Thinking About Predation – A Personal Diary*

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When Joel Dirlam and I wrote our *Fair Competition* – 36 years ago – I doubt it even crossed our minds that anyone might entertain the view that there is no such thing as predation. Yet 32 years later a majority of the United States Supreme Court declared:

there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.¹

Even after making allowance for the fact that the Court’s polling expert was probably a refugee from the *Literary Digest* (those of you who do not grasp the historical allusion have the consolation of youth) – he failed to interview Scherer, Dirlam, Shepherd, Greer, Williamson or Salop – I think Joel and I would still have been surprised by the widespread skepticism that prevails today even within our profession about what we regarded as a self-evident proposition, that economists have long recognized the possibility of harmful effects of price discrimination on competition – when used by a powerful seller to drive weaker (but not necessarily less efficient) rivals out of business . . . . It carries the threat of distorting the process of competition by awarding victory on the basis not of efficiency but of financial strength . . . .²

We certainly were not suggesting that every discriminatory price cut was a threat to competition. On the contrary, we observed,

The offer of selective price cuts, perhaps under the pressure of a valued customer, perhaps in order to meet the price of a competitor, is a necessary part of the competitive process. (p. 24)

We also expressed severe reservations about some of the FTC complaints and decisions in the late ‘40s and early ‘50s purporting to find threats to competition at the primary level under Robinson-Patman. Indeed, the central purpose of our book was to confront the compatibility of protecting competitors from unfair disadvantage with the preservation of competition as an effective force in the market; we therefore explicitly conceded the danger that the antitrust laws might be applied to serve the former purpose at the expense of the latter. But the following summary of our views on the retail pricing aspects of the once famous –
or infamous - A&P case fairly reflects our conception that there really can be such a thing as predation:

A continuing low price policy under the continuous threat of new entrants is indeed an element in workable competition: sporadic destructive price cutting only on the specific occasions and in the specific areas in which the entrants emerge or threaten to emerge is not the same thing . . . . Promotional pricing may make a market more competitive; selective promotional pricing may also be the instrument for making it less so . . . . And in the instances of individual zones and stores ‘turning on the heat,’ the lower prices were clearly limited in time and space until the threatening competitor could be eliminated or disciplined. (p. 214)

Small wonder that John McGee reviewed the book unfavorably in the AER.

I do not propose in my brief remarks today to retrace the arguments or resurvey the enormous body of literature on the subject since 1954, which I can evoke merely by alluding to the challenges of McGee, Bork, Easterbrook and Areeda–Turner, and the responses of the various economists I have already listed, along with Joskow and Klevorick. Instead, I will recount some of my own more or less direct and public encounters with the issue – not, I hasten to observe, with the expectation of offering any definitive resolution of the issues, even in those specific cases, but as a way of expressing satisfaction in welcoming our profession back, as it has over the last decade or so been repudiating the Chicago revolution.

If I am right in characterizing the present trend of economic opinion on the subject, I suggest you might want to use as an example of the hog/corn cycle for your elementary economics classes the likelihood that the courts will for a very long time continue carrying the Chicago banners in the opposite direction, if anything with increasing unanimity – reflecting a decade of Reagan/Bush appointments and the very long time lag created by judicial life tenure. See, for example, the U.S. District Court decision last August setting aside a jury verdict in favor of the Liggett Group in its predation suit against Brown & Williamson. The contested B&W policies were undeniably exclusionary in intent; the basis of the Court’s dismissal was its conclusion that the defendants lacked the power to produce the intended results, and that in any event price competition – even if it drives a competitor out of the market – is what the antitrust laws are supposed to promote.³ It appears, however, that while B&W’s vigorous – I’d be inclined to say ruthless – introduction and promotion of its generic brand has not eliminated the competition of generics, in the introduction of which Liggett had pioneered with great success, it has in some measure restored the previous decades-long regime of stable and very profitable oligopolistic follow-the-leader.⁴

In the summer of 1977, most of you will recall, Freddy Laker instituted his regularly scheduled Sky Train service across the Atlantic. It was very spartan standby service – no advance reservations, long lines, and no assurance of actually getting a seat – but the fares were much lower than not only the regular coach