardians.[37] Emerging in the opinion is the development that Mnookin so graphically identifies throughout the book: the increasing autonomy of the child accompanied by the concomitant weakening of family ties.

A second example of the increasing legal independence of the child used by Mnookin concerns the right to an abortion. *Planned Parenthood of Central Missouri v. Danforth*,[38] the principal case presented by Mnookin, contains important declarations about the right

33. R. MNOOKIN, *supra* note 1, at 655.
34. R. MNOOKIN, *supra* note 1, at 747.
35. 85 Wash. 2d 182, 532 P.2d 278 (1975), *reprinted in* R. MNOOKIN, *supra* note 1, at 747.
36. *Id.* at 185, 532 P.2d at 281, *reprinted in* R. MNOOKIN, *supra* note 1, at 749.
37. *Id.* at 187-88, 532 P.2d at 281-82, *reprinted in* R. MNOOKIN, *supra* note 1, at 749-50.
38. 428 U.S. 52 (1976), *reprinted in* R. MNOOKIN, *supra* note 1, at 139. After *Danforth*, Mnookin presents *Bellotti v. Baird*, 428 U.S. 132 (1976), *reprinted in* R. MNOOKIN, *supra* note 1, at 144, decided on the same day. That case involved a challenge to a state statute which limited a minor's right to an abortion. The Court remanded the case for certification of questions of statu-

of a minor to obtain an abortion despite parental disapproval. In *Danforth* the Supreme Court held unconstitutional a section of a state statute requiring written parental consent for an abortion by unmarried women under the age of eighteen.[39] The Court stated the general governing principle in simple, forthright language: "Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[40] Applying the test of *Roe v. Wade*,[41] the court conld not find "any significant state interest" in allowing a parental veto.[42] The minor's constitutional right to freedom from such restrictions was thus upheld.

While these cases illustrate the increasing recognition of children's rights, they also contain clear reminders of the halting, limited nature of this trend. In *In re Snyder*, Cynthia Snyder was allowed to leave her family. However, the choice granted to her by the court was not one between parental authority and complete independence.[43] Instead, Cynthia was to be subject to the supervision of foster parents, with the state retaining authority to intervene when necessary.[44] In this sense, the minor's autonomy was limited to a choice between masters. Similarly, in the abortion decisions the Court was circumspect in delineating the scope of the minor's rights. In *Danforth*, the Court noted that it "long has recognized that the state has somewhat broader authority to regulate the activities of children than of adults."[45] Though the Court could not find a significant state interest in allowing parents an abolute veto, it suggested that less obtrusive limitations on the minor's rights might withstand constitutional scrutiny.[46] In *Bellotti v. Baird* the Court suggested the nature of the state interests which might justify such limitations: "In this case, we are concerned with a statute directed towards minors, as to whom there are unquestionably greater risks of inability

tory construction to the state supreme court. In the process, the Court made some interesting observations about the reach of the *Danforth* holding. *See* text accompanying note 47 *infra*.

39. 428 U.S. at 72, *reprinted in* R. MNOOKIN, *supra* note 1, at 139.

40. 428 U.S. at 74, *reprinted in* R. MNOOKIN, *supra* note 1, at 140-41.

41. 410 U.S. 113, 154 (1973).

42. 428 U.S. at 74, *reprinted in* R. MNOOKIN, *supra* note 1, at 140.

43. 85 Wash. 2d 182, 187, 532 P.2d 278, 281, *reprinted in* R. MNOOKIN, *supra* note 1, at 749. It should also be noted that the "voice of the minor" to which the court responded did not speak unaided. The court stressed that a psychiatrist selected by the minor's parents had also concluded that the parent-child relationship had deteriorated substantially. *Id.* The court's emphasis on this factor leaves unclear how the court would respond if the minor were the only party advocating separation.

44. *Id.*

45. 428 U.S. 52, 75 (1976), *reprinted in* R. MNOOKIN, *supra* note 1, at 141.

46. *Id.* The Court stated: "We emphasize that our holding that Section 3(4) is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.*

to give an informed consent."[47]

The emphasis on the increasing legal independence of the child in *Child, Family and State* can obscure the tentative character of this development. Use of the casebook may lead to an exaggerated perception among some students about how far the law has gone in recognizing the rights of children.[48] However, Mnookin's organization, comments, and questions go far to counter this misimpression. The trilateral parent-state-child construct introduced early in the book[49] is often invoked in discussing cases and problems.[50] The discerning reader soon understands that Mnookin never loses sight of the fact that children's rights are emerging in a legal environment dominated by family and state.

Mnookin skillfully communicates this awareness in his treatment of *Ginsberg v. New York*[51] and *Tinker v. Des Moines Independent Community School District*.[52] These cases were decided within a year of each other by the Supreme Court. Upholding the right of children to wear armbands in school, *Tinker* contains sweeping declarations about the first amendment rights of minors. The Court made clear that the right to feedom of speech is one of a child's "fundamental rights which the state must respect."[53] In the casebook, *Tinker* is preceded by *Ginsberg*, a case whose holding and tone are quite different. *Ginsberg* articulated a variable obscenity standard for minors, determining that limitations unconstitutional as to adults may be acceptable if applied only to minors.[54] The arguments presented in support of its holding made clear the Court's view of the child as subject to parent-state hegemony. The Court found two interests justifying the challenged statute. The provision was a permissible way for the state to aid parents in their efforts to protect their children from harmful reading materials.[55] In addition, the state's independent interest in protecting the welfare of minors was furthered by the provision.[56] The interests of the children whose freedom was being restricted were hardly considered. By juxta-

47. 428 U.S. 132, 147 (1976), *reprinted in* R. MNOOKIN, *supra* note 1, at 148.

48. The likelihood of this misperception is increased by Mnookin's extensive use of nonlegal materials. Drawing upon work done in medicine, psychology, sociology, and philosophy, Mnookin is able to present information and insights not contained in case law. However, a number of these disciplines have advanced a much more autonomous vision of the child than has the law. By interspersing such nonlegal materials with cases, Mnookin's book may convey to the careless reader the misimpression that the law has been as generous in defining the extent of children's autonomy as have other disciplines.

49. R. MNOOKIN, *supra* note 1, at 107.

50. *See, e.g.,* Professor Mnookin's discussion of parent, state conflict over custody of the neglected child in R. MNOOKIN, *supra* note 1, at 495-594.

51. 390 U.S. 629 (1968), *reprinted in* R. MNOOKIN, *supra* note 1, at 110.

52. 393 U.S. 503 (1969), *reprinted in* R. MNOOKIN, *supra* note 1, at 127.

53. *Id.* at 511, *reprinted in* R. MNOOKIN, *supra* note 1, at 130.

54. 390 U.S. at 640, *reprinted in* R. MNOOKIN, *supra* note 1, at 114.

55. *Id.* at 639, *reprinted in* R. MNOOKIN, *supra* note 1, at 113.

56. *Id.* at 640, *reprinted in* R. MNOOKIN, *supra* note 1, at 113-14.

posing these cases and exploring their implications in questions, Mnookin makes clear to the careful reader that the courts promulgating new rights for children are still committed to upholding the traditional authority of parents and states in most respects.

Mnookin is not only aware of the continuing parent and state dominance over the child, but he also points out the manner in which these relationships benefit the child. Following the *Snyder* decision recognizing a child's limited right to leave her parents, Mnookin presents a piece arguing that "[b]ecause of its preparatory role, maintenance of the family tradition is in fact a prerequisite to the existence of a rational and productive individual tradition."[57] That children are not in certain instances sufficiently mature to make informed decisions is a point Mnookin also recognizes. In the materials following *Ginsberg*, Mnookin presents a piece quoting Justice Stewart's succinct statement of this point in the first amendment context: "A child is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees."[58] Thus, Mnookin does not embrace without reservation the emergence of children's autonomy which he chronicles so well.

Mnookin's ability to pose clearly the dilemmas that arise as this society grants rights to its young is a major virtue of *Child, Family and State*. While emphasizing the law's increasing willingness to recognize that children have rights, Mnookin subtly reminds the reader of the inchoate nature of this trend. His questions and comments force the reader to evaluate the benefits of conceding greater autonomy to children. Used by one willing to think carefully about the complex issues Mnookin identifies, *Child, Family and State* provides an excellent foundation for an understanding of children and the law.

57. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U.L. Rev. 605, 657, *reprinted in* R. Mnookin, *supra* note 1, at 752.

58. T. Emerson, The System of Freedom of Expression 496-97 (1970), *reprinted in* R. Mnookin, *supra* note 1, at 123.