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A Kantian Critique of Antitrust: On Morality and Microsoft

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Most economists support free markets – to a point. I chose that last word very carefully, for just as a geometrical point is a theoretical construct that does not exist in the real world, so is the textbook model of perfect competition. But most economists support free markets only insofar as they adhere to this idealized conception. Many economists go so far as to define "free market" to mean a perfectly competitive industry, as if an efficient outcome has anything to do with the word "free." Indeed, the term "market failure" has been coined to describe any deviation from perfect competition, including imperfect competition and monopoly (as well as externalities, public goods, etc.).[2] But the only sin of the market, in this case, is a failure to live up to an impossible example, a failure to do that for which it was never designed or intended. So according to this view, market failure is everywhere – what to do about it?

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[2]The discussion of market failure herein closely parallels Austrian arguments; see, for instance, Kirzner (1963) and Cordato (1992). For a critical analysis of the term "market failure" from the perspective of transaction costs, see Zerbe and McCurdy (1999, 2000).

The typical economist's first impulse is to bring in government to solve the problem: if the market fails (which it does almost by definition), then the government can fix it. There are, of course, many problems with this, and I will emphasize two in particular. One is that government is no less imperfect than the market (to be generous); therefore, it is by no means guaranteed to resolve any "market failure," and may indeed exacerbate the situation (making any "problem" worse). Examples of this include incentive problems, as highlighted by the public choice school, or informational problems, as emphasized by the Austrian school. The second problem, the one upon which I choose to focus, is not whether the government can do anything about so-called market failure, but whether the government *should*. In other words, is the government justified in using its coercive power to interfere with business operations for the purpose of (hypothetically) increasing some measure of social welfare?

In cases of monopoly, price-fixing, cartels, mergers, and other "anti-competitive" behavior, the prescribed government action is antitrust. As far as most economists are concerned, if monopoly is evidence of the devil in man, antitrust is the avenging angel. But in the real world, antitrust is far from perfect, as even its fiercest adherents admit. Though the "problem" of monopoly or monopolization is easy to identify in general, it is notoriously difficult to correct in specific cases. In fact, behavior that is used to support antitrust allegations can just as well be interpreted to show competitive behavior (as in cases of predatory pricing). The antitrust laws are vague, some extraordinarily so, and when combined with the changing tide of Supreme Court decisions, they result in a chaotic environment for business owners who have little idea what comprises legal activity and what does not. Finally, there are infamous problems with proper remedies for antitrust violations, including the possibility of second-best outcomes, efficiency-raising mergers, and other welfarist quandaries.

But the issue I plan to explore is not how well antitrust works or how it can be made better, but whether it should be used at all. Few economists have any reservations about the justification of antitrust, even if they do have doubt about its efficacy. Almost never do economists question the right of the government to use its coercive power to punish firms for not maximally promoting social welfare.[3] To most economists, the term "free market" describes a result of maximal efficiency, not an institution embodying secure property rights. In their view, antitrust is justified if it helps achieve that efficiency result: Richard Posner, a staunch defender of antitrust law and economics, writes that "the issue in evaluating the antitrust significance of a particular business practice should be whether it is a means by which a rational profit maximizer can increase its profits at the expense of efficiency" (2001, ix). In my view, antitrust is a violation of property rights with no parallel justification—in other words, with no initial violation of property rights which antitrust action seeks to offset.

Richard Epstein (1982) forcefully makes this point, emphasizing that most conceptions of property rights include the right of disposition, meaning that property owners have the right to transfer some or all of their property to another party under whatever terms the parties agree to. The owner can give the property away, loan it to someone, or offer it for sale at whatever price he chooses. If the potential buyer does not judge that price to be worthwhile, she does not have to buy it. Consumers have no right to be sold an item at the price they would like to pay, for invoking such a right would involve a coercive transfer from the property owner.

I have no need to criticize the sincere concern that welfarist

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[3]Notable exceptions include Dominick Armentano (1986, Ch.6; 1990; Ch.9) and Walter Block (1994), who draw on the work of Israel Kirzner and Murray Rothbard, respectively. A recent philosophical inquiry into antitrust dismisses (with prejudice) any problems with interventionist policy: "it is uncontroversial that there are circumstances in which the public interest justifies the state in infringing liberty or autonomy: think of the liberty of convicted murderers" (Black, 2005, 56).

antitrust advocates have for the well-being of the intended beneficiaries of the antitrust laws (usually understood to be consumers, or sometimes less efficient or smaller competitors). I also have no desire to delve into the politics behind the antitrust statutes or decisions, to discover the "real" intentions of those who passed them, as studied by public choice theorists (McChesney and Shughart II, 1995). This paper is a critique of the standard academic justification of antitrust economics, not the actual implementation of antitrust law or the motivation behind its passage or enforcement.

As such, the initial approach in this paper will be very general and abstract, and will outline a philosophical argument based on a well-known anti-consequentialist ethical system, that of 18th century philosopher Immanuel Kant. Kant wrote well before the time of antitrust, of course, but his moral and legal philosophy speaks well to the aims and purposes of antitrust laws. The central aspect of this critique is that the proper role of law precludes the type of intervention characterized by antitrust, which only serves to affect welfare and not to correct any wrongdoing in the sense of violations of rights or duties. I would hope that acceptance of this thesis does not hinge on one's acceptance of the precise details of Kantian ethics, but would appeal to anyone attracted to the principles of classical liberalism, such as minimal government and strong property rights.[4]

This chapter will cover two broad general topics, one focusing on firms, and the other focusing on the state, before turning to an actual antitrust case to illustrate the more abstract points of the analysis. First, I will explain why actions forbidden by antitrust do not involve any violation of rights or duties, as dictated by Kant's formalization of the

[4] For instance, Walter Block (1994) grounds his critique of antitrust on the principle that only acts representing initiation of aggression should be illegal, which rules out all behavior prohibited by antitrust law.

moral law, the categorical imperative. Second, I will discuss the role of the law in Kant's political theory, showing that it exists only to enforce citizens' clearly defined rights against each other, and not to promote a consequentialist end such as welfare-maximization. Along these lines, I will argue that antitrust is best understood as a category of criminal law, and Kant has very strong views on criminal sanctions, which should only be used in cases of guilty wrongdoing. Finally, I will use the famous (or infamous) case against Microsoft to illustrate and elaborate upon the ethical points made in the first two sections of the chapter.

The Categorical Imperative and Duties

As described above, the standard justification for antitrust enforcement is based on preventing negative consequences of certain activities on the part of firms, placing the normative grounding of antitrust firmly in consequentialist ethics, or more precisely, a form of utilitarianism or welfarism. On the other hand, Kant's ethical system is generally regarded as deontological, which can be understood as "duty-based" or "nonconsequentialist."[5] To Kantians, a central concept in ethics is duty, which determines a person's moral obligations toward others as well as himself. These duties are determined by applying the categorical imperative, Kant's formalization of the moral law, to plans of action (or *maxims*). Kant outlined three formulations of the categorical imperative, the first two of which are most useful for our current purpose. The familiar Kantian concept of universalization is contained in the Formula of Autonomy or of Universal Law: "act only on that maxim through which you can at the same time will that it should become a universal law" (1785, 421). This formula clearly prohibits lying, for instance, by pointing out that if everyone commonly

[5]See Gaus (2001a, b) for a discussion of the term "deontology," for which there is no single agreed-upon meaning.

lied, statements would no longer be believed, and since lying depends on a presumption of honesty, lying would contradict its own efficacy. Another familiar Kantian concept, respect for other persons, is embodied in the Formula of Respect for the Dignity of Persons: "so act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means" (1785, 429). This formula provides another rationale for a duty not to lie: when you deceive another person, you are using that person's trust in you, as well as your good reputation, to achieve your end.[6]

There are two types of duties determined by the categorical imperative. Perfect (or narrow) duties allow no latitude in execution, and are often negative: examples include "do not steal" and "do not lie." Imperfect (or wide) duties, on the other hand, do allow for some "playroom," and they are often positive duties, including "be kind to others" and "cultivate your talents." These duties do not prescribe specific actions, but rather attitudes or ends that should be adopted, and acted upon when possible, but not to the exclusion of other duties. (For instance, the duty of beneficence does not require great sacrifice on one's part, because that might place him to need of assistance himself.)

It is easy to see how the two formulae of the categorical imperative explained above imply perfect duties, such as the duty not to lie. But how do imperfect duties derive from these rules? The second formula provides the easiest answer: it requires not only that we not use others simply as means to our ends, but also that we take others' ends to be our own, which generates duties such as beneficence: "we do not fully respect others as we should if we do not make their interests our own and help them insofar as we can" (Sullivan, 1989, 207). But a

[6]The third formula, the Formula of Legislation for a Moral Community, can be thought of as a combination of the first two, but emphasizing the role of the individual agent as determining her own moral law: "every rational being must act as if by his maxims he were at all times a legislative member of the universal kingdom of ends" (1785, 438).

universal absence of beneficence does not contradict itself, so how would the first formula imply such a duty? The universalization concept does not rely solely on logical contradiction, but also contradiction "in the will": could a world of universal indifference to other persons be willed by a rational agent? Paton answers in the negative: while there is no logical inconsistency, "there would, however, be an inconsistency in a will which willed this to be a universal law; for since each of us at some time is bound to seek help for himself, he would thereby will an exception to this law, and consequently he could not will it to be a law" (1947, 152).[7]

When examining antitrust, the distinction between perfect and imperfect duties is important for two reasons. The first is that perfect duties alone imply correlative rights. A duty not to steal implies a right to secure property, and a duty not to kill or harm implies a right to bodily safety. By contrast, the duty of kindness or beneficence does not imply a right to be treated kindly, because such a duty does not have to be followed to any certain extent, and therefore cannot ground a definite right. This explains Kant's refusal to endorse positive rights such as a right to welfare, since they do not follow from any perfect duty to provide for it. Furthermore, since these correlative rights are implied by (perfect) duties that are themselves essential and absolute, these rights cannot be overridden or set aside in the interests of social welfare. In the famous words of Ronald Dworkin (1977), rights "trump" welfare, placing a limit on the state's activities motivated by utilitarian concerns.

The second reason, which will be examined further in the next section, is that the state can enforce only perfect duties, not imperfect

[7]This interpretation of the categorical imperative walks a fine line between willing and desiring, but nevertheless, it does have much support among Kant scholars, and has been shown to be necessary to generate even "obvious" perfect duties, such as duties against killing (Herman 1989).

duties. The state can pass a law against theft or murder, but not against failures of sufficient kindness or self-improvement.[8] In practical terms, this is because there is an actual act to punish in cases of violations of perfect duty, whereas imperfect duties cannot even be said to be "violated," just "underperformed" (which does not indicate a wrongdoing, but rather a lack of virtue). More generally, imperfect duties cannot be enforced by the state because no one has a right to their performance.

Rights, Duties, and Antitrust Prohibitions

In this section, I will use these two formulae of the categorical imperative to show that firms have the right to engage in actions prohibited by antitrust law, and that there are no rights of competitors or consumers that are legitimately protected by antitrust law. Most antitrust prohibitions fall under two broad categories, mergers of assets and restrictions on terms of sale (such as price). The justification normally given for their prohibition is minimizing the negative consequences that may result, usually understood as higher prices, lower consumer surplus, or lower social welfare/efficiency. But are any rights violated by these actions, or, in other words, do firms have any duty not to engage in these practices? I hope to show that according to Kantian ethics, the answer is no, denying any justification for antitrust enforcement.

As stated above, antitrust prohibitions are based on the negative consequences of firm behavior, such as increased prices to consumers, so I will start there. Would the categorical imperative prohibit charging high prices, and therefore provide a justification for state action to

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[8] "Good Samaritan" laws require a certain amount of kindness in dire circumstances, but the moral and legal status of forced beneficence such as this is controversial among philosophers. For an argument supporting such laws consistent with both utilitarian and Kantian ethics, see Weinrib (1980).

prevent such behavior? The universalization formula of the categorical imperative is most applicable here: is there any logical contradiction in all firms being able to raise their prices? This may certainly have negative consequences, obviously for consumers, and also positive ones, in particular for firms that do not choose to raise their prices and may gain competitive advantage. But there is nothing contradictory in such a scenario: in fact, most firms are able to raise their prices at will, even with no justification based on increased costs or increased demand. It is simply part of the market process, wherein firms experiment with raising and lowering prices to find the one that (at that point in time) maximizes profit. And such a world is obviously not unimaginable, so the test of contraction in the will fails to rule out raising prices as well. (This would also apply to selective increases in price, such as in cases of price discrimination.)

Of course, it is not the act of raising prices that is prohibited by antitrust, but rather behavior that may lead to greater ability to increase prices in the future, such as mergers. Does the categorical imperative rule out asset mergers? Again, we use the universalization formula: is there any logical contradiction in all firms being able to merge their assets with another firm when they wish? There is nothing in the concept of merger that, when universalized, contradicts itself, so it is difficult to see how the categorical imperative would rule it out.[9] We can also apply the stronger test of contradiction in the will: could a universal right to merge be willed by a rational agent, or does it result in such an unimaginable state of affairs that no one could will it to be? Even though some people, such as consumers, may not like a world in which firms could merge whenever desirable, there is nothing in the idea that

[9]Note that the maxim is stated as the right to merger, not simply merger itself; certainly, if every firm merged into it, that would make any further merger impossible, which would seem to contradict itself. But we are not asking if every firm should merge, but only if they should be able to merge if it is in their interests to do so.

is impossible for a rational agent to conceive of or will.

Other prohibited behaviors that are understood to lead to higher future prices include predatory pricing, exclusive dealings, tying, and bundling. These actions can also be seen to put competitors to a disadvantage, another negative consequence, but is there a deontological justification for forbidding these activities? All of these practices are, generally speaking, restrictions on the terms of trade, in which the seller places or changes the limits on the terms he is willing to accept before finalizing a transaction.[10] Would universalizing possible restrictions on terms of trade be contradictory in any way? As with raising prices (also a restriction on trade), other restrictions may shift the benefits of transactions from one party to another, but they do not contradict their very use, so it is difficult to see how to construe a duty not to restrict terms of trade based on the universalization formula of the categorical imperative.

The frustrated reader may ask: "don't negative consequences play any role in Kantian ethics?" Despite common understandings to the contrary, they do, and a large role at that, but as general consequences of universalizing a maxim, not specific consequences of a particular instance of following a maxim. For instance, even if a particular lie were to be judged as having good consequences, lying is still wrong because if universalized, it leads to a breakdown of trust, which is a precondition for effective deception. This is a consequence of universal lying, and certainly a negative one, but most importantly it is a contradictory one, defeating the very purpose of lying. Turning back to antitrust, prohibited actions such as merger and bundling may lead to higher prices in the future, or lower profits for competitors, which is certainly negative to some (and possibly positive to others), but there is nothing in the consequence which contradicts or defeats the purpose of

[10] Of course, any nonnegotiable price set by a seller is a restriction of terms!

the original act: in fact, it very well may be the intention of merging firms to charge higher prices. Consider honesty, specific instances of which may have negative consequences ("truth hurts"), but, in general, is nonetheless logically consistent with itself.

To summarize, we found no basis in the categorical imperative for any duty not to merge assets or restrict terms of trade (such as price). Since we found no such duties, there can be no correlative rights on the part of consumers or competitors to restrict these activities. This is clearly evidenced by the fact that not all mergers, nor all restrictions on trade, are prohibited by the state, but rather only those that are seen to be particularly detrimental to consumer surplus, social welfare, or efficiency (once again being generous regarding the antitrust authorities' motives). If there were rights or duties involved, these activities would be unambiguously wrong, and the state would have a *per se* justification for prosecuting them. But as it is, the only criticism that can be laid upon mergers and restrictions is that they have possibly negative effects on outcomes, but if these outcomes result from nonwrongful activities (those that violate no duties or right), then the state has no business punishing firms for them.

We can approach this question from other directions, such as: "don't consumers have rights to low prices, or other firm owners to their livelihood?" If such rights do exist, then they would have to follow from duties imposed on sellers, to charge low prices or refrain from certain restrictions on terms of trade such as predatory pricing, and we saw above that no duties exist. (In fact, these would be somewhat contradictory duties, one prohibiting prices too high, the other, prices too low!) We saw above that Kant did not endorse welfare rights; others have a duty not to interfere with our free activities (that themselves do not violate any duties), but we alone are responsible for our own well-being. To claim a right to a certain level of well-being would imply that others have a perfect duty to provide for it—a coercive taking that uses the providers merely as a means to an end—but beneficence is an imperfect duty in Kant's system, which generates no correlative rights.

"OK, but don't firms who merge and restrict terms of trade use their consumers or competitors as means to their own profit-making, while not considering them as ends at the same time (a violation of the second formula of the categorical imperative)?" If this were so, then all business owners would be guilty of this sin, including Adam Smith's tradesmen who sell their wares not for the good of their customers, but to improve the well-being of their families. But note that the second formula states that persons cannot use others simply as means, without at the same time as ends. We use other people all the time: we use grocers to obtain food, mechanics to keep our automobiles running, and friends when they're not. But we do so while treating these persons with respect, chiefly through eliciting their services or help voluntarily. It is in this way that we treat them as ends and not just means.

What, then, would violate the second formula in terms of commerce? Deceit and fraud, specific instances of the general phenomenon of lying and therefore violations of perfect duty, would be obvious answers, as well as blatant coercion. As long as the seller behaves honestly and openly, and the buyer is free to accept or reject the terms of trade as offered, then the seller is not using the buyer merely as a means, but is at the same time respecting the buyer by being truthful and honorable in his business. So no duties prohibiting mergers or restrictions on terms of trade can be derived from this formula of the categorical imperative either, unless we throw away the baby with the bath water and condemn all commercial activity.

The Role of Law in Regulating Firm Behavior

I now introduce Kant's theory of law and the state to complement the discussion of rights and duties in the previous section. If we accept that there is no duty on the part of firms to avoid mergers and restrictions on terms of trade, and that consumers have no right to low prices, or competitors to a particular standard of livelihood or success, then we will see that there is no basis for state enforcement of laws based on such duties or rights. The argument is simple: since there are no rights violated by firm behavior (outside of coercion and fraud), there is no wrongdoing, and in the absence of wrongdoing, there is no justification for punishment. In Kant's view, the punishment powers of the state must only be used to punish those guilty of wrongdoing, and not the pursuit of welfarist ends, which, as we have seen, is the only possible rationale for antitrust enforcement.

In Kant's political theory, the state exists to ensure the maximum degree of mutually consistent freedom of action for everyone by restricting actions that would limit others' freedom, moving toward what Kant called the "kingdom of ends," in which all persons are free to pursue their ends consistent with the same freedom for all. The state attempts to create this situation by enforcing a subset of perfect duties (or the rights implied by them), such as duties prohibiting murder, assault, and theft. The prohibition of murder, for instance, limits the freedom of the murderer, but murder is itself a violation of perfect duty that limits the other person's freedom to pursue his own legitimate ends. (The same logic applies of theft and assault.) The state does not enforce imperfect duties such as beneficence; these are sometime referred to as "duties of virtue," because they are not required to be performed in any specific or minimal fashion, and therefore cannot be enforced as can the narrow dictates of perfect duty.[11]

With this understanding of the role of the state (shared by many classical liberals and libertarians), there is no place for antitrust law in the absence of perfect duties to be violated or correlative rights to be enforced. If firms had a perfect duty to charge low prices, and consumers therefore had a right to them, then that right could be enforced by the state. But since there is no such duty or right, there is no justification of such a law or enforcement thereof.

[11] Also, not all perfect duties are legally enforced, such as the duty not to lie (in noncommercial contexts, at least).

Insofar as the state does prosecute and punish antitrust violations, antitrust law can be (though usually is not) considered part of the criminal law: "the infliction of 'punishment' is sufficient to render a legal process criminal in nature" (Fletcher 1978, 408-9).[12] But Kant held that criminal punishment is reserved only for those found guilty of wrongdoing, two terms which cannot be applied to firms operating without fraud or deceit, no matter what prices they charge, or how efficiently or "ruthlessly" they may compete. Kant warned strongly against using punishment for consequentialist purposes: "punishment... can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society... [The criminal] must previously have been found punishable before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens" (1797, 331). Since antitrust law and enforcement can only be justified by consequentialist logic, any punishment of such violations would be counter to Kant's view of criminal law and the state. Essentially, firms found guilty of antitrust violations have done nothing wrong in the sense of violating any rights of consumers or competitors, but merely have acted in such a way that failed to maximize social welfare (in the state's estimation). Since real-world firms can never maximize welfare as textbook firms do, and perfect

[12] This characterization of state enforcement of antitrust law recognizes that the vast majority of antitrust cases in the United States are private suits, mostly brought by competitors. Analysis of these actions would obviously have a different flavor from those stemming from state enforcement, but it would still come down to the issue of rights (in a Dworkinian sense): who has the prevailing right in a dispute between two competitors, the one competing fiercely (possibly by undercutting the other's price) but violating no right of the other firm, or its competitor that wishes to restrict the behavior of the first. From the previous discussion, it follows that in a Kantian framework, such a suit should be decided in favor of the "fierce" (read: effective) competitor; the truth, of course, is often much different.

competition in the academic sense is impossible to realize, the state has unlimited legal authority to prosecute and penalize firms at will, which can lead us down a slippery slope to industrial policy or even socialism.

Application to *U.S. v. Microsoft*

I will use the recent antitrust case against Microsoft to illustrate some of what I have written above. The Microsoft case is particularly appropriate for several reasons. First, Microsoft has been vilified by significant portions of the public to a degree seemingly inexplicable based on the legal merits of the case against it, which would seem to imply some moral wrongdoing at the heart of the case, rather than merely technical considerations. Second, the nature of the Microsoft case, in particular the rapidly evolving software industry, renders traditional antitrust analysis of the case outdated, leaving moral arguments to be emphasized more strongly.[13]

I will abstract from the legal and economic details of the Microsoft case; there has been enough written on these aspects.[14] In fact, for the purposes of the discussion to follow, we could (though we won't) assume that all of the government's allegations were true, and even that all of Microsoft alleged practices would have lowered efficiency or welfare, because the ethical framework I am using does not take any of this into consideration. As detailed in the first two sections, my point is that even if Microsoft's actions threatened to lower welfare,

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[13]Note that some disagree with the anachronistic nature of antitrust law when applied to modern industries such as software, such as Richard Posner (2001, Ch.8); see also Eisenach and Lenard (1999) and Evans (2002).

[14]For a sampling, see Hazlett (1999), Liebowitz and Margolis (1999), Lopatka and Page (1999), McKensie (2000), Brennan (2001, 2003-4), Gordon (2002), and the symposia on the Microsoft case in the *Connecticut Law Review* (Summer 1999) and the *Journal of Economic Perspectives* (Spring 2001).

that result is not enough to justify antitrust penalties without demonstrating some breach of moral duty.

Let us summarize the arguments made against Microsoft in the antitrust case. Microsoft is alleged to have used its market power to increase its profits by either expanding its monopoly position over operating systems or extending this monopoly into related markets, such as browsers or Internet services. Specifically, it allegedly engaged in preferential dealing with original equipment manufacturers (OEMs) to make sure its products were preinstalled on new computers; bundled other software (such as its Internet Explorer web browser) with its Windows operating system; and placed an icon for its MSN.com Internet service on the Windows desktop to the exclusion of competing Internet service providers. Predatory intent was also imputed into most of this behavior, though as we will see.

What negative consequences were predicted to result from Microsoft's behavior? The most obvious harm would come to Microsoft's competitors if Microsoft's practices were successful in increasing its market share, or if they were truly predatory and used competitors' misfortune as an instrument to increase Microsoft's own profits. This potential harm to competitors is more immediate, compared to the expected future harm to consumers in the case that Microsoft's actions eliminate competition and allow it to raise prices, or in the case that these actions hinder innovation in the software industry, lowering users' utility from inferior future software products.

Microsoft's business practices are rarely disputed, but the predicted effects of them on prices, innovation, the software industry, and overall welfare are the focus of considerable controversy. Consumers may not be harmed at all: there is significant reason to doubt that prices have risen, or will rise, due to Microsoft's pricing strategies, or that they have squashed innovation through their bundling of related software into the Windows operating system (Liebowitz and Margolis, 1999). On the other hand, they very well may have hurt the interests of their competitors; or, Microsoft may have inspired greater innovation and strategy (as well as litigation) on the part of their competitors. But I return to the central question posed in this chapter: has Microsoft done anything wrong in the broader moral sense? The Kantian critique of antitrust law outlined earlier in this chapter would suggest that Microsoft has done nothing wrong by engaging in the maligned practices, however harmful they may have been (or may be in the future).

I will argue this point in two parts: first I will discuss the specific charges of bundling and exclusive dealing, which are both based on exploiting marketplace advantages. I then turn to the more general discussion of predatory behavior, and the role that intent plays in our moral deliberation regarding antitrust. I hope to show that if there is any possible source of wrongdoing in Microsoft's actions, it is not in the practices themselves, which are morally innocuous, but instead due to the predatory nature of the behavior. I will eventually reject this possibility, but even were we to admit it, it still would not be sufficient to justify antitrust action.

Specific practices and "unfair" advantage

The practices I discuss in this subsection are each based on one central concept: exploiting advantage in the marketplace, either to extend that advantage to other areas of business, or to strengthen or fortify the original advantage itself. Specifically, none of the practices described below would have been effective in increasing profits (or arousing the government's attention) if Microsoft had not had a near-monopoly over operating systems (eliciting complaints that Microsoft was being punished for its size or success). Each of the practices can be seen as attempts to either further that near-monopoly, or to extend it to other markets (such as browsers or Internet service), assuming the efficacy of such attempts.

One method that Microsoft allegedly used to further its monopoly status was to bundle software (especially Internet Explorer) with Windows by packaging the two programs together in the retail version of Windows, or in the operating system sold to OEMs. The standard theory of monopoly extension through bundling holds that a firm with a monopoly in one area can extend that monopoly to another product (the bundled good) by requiring that they be purchased together. This may allow the firm to raise the price of the bundled good, or foreclose the market for the bundled good from competition (since presumably all consumers would buy it from the monopoly provider of the first good). This basic story, as with predation in general, has many problems, now widely recognized by economists (see Miller III and Pautler, 1985, and references therein), but here we can give it the benefit of the doubt, and assume for the time being that bundling is profitable to the firm that practices it but detrimental to overall welfare. It would then be bad (in a consequentialist sense), but is it wrong (in a deontological sense)?

It is very hard to see how it could be. We can put this question this way: does a firm have a duty not to bundle two goods or services together? Does bundling, if practicable by all firms, contradict itself in any way? Is a world in which firms are free to bundle their products unimaginable? Such a prohibition, if not based on consequentialist logic, would have to give some moral primacy to the original, unbundled status of the two products, and then declare the union of them to be "wrong" in some sense. It seems clear that positing such a duty against bundling does not have any basis in Kantian ethics.

One could argue that selling unbundled products gives consumers more choice, and therefore would allow more competition in the market for the bundled good. But selling the products bundled and unbundled would provide even more choice; Internet Explorer is available separately (and for free), even though Windows cannot be bought without it. Though this may represent a lessening of choice, there are several points which counter this: first, the bundling may create value to consumers who, in most cases, will want to use a web browser with Windows, and second, Microsoft does not prohibit installing another firm's browser, so other firms can still compete in the industry (albeit lacking the advantage of bundling with Windows). This leads naturally to another questions: do firms have a duty to provide maximal choices to consumers? Such a duty would require all firms to provide all possible goods and services to any consumer who demanded them, which would certainly put a stop to commerce as we know it (generating a clear self-contradiction). Firms provide those products, and only those products, that they can produce and sell at a profit that exceeds their opportunity cost. In other words, just as they have no right to a particular price (absent a prior contractual agreement), consumers have no right to a particular marketing arrangement (such unbundled products), since that would imply a duty on the part of firms to provide them.

The discussion of the MSN.com icon on the Windows desktop is directly parallel to the bundling discussion; the only difference is that it involves promoting, rather than bundling, a product on the back of the monopolized one. Internet service providers (ISPs), such as American Online, alleged that Microsoft was giving its own Internet service MSN.com an unfair advantage by including its icon on the Windows desktop. But many firms use one product to advertise another; after a consumer has purchased the first product, it has a kind of temporary monopoly that it can use to promote other products. For example, as you watch a television program on one network, you're (presumably) not watching a program on another network, but the network you are watching shows you commercials for its other programs. Turning back to the Microsoft example, we can ask: what are the alternatives? Competing ISPs wanted their icons placed on the Windows desktop when initially installed, but forcing one firm to promote other firms' products is patently absurd, leaving the other alternative: no ISP icons at all, which has dubious benefit for consumers. (And once again, there was nothing to stop consumers from investigating and signing up with other ISPs, even though MSN.com had privileged desktop placement.)

Finally, Microsoft was accused of exclusive dealing designed to foreclose competitors from markets. For instance, Microsoft allegedly used its strong bargaining position, derived from its near-monopoly over operating systems, to provide incentive to OEMs to promote Internet Explorer to the exclusion of competing browser Netscape. This is another example of a restraint on the terms of trade, which was discussed earlier: should a firm, as a condition of a contract or transaction, be free to require that their product be the only one sold by an intermediary seller, or at least that the intermediary not sell a specific competing product? This has undeniable negative impact on competitors, though it does not keep them for pursuing another intermediary through which to sell its product (or selling directly to the consumer), and may provide marketing advantages to the intermediary. (Many stores and restaurants advertise that they exclusively serve a particular brand of coffee or soda.) But there is nothing contradictory in allowing firms to contract with other firms to the exclusion of competitors.

The common thread that links all of these practices is marketplace advantage and how firms use it. Do firms have a duty not to make use of advantages they have over competitors, or a duty not to invest in such advantages? Some advantages are accidental, such as happening upon a successful product (a "runaway" or "sleeper" hit that came out of nowhere); discovering hidden talent among employees or executives; or being in the right place at the right time (owning a hot dog restaurant next door to a newly-announced sports complex). These are windfalls, cases of good luck, which certainly have ethical relevance (Williams, 1981), but taking advantage of them is not self-contradictory in any way; it does not negate the advantage, or distribute it amongst others. And does it make a difference if the advantage was created intentionally or strategically? One could argue that this is the nature of investment, spending resources now to improve your business position in the future. Investing in new technologies to increase productivity and lower costs gives a firm an advantage over competitors that did not take similar actions, and charging the lower prices enabled by the lower costs is a way to exploit that advantage. Creating and exploiting advantages is universal, and fuels competition, entrepreneurship, and innovation, rather than contradiction or chaos.

The frustrated reader (if he's lasted this long) may ask: "don't monopolies have a responsibility to consumers and competitors, simply because they have a monopoly position?" But what would be the basis of this responsibility? It could not be reciprocity, as if the monopoly owed something to those who contributed to its monopoly status. Such an argument would have some validity when applied to state-granted monopolies, such as utilities, in which case we can understand them to have exchanged some control over their operations in exchange for exclusive market rights. But a firm that achieves monopoly status through free (and legal) action does not owe anybody for its achievements (not even its customers, who received goods or services for their money, and have no further claim on the firm). Is the responsibility based on the harm a monopoly could (supposedly) cause in violation of such responsibility? This is simply a different way of wording the earlier discussion over duties, and the conclusion there was clear. Finally, is a responsibility owed to competitors because they do not enjoy the advantages of a monopoly? But this would be truly contradictory, thwarting the incentives to gain advantage: a firm would not strive for advantage if it could not make use of it, or if it could simply free ride on the advantage of others (who similarly would not seek it either). A monopoly does not preclude others from competing on the same terms, provided they achieve the same advantages; in fact, this often happens in cases of serial monopoly, markets which are controlled temporarily by a sequence of firms. Analogies to sports are obvious: claiming that a monopolist has a responsibility to its competitors is like the winner of a marathon who is required to turn around, help the others to the finish line, and then share the prize money.[15]

Predation and motivation

Stepping back from the specific practices, we now ask a more general question: does it matter if Microsoft engaged in these practices with predatory intent, that is, the goal to harm its competitors as a means to increase its own profit? Before I discuss the ethics of predation, there is an informational problem here: it is very difficult to determine predatory intent based on observed behavior alone. Most predatory actions, such as lowering prices or bundling products, are also frequently performed for nonpredatory reasons; even true monopolies (with no competition) or firms in very competitive industries can profitably engage in either activity with no hope of direct harm to rivals. Furthermore, many economists now doubt the efficacy of predation, implying that all observed "predatory" actions are in fact "pro-competitive." But once again, I abstract from the issue of whether predation is ever profitable or rational, assuming it is (or at least that it is attempted for some reason), and instead focus on the normative aspects of it – does evidence of predatory intent imply any wrongdoing that would justify antitrust enforcement?

Certainly, if we are looking for moral wrongdoing, an activity done principally to harm competitors' interests, rather than directly increase one's own profits, seems to fit the bill. Of course, most actions that a firm takes to increase its own profits would hurt its competitors' interests (even recognizing that competition is not a zero-sum game).

[15]It need not be mentioned that if we were discussing a true monopoly, any mention of competitors would be nonsensical. The existence of competitors, actual or potential, belies the accurate attribution of monopoly in the technical sense. Antitrust economists cling to the textbook conception of perfect competition, but play fast and loose with the definition of monopoly. (Odd, that.)

But might there be an important moral distinction between lowering prices to increase sales and market share, which lowers competitors' profit only as an unintended consequence, and lowering prices in hopes of driving your competitors out of business (and raising prices afterwards)? In the end, the distinction is in terms of motivation, the principal reason prices were lowered, which is a contentious issue in terms of morality and the law, for several reasons.

First, motivation is usually not observable, but must rather be inferred from behavior, which brings in the informational problem again. What about the behavior in question implies predatory intent? Since Areeda and Turner's classic 1975 article, economists have proposed a plethora of cost-based criteria to provide evidence of predatory intent, because in a simple understanding of profit maximization, pricing below cost is only profitable in the long run if competitors leave and prices can be raised later. But pricing below cost can also be profitable in the long run if it helps promote a new or improved product, or even in the short run if it serves as a loss-leader to help promote another item with a high enough profit margin to compensate for the loss. In the Microsoft case, more direct evidence of predation was introduced in the form of email correspondence among Microsoft employees, with talk of "cutting off Netscape's air supply" and other martial language regarding competitors (and the government prosecutors). But is this proof of intent, or simply inspiring language, akin to a locker room speech by a coach to "kill" the other team?

Second, assuming predatory motivation were ascertained, one could ask: what is wrong with one firm truly wanting to "defeat" another? This is competition, and firms are not "friends" in any sense. As long as firms are not using deceit or illegal force to injure its competitors (such as spreading false information about their products, or sabotaging their factories), and instead using legitimate means of competition, such as selective pricing and promotion of its own products, it is hard to see any perfect duty being violated. And Kant's imperfect duty of beneficence would not necessarily apply in a setting of lawful competition; Kant did make allowances for greater kindness to friends and family than mere acquaintances, or complete strangers.[16] There is certainly no requirement for business rivals to be "nice" to each other—just lawful. Also, duties of beneficence in a business setting would involve excessive sacrifices; kindness towards a competitor implies foregoing an opportunity to increase one's own profits, and there is no strict requirement from Kantian ethics to make such a sacrifice.

Third, even if we were to condemn predatory intent as unethical motivation for business behavior, is it a sufficient ground for legal action? In Kantian ethics, motivation is a central concern, for it alone determines whether a person acts morally or not (separate from the moral quality of the act itself). Kant held that there is an important difference between the good (or bad) consequences an act produces and the morality of the act in itself. One can act according to duty, in his framework, without acting out of respect to duty – doing the right thing for the wrong reasons, to use a common aphorism. This would be a fair way to characterize predatory behavior such as price-cutting; lowering prices is generally good (in the short term), but if it is done primarily to harm competitors, it is done for (what some would call) the wrong reason.

But motivation plays no part in Kant's theory of the law, which polices only external acts, not internal drive or intent.[17] In Kant's view,

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[16] "In wishing I can be *equally* benevolent to everyone, whereas in acting I can, without violating the universality of the maxim, vary the degree greatly in accordance with the different objects of my love" (Kant 1797, 452).

[17] This of course is in stark contrast to the doctrine of *mens rea*, a precondition for criminal behavior that demands that the accused must been of "guilty" or "bad" mind at the time of the crime. But Kant opposed punishment based on intrinsic moral criteria; see Hill (1999).

the law exists to protect individuals from actions that violate rights correlated with perfect duty. The action is the only factor relevant to the determination of state enforcement, for it is the action alone that impacts the victim, not the intent or motivation of the injurer. (Hate crimes, which combine both aspects, would be an obvious challenge to this view.) So even if we judge predatory intent to be immoral, it is not a legitimate concern for the state, for whom the only question is: do antitrust violations represent a breach of perfect duty resulting in a rights violation? We have already seen that the answer is no, and the matter of motivation does nothing to change it.

Finally, we could pronounce the entire issue of motivation moot. One could argue that whether actions were predatory or not, the overall motivation was in fact the same–maximizing profit–but using a different instrument to pursue it. A firm whose overall motivation is simply to drive out its competitors will likely not maximize its profits, and will be subject to a takeover bid by another firm with more profit-minded goals. We could say that predation was only an intermediate action in the service of the larger motivation of profit-maximization. But doesn't this involve using one's competitors as a means to an end, which is prohibited by the second formula of the categorical imperative? Remember that this version of the moral law does not rule out using others as means to one's end but only prohibits merely using others as such, while not at the same time respecting them as rational agents with their own ends. As stated before, any commercial transaction uses others as a means to enhancing one's own well-being, but if the transaction is voluntary and not fraudulent, then all participants are respected. So the question becomes: is there any fraud, deceit, or coercion involved in predatory business behavior? Since predatory behavior does not directly involve competitors, but rather consumers who receive low prices or bundled goods, it is difficult to see how competitors can complain of fraud or deceit, much less coercion (nor can consumers, of course). Of course, they can (and often do) complain of overly intense competition, but that again leads to an informational question: is the voracious competitor behaving in a predatory fashion, or is it simply a more efficient competitor? Even if the behavior is judged to be predatory, it is nonetheless a business strategy that does not mislead or coerce competitors or consumers in any way, and therefore does not violate the categorical imperative.

Conclusion

Economists often question the efficacy of antitrust, but rarely its justification. Ideally, antitrust enforcement is imagined to correct market inefficiencies or failures stemming from the acquisition or abuse of "market power" or monopolization. But economists rarely address what monopolies did wrong to justify criminal penalties for their behavior. If their "wrongdoing" was simply in failing to maximize efficiency, the government is holding firms to an impossible ideal, one that allows the government to engage in selective (and perhaps politically motivated) prosecution.

I argued in this chapter that none of the behaviors rendered illegal by antitrust law represents a wrongdoing that is punishable by law according to Kantian ethics and legal theory, which corresponds closely to the classical liberal ideal of limited government. When government exists simply to prohibit some citizens from violating the rights of others, it has no role in regulating activity that violates no rights whatsoever, such as asset mergers, bundling, exclusive dealing, and even collusive price-fixing. As long as firms enter into voluntary transactions with their customers, and do not engage in truly wrongful conduct against their competitors (such as espionage or violence), there is no rights violation involved with free enterprise. Therefore, there is no justification for antitrust prosecution, absent an appeal to consequentialist notions of justice in which the well-being of some can be traded off to benefit others, which denies persons the equal respect and dignity that Kantians, and classical liberals in general, hold dear.

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