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I. INTRODUCTION

No antitrust statute has attracted more opprobrium than the Robinson-Patman amendment to section 2 of the Clayton Act[1] which seeks to proscribe the practice of price discrimination.[2] A leading commentary on the Act denounces it as "a masterpiece of obscurity"[3] and it is

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1. 15 U.S.C. §§ 13(a)-(f) (1976).

2. As amended in 1936 by the Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936), section 2 of the Clayton Act prohibits price discrimination which may either substantially lessen competition, tend to create a monopoly in a line of commerce or which may injure, destroy, or prevent competition with persons competing with the recipients of a favorable discrimination or with the customers of those recipients and their competitors. In other words, the statute is concerned with anti-competitive harm principally on three distinct commercial strata: (1) competition at the level of the seller's own rivals (primary-line competition); (2) competition at the level of the buyer's levels (secondary-line competition); and (3) competition at the level of the buyer's customers (tertiary line or third-line competition), although the possibility of a proscribed discrimination even beyond these three strata was acknowledged by the Supreme Court in Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

While the Robinson-Patman amendments were also designed to strengthen the original Clayton Act's prohibitions of price discrimination affecting primary-line competition, "[they] were motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores," FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-44 (1960), and consequently aimed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power," FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960). The unamended language of section 2 of the Clayton Act was ineffectual to prevent quantity discounts to chain stores and the ensuing purchasing advantages because it specifically exempted price differentials made "on account of differences in the . . . quantity . . . of the commodity sold." 38 Stat. 730 (1914). As a result, significant price differences could be based on minor differences in quantity. *See* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 7 (1962 & Supp. 1964) [hereinafter cited as ROWE].

3. The origins of the amendments of 1936 have been succinctly described:

> The political impulse underlying the law was an impulse to control changes in the channels of distribution, to curb the power of the stronger distributors, and to enhance the opportunities of the weaker ones. It was akin to that which underlay the NRA codes in the distributive trades, the chain store tax laws, and the state

elsewhere criticized as being ambiguous, contradictory, jejune, and complex.[4] The pro-competitive objectives of the statute are denigrated as misconceived and unattainable.[5]

Notwithstanding this plethora of criticism, a number of legislatures have emulated the United States example and introduced statutory prohibitions of price discrimination. The most recent of these statutes is the Australian Trade Practices Act of 1974[6] which contains a prohibi-

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laws permitting resale price maintenance and forbidding sale below cost. It expressed, not a concern to preserve free markets, but rather a concern to assure the survival of small business.

C. EDWARDS, THE PRICE DISCRIMINATION LAW 12 (1959) [hereinafter cited as EDWARDS].

4. Aside from ROWE, note 2 *supra*, the leading critiques of the Robinson-Patman Act include C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (2d ed. 1959); D. BAUM, THE ROBINSON-PATMAN ACT, SUMMARY AND CONTENT (1964); EDWARDS, note 2 *supra*; A. SAWYER, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT (1963).

5. *See* R. POSNER, THE ROBINSON-PATMAN ACT, FEDERAL REGULATION OF PRICE DIFFERENCES (1976); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE chs. 10, 26 (1976) [hereinafter cited as SCHERER].

See ROWE, *supra* note 2, at 113-14, where the author observes:

> The provisions of Section 2(a) relating to the competitive effects of challenged prices are the key to the legality of most differential pricing practices. . . . These few words present supremely complex and controversial facets of the Robinson-Patman Act. Still vacillating are the legal interpretations as to just what degree and type of market consequence will be deemed to constitute the proscribed statutory effect on competition in various commercial situations. That legal uncertainty is compounded by the broader philosophical clashes centering on whether the restrictions on pricing imposed by such applications of the Robison-Patman Act foster "hard" or "soft" competition and are compatible with over-all antitrust objectives. For, to the extent the Robinson-Patman law is applied to penalize and inhibit normal competitive price variations merely because they discomfit individual competitors, the statute veers from the antitrust objective of fostering flexible competitive pricing toward the contrary policy of price stabilization by law.

(citation omitted).

6. Trade Practices Act 1974 (Com.) § 49 which provides:

(1) A corporation shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to—
  (a) the prices charged for the goods;
  (b) any discounts, allowances, rebates or credits given in relation to the supply of goods;
  (c) the provision of services in respect of the goods; or
  (d) the making of payments for services provided in respect of the goods,

  if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.

(2) Sub-section (1) does not apply in relation to a discrimination if—
  (a) the discrimination makes only reasonable allowance for differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting

tion of price discrimination that significantly resembles the scheme and language of the Robinson-Patman Act. Additionally, anti-discrimination laws have been promulgated in Canada,[7] The Republic of Ireland,[8] France,[9] Japan,[10] and West Germany[11] and in the European Economic Community[12] under both the Treaty of Rome[13] and the European Coal and Steel Community Treaty.[14] Finally, the Organization for

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from the differing places to which, methods by which or quantities in which the goods are supplied to the purchasers; or

(b) the discrimination is constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

(3) In any proceeding for a contravention of sub-section (1), the onus of establishing that that sub-section does not apply in relation to a discrimination by reason of sub-section (2) is on the party asserting that sub-section (1) does not so apply.

(4) A person shall not, in trade or commerce—

(a) knowingly induce or attempt to induce a corporation to discriminate in a manner prohibited by sub-section (1); or

(b) enter into any transaction that to his knowledge would result in his receiving the benefit of a discrimination that is prohibited by that subsection.

(5) In any proceeding against a person for a contravention of sub-section (4), it is a defence if that person establishes that he reasonably believed that, by reason of sub-section (2), the discrimination concerned was not prohibited by sub-section (1).

7. Combines Investigation Act of 1960, CAN. REV. STAT. ch. C-23, § 34 (1970).

8. The Irish prohibition of price discrimination is contained in Fair Trading Rules promulgated pursuant to the Restrictive Trade Practices Act of 1953, 1953 Acts of the Oireachtas No. 14. *See, e.g.*, article 15(1) of the Restrictive Trade Practices (Radios) Order, Dublin, May 27, 1955. The Act was repealed in 1972 Acts of the Oireachtas No. 11, § 26, which merely continued the provisions of the 1953 Act.

9. Price Ordinance No. 45-1483 of June 30, 1945, art. 37(1)(a).

10. Law concerning the Prohibition of Private Monopoly and the Maintenance of Trade of 1947, Law No. 54, art. 2(7) (as amended), *translated in* 2 E.H.S. Law Bull. Series, No. 2270 (F. Nakane ed. 1968).

11. Act Against Restraints of Competition, July 27, 1957, BGBI 1081, *republished* Apr. 4, 1974, BGBI 869, as amended by Law of June 28, 1976, BGBI 917.

12. The European Economic Community was established by the Treaty of Rome signed on March 25, 1957 (effective January 1, 1958) by Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. Denmark, Ireland, and the United Kingdom subsequently joined the Community on January 1, 1973. Political union is regarded as the ultimate aim of the Community, but the primary function of the Treaty of Rome is to create a common market and to approximate economic policies. I THE EUROPA YEAR BOOK 1979: A WORLD SURVEY 175 (1979) [hereinafter cited as EUROPA YEAR BOOK 1979].

13. Treaty of Rome, arts. 85(1)(d), 86(d), 298 U.N.T.S. 47-49, [1979] 1 COMMON MKT. REP. (CCH) ¶¶ 2005, 2101.

14. This treaty, signed in Paris on April 18, 1951 (effective July 25, 1952), by the six original members of the European Economic Community, *see* note 12 *supra*, formed the European Coal and Steel Community to pool the coal and steel production of these nations as a first step towards the creation of a united Europe. *See* THE EUROPA YEAR BOOK 1979, *supra* note 12, at 183.

Economic Co-operation and Development[15] recently formulated a guideline requesting enterprises to refrain from discriminatory activities.[16]

The central question in evaluating the various price discrimination statutes and the OECD guidelines is whether price discrimination is capable of legal regulation[17] and, more fundamentally, whether price discrimination should be the subject of legal regulation at all. A principle obstacle to any legal scheme of trade regulation is a threshold definitional confusion as to what precisely constitutes the practice of price discrimination[18] and the concomitant lack of clarity in identifying

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15. The Organization for Economic Co-operation and Development (OECD) was founded in September of 1961; it replaced the Organization for European Economic Co-operation (OEEC) which had been established in 1948. The membership of the OECD comprises Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States of America. Yugoslavia participates in the work of the OECD with special status. The aims of the organization are "[t]o promote economic and social welfare throughout the OECD area by assisting member governments in the formulation of policies designed to this end and by co-ordinating these policies; and to stimulate and harmonize its members' efforts in favour of developing countries." EUROPA YEAR BOOK 1979, *supra* note 12, at 242.

16. *See* text accompanying note 108 *infra*.

17. In reference to the objectives of the Robinson-Patman Act, see, *e.g.*, Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. PA. L. REV. 222, 223-24 (1955):

> [S]ince price less cost equals profit, it follows that price discrimination, in the economic sense, is rigorously defined as a difference in the profit earned from one customer as against another.
>
> This condition is of course very widespread in the business world. Most of these profit differentials, which we will henceforth call discriminations, are transitory and fortuitous. If there were established a condition of perfect non-discrimination this morning, by nightfall there would be plenty of discrimination, if for no other reason than unforeseen changes in supply and demand. Those changes make some customers, some products, some localities, some channels of supply, more remunerative than others, and an alert business management will always be on the lookout for these more profitable opportunities and exploit them as best it can.
>
> But this process must under active competition destroy the discriminations which initiated the process. As business concerns devote their labor and capital to these more profitable sales, and pro tanto withdraw from less profitable ones, they increase supply in the one market and decrease it in the other. So long as there is any profit differential—any discrimination—there remains an incentive to continue the process until the discrimination has been completely removed; but in the meantime, other changes in market conditions have created new differentials. Thus, under competition, discriminations are always being created and always being destroyed. To block either the creative or the destructive part of the process is to block competition.

Id. (footnote omitted).

18. The Supreme Court construed the price discrimination language of the Robinson-Patman Act synonymously with a price differentiation, stating that "there are no over-

the alleged evils attributable to the practice.[19]

Obfuscated by forensic rhetoric is the fact that price discrimination is an economic phenomenon. This economic dimension is frequently ig-

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tones of business buccaneering in the § 2(a) phrase 'discriminate in price.' Rather, a price discrimination within the meaning of that provision is merely a price difference." FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). *Cf.* ROWE, *supra* note 2, at 30-31:

> Significantly, the "cost" concept contemplated by economists as pertinent to the ascertainment of whether a price *is* discriminatory goes far beyond the narrow area of costs cognizable under the Robinson-Patman cost proviso permitting legal "justification" of price differentials.
>
> On the one hand, the statutory proviso recognizes only differences in the cost of "manufacture, sale or delivery" which moreover must result from "differing methods or quantities" in which the seller's products are "sold and delivered." Apart from this limited range of cognizable costs, the application of the proviso may entertain only "historic" or "actual" costs, so that a price would be legally "cost-justified" only if the pertinent cost economies *are already realized* at the time of the price quotation.
>
> By contrast, the economist's conception of cost is not confined by such limitations in the *class* of cognizable costs, but may consider *any* tangible or intangible element of cost—such as plant investment, utilization of facilties, credit risks, product differentiation—whether or not precisely measurable or allocable to a particular product. Furthermore, the economic view of cost is not limited in *time* to the recognition of "actual" or "historic" costs, but will take into account *any* cost anticipated or realized by the supplier at *any time* in relation to a product.
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> Due to the disparity in conceptions, therefore, a price differential may be entirely nondiscriminatory in economic sense, by reason of cost variations of a range and character which preclude their recognition under the statutory cost proviso.
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> This divergence between the legal and economic concepts of discrimination has several important consequences:
>
> (1) Economic discrimination can exist in the face of universal price equality, which is entirely lawful under the statute.
>
> (2) Price differentials may or may not be discriminatory in the economic sense, depending on a wide range of considerations which the statute does not legally recognize.
>
> (3) Economic discrimination is *compelled* by the statute whenever it prescribes price uniformity by sellers among customers which relieve the seller of substantial elements of cost: i.e., uniform prices as between brand-promoted and unbranded products; or uniform prices as between customers—whether called jobbers, wholesalers, or retailers—which perform differing amounts of distributive functions such as storage, delivery, or promotion. For such uniform prices would treat unequals as equal, and force those who get less value from the supplier to pay the same as those who get more.

(emphasis in original) (footnotes omitted).

19. According to the legislative history of the Robinson-Patman amendments, the alleged evils sought to be banished by its prohibition on price discrimination were the competitive advantages available to multiple-function firms which had become economically integrated. *See* note 2 *supra*. However, this has been called a Pyrrhic victory by many who hold that the Act penalizes marketing efficiency and thwarts competition. *See* ROWE, *supra* note 2, at 34:

> If a businessman actually fulfills the wholesale function by relieving his suppliers of risk, storage, transportation, administration, etc., his performance, his capital investment, and the saving to his suppliers, are unaffected by whether he also per-

nored in the debates surrounding the Robinson-Patman Act and its imitations.[20] The policy consequences of enforcing these anti-discrimina-

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forms the retailing function, or any number of other functions. A legal rule disqualifying him from discounts recognizing wholesaling functions actually performed compels him to render these functions free of charge. The value of the service is pocketed by the seller who did not earn it.

(citing REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 207 (1955)). *Contra* E. KINTNER, A ROBINSON-PATMAN PRIMER (2d ed. 1979) [hereinafter cited as KINTNER], where the author states:

It has been suggested that our antitrust laws are being increasingly enforced and applied so as to stifle competition and discourage efficiency, whereas the true purpose of those laws is to preserve competition and stimulate efficiency. Indeed, the thought is that a number of antitrust laws—including those concerned with price discrimination—are perhaps themselves anticompetitive in effect, because they are based on unsound theoretical and empirical foundations.

. . . .

I do not think that those defects that may exist in antitrust methods can be attributed to fatal flaws in the statutes themselves. The answer may simply be that the problem of the application of the antitrust statutes, and of their underlying policies, has inevitably been so difficult that bad law has been created along with good law.

The Robinson-Patman Act, as well as each of the other antitrust laws, has a firm empirical base in the economic history of this country. . . .

It can fairly be said, moreover, that the Robinson-Patman Act does not force the larger buyer to give up the advantages stemming from its greater efficiency—it can claim a price benefit to the extent justified. The Act simply limits the larger buyer in the use of its *economic power*. . . .

The spirit and design of each of the antitrust laws are essentially in favor of competition and in favor of efficiency. The laws are anticompetitive only in the sense that they oppose the unfettered competition that would eventually lead to the destruction of competition. They are antiefficiency only in the sense that they reject the temporary efficiency offered by the firm seeking dominance in favor of the more gradual, but more stable, efficiency offered by a fully competitive system.

I do not believe that, when fairly and effectively administered and applied, the antitrust statutes are anticompetitive in effect. The comparative youth of our antitrust statutes, their ambitious scope, and their undoubted complexity have, unfortunately, produced a number of questionable judicial decisions, as well as some law enforcement of debatable wisdom.

Id. at 343-44 (emphasis in original).

20. At the forefront of the Robinson-Patman debates was an emotional concern for the survival of the spirit represented by the "mom and pop" store. For example, in the Robinson-Patman debates Representative Nichols rhapsodized that there was

a certain sentiment and romance about the corner or crossroads grocery store. There formerly and there now, exists the spit and whittle club. You know, where the boys gather round the stove in the winter, sit around its red-hot fire, chew tobacco, spit on the bowl and listen to it sizzle, and settle the problems of the Nation, and the problems of the community.

80 CONG. REC. 8134 (1936). Similarly, Representative Wright Patman, one of the sponsors of the statute warned that:

[T]he day of the independent merchant is gone unless something is done and done quickly . . . we have reached the crossroads; we must either turn the food and

tion statutes cannot properly be evaluated without an examination of price discrimination in its economic context.[21]

II. DEFINITIONAL ASPECTS

Price discrimination is a well-known economic concept and is described in most introductory texts.[22] Economists, however, eschew

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grocery business of this country . . . over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist. . . .

Hearings on H.R. 8442, H.R. 4995, H.R. 5062 before the Comm. on the Judiciary of the House of Representatives, 74th Cong., 1st Sess. 5-6 (1936).

Strikingly similar concerns animated the debates in the Australian parliament, some forty years later, on its price discrimination statute. For example, Mr. A. Whitlam observed:

[T]he very survival of small business . . . is at stake, at least in respect of the retail sphere, if section 49 is abolished. I ask all honourable members to have some regard for the prospects of the survival of those sturdy independent yeomanry when they come to consider this matter. . . . I ask them to have regard for the smaller man, the man in the corner store, the man who is not merely a manager but who owns his business, the man who puts his capital at risk.

30th Parl., 1st Sess., 3rd par., H. of R., 2 *Weekly Hansard* 291 (1977). Similarly, Mr. Jacobi declared:

To the small business people throughout the country section 49 is the cornerstore of survival.

. . . .

If this section is repealed the result will be a return to the law of the jungle. The retail chains will increase their holding of the present food market from 60 per cent to 80 or 90 per cent because of the pressures they can exert on suppliers. No member of this chamber would have to travel more than 200 yards from where he lives to see what the large monopolistic retail chains have done to the small corner shop. . . .

2 *Weekly Hansard* at 310-11.

21. Paradoxically, despite the apparent motivation of the Robinson-Patman Act to preserve small businesses, it appears that the enforcement activities of the Federal Trade Commission have been targeted disproportionately against them. *See, e.g.*, Banta & Field, *FTC Orders Issued Under the Price Discrimination Law: An Evaluation*, 3 ANTITRUST L. & ECON. REV. 89 (1969-70) [hereinafter cited as Banta & Field]; KINTNER, *supra* note 19, at 15-16. For a thorough discussion of enforcement policies and practices, see KINTNER, *supra* note 19, at 306-39.

22. *See, e.g.*, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 333-34 (1955):

Price discrimination, in the economic sense, occurs whenever and to the extent that there are price differences for the same product or service sold by a single seller, and not accounted for by cost differences or by changes in the level of demand; or when two or more buyers of the same goods and services are charged the same price despite differences in the cost of serving them. In order to know when there is or is not price discrimination, in the economic sense, between two or more buyers, it is necessary to know not only the price but also the total costs applicable to each class of transaction under comparison.

. . . .

The actual lower costs of serving one or more buyers can arise from a great

simple, all-inclusive definitions of the practice. The reason for this definitional reluctance is two-fold: first, from a theoretical point of view, the theoretical concept of price discrimination has undergone a slow definitional evolution;[23] second, the manifestations of price discrimination in practice are multifarious and defy an all-embracing definition.[24]

Modern economic theorists agree that price discrimination occurs where separate units of a product are sold at price differentials not directly matching the differences in the supply cost of each product.[25] In economic terms, then, price discrimination results whenever differentials in price for a single product are not related to differentials in incremental costs. For example, economic price discrimination will include cases where units of a good or service with equal supply costs

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variety of circumstances. The product sold to some buyers may be physically somewhat different, in lacking certain appliances or finishing touches or quality. There may be differences in the services which go along with the goods to form the complete package for which consideration is given—such services as delivery, packaging, storage, credit extension, risk of default, handling, clerical attention, sales force attention, and many others.

See also, ROWE, *supra* note 2:

By contrast with the statutory equation of a price *difference* with a price *discrimination*, the economic concept of discrimination considers price in relation to all surrounding elements of the transaction which *ultimately* affect the seller's costs. Hence a nominal price identity between customers will produce an economic discrimination *if* reflecting cost variations; while a nominal price disparity, *if* coupled with corresponding cost variations may show economic equality.

. . . .

. . . Contrary to an important legal premise of the Robinson-Patman Act, price variations are *not* causally based on costs, but on the interplay of manifold economic pressures.

Under competitive business conditions, costs are only part of the panorama of price. A monopolist or "public utility" sheltered from competition may have plenary power to set his prices on the basis of "cost." But sellers exposed to market forces must quote prices responsive to the pressures of competition and other external forces which curtail their own pricing discretion and exercise not only bookeeping but also strategic judgments. In any event, their prices are *not* based on cost, but respond to a variety of pressures. Indeed, prices—which influence sales, hence production volume, which in turn governs the efficiency of the firm's plant utilization—may determine the unit cost of the ultimate output more directly than vice versa.

Id. at 29, 31.

23. For a discussion of the evolution of price discrimination theory, see M. GREENHUT & H. OHTA, THEORY OF SPATIAL PRICING AND MARKET AREAS ch. 3 (1975).

24. *See, e.g.*, the 20 or more different types of price discrimination listed in Machlup, *Characteristics and Types of Price Discrimination*, NATIONAL BUREAU COMMITTEE OF ECONOMIC RESEARCH CONFERENCE REPORT, BUSINESS CONCENTRATION AND PRICE POLICY 397-435 (1955) [hereinafter cited as Machlup].

25. *See, e.g.*, G. STIGLER, THE THEORY OF PRICE 209 (3d ed. 1966).

are sold at different prices and where units of a good or service with differing supply costs are sold at the same price. However, the view taken by the Supreme Court in *FTC v. Anheuser Busch, Inc.*,[26] was that the Robinson-Patman Act evisaged only those discriminations which involved price differences.[27] This simplistic approach of the Supreme Court obviously overcomes the complex definitional problem of embracing in a single description the multitude of ways in which price discrimination may manifest itself. This simplicity, however, does very little to isolate any pernicious instances of price discrimination from those instances which may have desirable consequences.

For the purpose of economic analysis, price discrimination may be classified according to (1) the purposes for which discrimination is practiced, (2) the degree of discriminatory power that is employed, or (3) the techniques of discrimination which are used. In integrating these classificatory approaches, it is typical to identify three main subcategories of price discrimination, namely, personal discrimination based upon differences between individual customers; group discrimination between classes of customers; and product discrimination, under which different products are offered at discriminatory prices.[28] An economist's evaluation of these multifarious forms of price discrimination will be in terms of their income distribution effects, efficiency effects, and their impact upon market structure and competitive processes. These economic criteria are discussed below.[29] To some extent, they all form the basis for regulating price discrimination under the Robinson-Patman Act. However, of primary importance are the implications which each of the forms of price discrimination have for the promotion of competition. In this regard a very important distinction

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26. 363 U.S. 536 (1960). *See* note 2 *supra.*

27. The Supreme Court observed that

> [T]he statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, "discriminate in price." . . . As one commentator has succinctly put it, "Inevitably every legal controversy over any price difference would shift from the detailed governing provisions—'injury,' cost justification, 'meeting competition,' etc.—over into the 'discrimination' concept for ad hoc resolution divorced from the specifically pertinent statutory text."

363 U.S. at 550-51 (quoting Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 38 (1956)).

28. This integrative approach has been adopted by Professor F. Machlup; *see* note 24 *supra.* Machlup made use of and modified a scheme of classification suggested by Cassady, *Techniques and Purposes of Price Discrimination*, 11 J. MARKETING 135 (1946). The comprehensiveness of Machlup's classification makes it a fruitful source of analysis of price discrimination and it is most recently employed in SCHERER, *supra* note 5, at 255-57. Machlup's descriptive labels appear in the text hereinafter.

29. *See* text accompanying notes 59-82 *infra.*

can be drawn between those discriminatory forms which are episodic or evanescent in effect and between systematic or prolonged discriminatory practices. It will be argued that only the latter instances of price discrimination ought to be proscribed as they are more often than not likely to be the instances of price discrimination which have a deleterious effect upon competition. This distinction between innocuous episodic discriminations and reprehensible systematic discriminations must, therefore, be borne in mind as each of the forms of price discrimination is described.

Personal discrimination describes differential treatment between individuals based upon their bargaining strength, eagerness to buy, or the competitive opportunities of each. Examples of personal discrimination include the "haggle-every-time" type, where each transaction is a separately negotiated bargain with buyers who are not regular customers but a fluctuating group with varying composition, such as used car purchasers who are granted "trade-in" allowances. The principal influences upon the seller in this sort of market are the terms which the customer claims are obtainable from competitors of the seller. Another commonly occuring episodic discriminatory form is the "size-up-his-income" type, where wealthier customers are charged according to their ability to pay. Typical examples include the pricing of legal and medical services. Both of these forms of personal discrimination are not likely to contravene the Robinson-Patman Act since, being of short duration, they are unlikely to produce the three forms of anti-competitive harm proscribed by that statute, namely, damage to an individual purchaser, a substantial lessening of competition in the market at large, or a tendency on the part of the supplier towards monopoly in a line of commerce.

A form of personal discrimination which may have positively pro-competitive effect is the "give-in-if-you-must" type, where buyers are regular customers extorting secret departures from a seller's price list in a market where business is slack, capacity is under-utilized, and knowledge of the market is based upon rumor. In this sort of market, secret discriminations will erode any propensity towards uniform and parallel pricing by sellers.[30] On the other hand, a form of personal discrimination which may produce anti-competitive effects is the "let-him-pay-more" type where higher prices are exacted by a seller from customers in proximity to the point of shipment. These customers are unlikely to incur the expense of seeking out competitors of the discriminatory seller in more distant markets. This pricing practice, which may have the effect of charging the proximate customers "phantom" or unincurred freight costs, is to be condemned in that the

30. *See* text accompanying note 76 *infra.*

premium paid by the proximate purchasers may undermine their ability to compete with their more distant competitors who may not incur this impost.[31] In order for this latter pricing practice to give rise to an anti-competitive effect, it must eventually be identified as a systematic occurrence.

Group discrimination aims at taking advantage of differences between groups of buyers. Examples include price differentiated according to the customer's age, sex, membership of certain organizations, occupational category, or distribution function; or based upon the location of customer groupings or the uses to which the seller's product is put by different groups.

A typical form of group discrimination based upon customer location is the "keep-them-in-their-zones" type in which the seller exonerates purchasers from freight charges incurred in delivering his product to geographic zones delineated by him. This will have the effect of preventing resales by intermediate purchasers beyond their designated zones since, in incurring freight charges by selling beyond their zones, they would be at a disadvantage vis-a-vis the freight-free inhabitants of the zones into which they would intrude. By preventing resales in this way, the discriminatory seller could of course charge a higher than competitive price in each zone confident that these prices would not be undercut. Of equal anti-competitive influence is the fact

31. *See* Comment, *Indirect Discrimination Under the Robinson-Patman Act*, 49 NW. U.L. REV. 225, 227-28 (1954) [hereinafter cited as Comment], where the author states:

> A . . . class of indirect discrimination cases under Section 2(a) concerns the so-called "phantom" freight and freight charge absorption cases which were produced by the basing point system. Under this system, freight charges are computed from a base point other than the actual place of manufacture or shipment. Apparent equality of treatment exists where competing buyers pay the same factory price for goods of like grade and quality to which freight costs (uniformly charged from a base point) are added. Among competing buyers in different localities, however, there is an inherent discrimination. Buyers at places where the freight cost from the point of shipment was greater than from the basing point are favored as against buyers at places where the freight cost from the point of shipment was less than from the basing point. Favored buyers thus pay less than actual freight costs. In effect, the seller absorbs the difference and enables a favored buyer to make a saving. Non-favored buyers pay more than actual freight ("phantom" freight). Theoretically, the seller thereby offsets his absorption expense by means of such fictitious charges.

Id. (footnotes omitted).

In Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), the basing point was Chicago for products shipped from Kansas City and delivered prices were computed by adding the cost of freight from Chicago to points of delivery. The Supreme Court held this basing point system invalid as an indirect price discrimination prohibited by section 2(a) of the Clayton Act and found it immaterial that there was no price discrimination between buyers at the same points of delivery since section 2(a) also extended protection to competing buyers in different localities. 324 U.S. at 734.

that the intermediate purchasers of each zone are aware of the unlikelihood of inter-zone price competition. Therefore, they would be prepared to pay higher prices for the seller's product since this can be recouped from their retail customers who have no alternative sources of supply.[32] These different zones may be created by the seller absorbing some of the costs incurred in dealing with the more distant geographic zones, a form of "indirect" discrimination under the Robinson-Patman Act.[33] More likely in the commercial context is that "phantom freight" will be imposed on customers in the neighboring zones to subsidize dealings with the more distant zones. Zone discrimination invariably has anti-competitive consequences for purchasers wishing to sell beyond their designated areas, thereby warranting the application of the Robinson-Patman Act.[34] Zone pricing on an industry-wide basis would of course be susceptible to attack under section 1 of the Sherman Act as a proscribed contract, combination, or conspiracy in restraint of trade or commerce by industry members.[35]

32. On the economics of resale price maintenance, see S. GAMMELGAARD, RESALE PRICE MAINTENANCE (1958); E. GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION (1939); RESALE PRICE MAINTENANCE (B. Yamey ed. 1966); Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955).

33. A direct price discrimination means outwardly charging two different prices of competing customers for goods of like grade and quality, whereas the absorption of cost differentials would generally constitute a form of indirect price discrimination. The Supreme Court in Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945), held that section 2(a) of the Clayton Act proscribed both direct and indirect price discriminations; the Court rejected the argument that it prohibited discriminations in price only, stating that all indirect discriminations affected by terms and conditions of sale were covered by section 2(a). *Id.* at 740. *See* Comment, *supra* note 31, at 226, where the author elaborates on the concept of indirect price discrimination:

> This very broad meaning attributed to "indirect" provides insight into the concept of "price discrimination" itself. In conventional terminology, "price" is the value or worth which is given in exchange for something. "Discrimination" is differential treatment of some sort. If this definition of "price discrimination" is applied, it would follow that no price discrimination could ever exist where a seller charged his customers identical prices for goods of like grade and quality. The cases arising under the Act, however, strengthen the implication drawn from legislative history that a substantially broader concept of "price discrimination" was intended by Congress. For example, a seller may perform some service for a favored buyer, such as special packaging, which would enable the latter to make a cost saving that enhances the profitableness of his operations. Discriminations of this kind, unassociated with "price" in a strict sense, would violate the Act. It is with reference to subterfuges which produce economic advantages other than reduced prices that the scope of "price discrimination" under the Act really becomes significant. . . .
>
> The concept of indirect price discrimination under the Act then must be expanded to include both subterfuges which have the *effect* of reducing prices and those which create some economic advantage other than price reduction.

34. *See, e.g.*, Milk and Ice Cream Can Inst. v. FTC, 152 F.2d 478 (7th Cir. 1946).

35. *See, e.g.*, Allied Paper Mills, 40 F.T.C. 696 (1945), *aff'd, in part*, 168 F.2d 600 (7th Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); National Crepe Paper Ass'n of America, 38

Two other forms of delivered pricing, involving group discrimination on a systematic basis, are "play-the-game" or basing point discrimination where sellers meet the prices charged by competitors throughout the market-place,[36] and "match-the-freight" where a seller, "in an attempt to overcome the competitive disadvantage of being located further away from a customer than some of his competitors, offers to absorb the excess of actual freight over the lowest freight from any competitor's plant to the destination."[37] Both of these instances of group discrimination, being organized on a systematic basis, will fall afoul of the Robinson-Patman Act prohibition and will not even be defensible under section 2(b) of the Act as a result of the Supreme Court's statement in *FTC v. A.E. Staley Manufacturing Co.*[38] that the Act "places emphasis on individual competitive situations, rather than upon a general system of competition."[39]

An unsystematic and sporadic form of geographic discrimination is "dump-the-surplus" discrimination, where sellers dispose of surpluses outside their regular markets at lower than usual prices. Dumping usually takes place in overseas markets to avoid depressing local prices,[40] but predation may sometimes be a motive.[41] The systematic reduction of prices by a seller only in the markets served by competitors is referred to as "kill-the-rival" discrimination.[42] Distinguishing predatory pricing from unobjectionable dumping may be difficult in practice since below cost pricing, if it ever occurs,[43] will not be sustained for more than a very short period of time[44] and thus to some extent

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F.T.C. 282 (1944), *aff'd sub. nom.* Fort Howard Paper Co. v. FTC, 156 F.2d 899 (7th Cir.), *cert. denied*, 329 U.S. 795 (1946).

36. For example, the adoption of Pittsburgh, Birmingham, or Evanston-Chicago as the points from which the prices of rolled steel will be computed. *See* Marengo, *The Basing Point Decisions and the Steel Industry*, 45 AM. ECON. REV. 526 (1945).

37. Machlup, *supra* note 24, at 406.

38. 324 U.S. 746 (1945).

39. *Id.* at 753.

40. *See* J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE (1966).

41. *See* Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 INTL LAW. 227 (1977).

42. *See* Machlup, *supra* note 24, at 408.

43. On the definitional problem, see Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); Koller, *On the Definition of Predatory Pricing*, 20 ANTRITRUST BULL. 329 (1975); Yamey, *Predatory Price Cutting: Notes and Comments*, 15 J. LAW & ECON. 129 (1972).

44. *See* the learned exchange among various scholars as reported in the following series of articles: Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Scherer, *Predatory Pricing Under the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976); Scherer, *Some Last Words on Predatory Pricing*, 89 HARV. L. REV. 901 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 97 YALE L.J. 284 (1977); Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978).

blurs the distinction sought to be drawn between systematic and sporadic discriminations. However, the discrepancy between the discriminatory prices will often evidence a predatory scheme or system.[45]

Group discrimination according to customer status[46] includes "promote-new-customers" type where new customers are offered prices lower than those paid by established customers in the hope of developing new customer allegiance. Reduced periodical subscriptions to new subscribers presents a typical example of this category. This form of price discrimination is unobjectionable unless it is of the "favor-the-big-ones" type which was the sort of discrimination extorted by chain stores that actuated the passage of the Robinson-Patman Act in the first place.[47] Equally prohibited is the "protect-the-middleman" type of discrimination where large retail purchasers who incur the cost of performing their own warehousing and distribution are charged the same prices as retailers purchasing from wholesale customers of the discriminatory seller. The seller, in protecting the middleman by removing from the large retailer the advantages of functional integration, may cause anti-competitive harm in the wholesale market even though price uniformity obtains in the retail market.[48] Resale price maintenance often motivates this form of discrimination. A more blatant form of resale price maintenance is enforced by "hold-them-in-line" discrimination where retailers who fail to comply with a seller's list price suggestions are denied special discounts or refunds granted to those who behave.[49]

Finally, numerous forms of price discrimination are based upon product use or, more specifically, the differing intensities of demand evidenced by different purchasers for the same product. An obvious example of this is "charge-what-the-traffic-will-bear" discrimination by railways where higher ton-per-mile rates are charged for expensive high-profit items, such as fabrics, than for cheaper materials such as coal. Another form of price discrimination based on product use is "get-the-most-from-each-group" discrimination which involves price differences more directly based upon differing intensities of demand. An example of this is the price of industrial electricity as compared with that of domestic rates.[50]

45. *See* the authorities cited in Gifford, *Promotional Price Cutting and Section 2(a) of the Robinson-Patman Act*, 1976 WISC. L. REV. 1045.

46. *See* Machlup, *supra* note 24, at 411.

47. On the legislative history of the Robinson-Patman Act, see Kintner, *supra* note 19, at 1-16; ROWE, *supra* note 2, at 3-23.

48. *See* Law, *The Performance of Distribution Functions as Legal Justification for Price Differentials Under the Robinson-Patman Act*, 69 DICK. L. REV. 39 (1964).

49. *See* Machlup, *supra* note 24, at 413.

50. It should be noted that, in addition to the possible Robinson-Patman actionability, discriminatory pricing by public utilities may be regulated by many statutes. Among the

Other forms of product price discrimination may simply involve no more than product differentiation. Examples include "appealing-to-classes" discrimination in which differences in price are associated with premium quality rather than increased production costs. This is illustrated by differences in price between expensive and cheap seats in theatres and airplanes, standard and deluxe automobiles, clothbound and paperback books. Similarly, "make-them-pay-more-for-the-label" price discrimination entails the supply of physically homogenous products under differently priced brand labels. All of these attempts to differentiate products will fail for Robinson-Patman purposes if the goods are still considered to be "of like grade quality" within the meaning of the Act.[51] "Clear-the-stock" price discrimination involves the differentiation by a seller of his product through the granting of price concessions at special times such as pre-Christmas or summer sales. Similar to this is the "switch-them-to-off-peak-times" discrimination which typically influences the pricing of electricity and telephone charges by public utilities and of hotel rates and theater tickets. A final form of product price discrimination is "get-the-most-for-each-product" type which addresses itself to product use and involves charging discriminatory prices for physically differentiated products that involve common processes in their manufacture; for example, the price of a fan which has an electromotor as a main component as compared to the price of a vacuum cleaner which uses the same electromotor.[52]

The great diversity of price discrimination forms outlined above highlights the difficulties of definition which confront not only the economists but lawyers as well. From the lawyer's perspective the problem is compounded by the fact that in defining the forms of discrimination to be proscribed, the relevant definitions may include certain beneficial examples of the practice and exclude more malignant manifestations.[53] To illustrate, a prohibition aimed at all forms of price discrimination will sweep away not only predatory practices, but also

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first federal excursions into this field were the Interstate Commerce Act of 1887, ch. 104, § 2, 24 Stat. 379 (current version of 49 U.S.C. § 10741 (Supp. III 1979)); the Elkins Anti-Rebate Act of 1903, ch. 708, § 1, 32 Stat. 847 (current version at 49 U.S.C. § 11902 (Supp. III 1979)); the Hepburn Act, ch. 3591, § 2, 34 Stat. 584 (1906) (current version at 49 U.S.C. § 10761 (Supp. III 1979)); The Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910) (codified in scattered sections of 49 U.S.C.); and the Transportation Act of 1920, ch. 91, § 404, 41 Stat. 456 (current version at 49 U.S.C. § 10741 (Supp. III 1979)).

51. *See* ROWE, *supra* note 2, at 63-76; Gifford, *Price Discrimination and Labelling*, 25 BUFF. L. REV. 395 (1976); Rowe, *Price Discrimination and Product Differentiation: The Issues under the Robinson-Patman Act*, 66 YALE L.J. 1 (1956).

52. This form of discrimination is unlikely to be actionable under the Robinson-Patman Act as the relevant discrimination will not harm competitors.

53. *See* text accompanying notes 25-27 *supra*.

the secret off-list discriminations which prevent the erection of uniform pricing structures in oligopolized markets.[54]

III. EVALUATION OF ECONOMIC PRICE DISCRIMINATION

Given the diversity of economic price discrimination types, it must be considered whether all or any of the manifestations of the practice ought to be the subject of legal regulation. In considering this question the policy objectives of the various anti-discrimination statutes should be borne in mind. The political idiosyncrasies of each national legislature probably determine the short-term objectives of the respective regulatory schemes, but in the long run the central objective of the statutes will reflect a balance between the objectives of economic efficiency, social equity, and political freedom. This long-term objective is reflected in the opinions of the United States Supreme Court in decisions like *United States v. Topco Associates*,[55] where the Court observed:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster.[56]

The weight which ought to be ascribed to each of these objectives is the subject of a burgeoning literature on the objectives of antitrust law.[57] It may be that the free enterprise guaranteed by the Sherman Act is inconsistent with the protection extended small business by the

54. *See* text accompanying note 76 *infra*.

55. 405 U.S. 596 (1972).

56. *Id.* at 610.

57. An early discussion on the objectives of antitrust policy took place in a series of exchanges between Professors H.M. Blake and W.K. Jones of Columbia University and Professors R.H. Bork and W.S. Bowman, Jr. of Yale University, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 377, 401, 417, 422 (1965). More recent discussions include P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1978); R.H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?* 125 U. PA. L. REV. 1191 (1977); Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979) [hereinafter cited as Pitofsky]. Congressional hearings on this topic include *The Role of Small Business in our Society Before the Senate Select Comm. on Small Business*, 94th Cong, 1st Sess. (1975); *Symposium on the Economic Social and Political Effects of Economic Concentration Before the Sub-comm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 92 Cong., 2d Sess. (1972).

Robinson-Patman Act,[58] but for an economist the implication of price discrimination for the pro-competitive objectives of antitrust legislation are best assessed by reference to three guiding criteria: income distribution effects, efficiency effects, and the impact of price discrimination upon market structure.

A. *Income Distribution Effects*

Generally speaking, the income distribution effects of economic price discrimination are self-evident, namely, that the practice causes a redistribution of income towards the discriminator away from his customers.[59] Also, self evidently, the reason that a seller discriminates is to make greater profits than would be the case without discrimination. These profits are made at the expense of purchasers and are usually manifested in the form of higher than competitive prices. For example, consider Professor Cooper's illustration: It costs $49 to produce and supply one widget to one customer. The state of demand for this product is such that there is one customer who would pay $100 for a widget, four customers who would pay $90 for one widget each, and three more customers who would pay $50 for one each. If the seller were to price individually he would sell eight widgets for $610, incur costs of $392 and, thus, realize a profit of $218. If the seller were obliged to charge a profit-maximizing single price he would charge $90 to sell five widgets for $450, realizing a profit of $205. At a uniform price of $100, he would make only one sale, realizing total revenues of $100 and a profit of $51; at a uniform price of $50 he would make eight sales and realize total revenues of $400 and a profit of only $8.[60] The income

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58. Small businesses are protected in that to bring an action under the Robinson-Patman Act, they merely have to demonstrate an injury to themselves rather than to competition at large. The Act may thus bolster the position of enterprises which would otherwise have been too inefficient to survive. *See generally* R. POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES (1976).

59. The principal advantage given to a discriminatory seller from secondary-line discrimination is that he may be able to use profits exploited in one market to underwrite predatory assault in another. *See* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), where the Court held that despite the lack of proof of injury to competition, the adverse effect of pricing competition on a *competitor* was sufficient to justify a violation of section 2(a) of the Robinson-Patman Act. 386 U.S. at 702-03. The only injury, however, was the plaintiff's loss of market dominance as a result of competitive pricing which it had itself engendered. Critics describe the decision as having effectively turned the antitrust law into a law against price competition, which is the hallmark of a competitive market. *See* Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967). For a retrospective analysis see Elzinga & Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & Econ. 427 (1978).

60. Cooper, *Price Discrimination and Economic Efficiency*, 75 MICH. L. REV. 962, 964 (1977) [hereinafter cited as Cooper].

transfers attending these discriminations are easily illustrated. For example, the discriminating seller who charged $100 to the customer with the most intense demand would have extracted $51 more than from the customer who paid the competitive price of $49.

The social desirability of this income redistribution ultimately becomes a matter not of economic theory but of political philosophy.[61] The discriminating widget manufacturer made his maximum profit of $218 with an output of eight widgets; his profit-maximizing single price would have involved the production of only five widgets, which may have produced a reduction of labor employment, contrary to another of the objectives of modern antitrust legislation. The inflationary evils attendant upon income transfer must also be balanced against the socially desirable consequences of this process. For example, a lawyer who serves high income clients may be able to finance socially desirable welfare cases out of the surplus income derived from the objects of his discriminatory pricing. This form of income redistribution is implicitly sanctioned by progressive income tax legislation. Moreover, the ability to discriminate may enable the provision of a service which would not otherwise be provided. As the widget example demonstrates, price discrimination allows a greater total profit than does uniform pricing; there may be market situations where the added revenue attainable through price discrimination makes the difference between providing a legal or medical service and foregoing it entirely.

B. *Efficiency Effects*

Economists generally agree that price discrimination requires three preconditions: first, the discriminator must possess some market power, *i.e.*, be able to control the price of his product; second, the discriminator must be able to separate his customers into categories with different price elasticities of demand, in other words, according to the responsiveness of demand to changes in price; and, third, there must be no chance for arbitrage (resales between the differently priced markets). According to economic theory, under perfect price discrimination the output of the discriminator would be identical to that of the competitive market. There would be no substitution away from the discriminator's product, because he would vary his price in accordance with the intensity of each purchaser's demand. The discriminator would not turn away a single sale that he could make at a price higher than his cost of production, thereby disposing of all his

61. For example, this income redistribution can be equated with the egalitarian impulse of progressive taxation. On the other hand, the elimination of discriminatory pricing may result in a uniform price which favors the larger income. *See* Pitofsky, *supra* note 57.

output which his customers wished to purchase at the very prices they wished to pay. Moreover, it is arguable that not only is a seller able to satisfy all his existing customers through discriminatory pricing, but he may be able to add new categories of customers that he would not otherwise have been able to approach.[62] In some circumstances, discrimination would enable a supplier to enter a market which would not otherwise have been served.[63]

Price discrimination, despite its efficiencies for the seller, has been criticized as inefficient because purchasers from a discriminator would be paying more than a competitive price for the discriminator's product. This criticism derives from the above model of perfect price discrimination because the model assumes that the practice invariably takes place in a noncompetitive market where the producer can sell all of his products because of his ability to divine the maximum price each customer is willing to pay. An objection to the theoretical model is that in the real world the discriminator faces almost insuperable problems in obtaining information about the demand intensities of his different customers. Consequently, he is unable to pitch his various prices at the precise levels which his different customers are prepared to pay. On the other hand, it has been argued that this ignorance has a beneficial effect because a discriminator will tend to group his customers. This response reduces output to those from whom he expects the lowest profits and increases output to those from whom he expects the highest.[64] This increase in output may attract its own efficiencies in the form of scale economies which would further reduce marginal production costs, thereby enabling the discriminator to reach a wider market.

An evaluation of the efficiency effects of price discrimination must certainly take into account the varying efficiencies of the different techniques of price discrimination previously outlined. For example, the various forms of personal discrimination represent the attempt by a seller to tailor his price in accordance with the varying intensities of demand exhibited by each individual customer. These forms of price discrimination, therefore, most closely approximate the theoretic model of perfect price discrimination which enables, as we saw in the

62. If a seller was obliged to charge a profit maximizing single price he might select one which excludes the lower income purchaser. On the other hand, if he was allowed to charge a range of prices, profits made at the higher range of a price schedule might subsidize sales to persons at the lower range of the schedule.

63. The lack of appeal presented by a sparsely populated market might be overcome if a seller was allowed to use profits from higher prices in a more profitable market to underwrite an exploratory marketing campaign to develop sales in the less appealing market.

64. *See* Cooper, *supra* note 60, at 965.

widget example, a seller to maximize output and resource utilization. The various forms of group discrimination, on the other hand, would produce inefficiencies both to the extent that a seller incurs expense in maintaining artificial group boundaries, such as the "keep-them-in-their-zones" type, and to the extent that a seller's groupings do not reflect commercial realities.[65]

The precondition that a seller possess some market power in order to discriminate in price calls for a consideration of the efficiency aspects of price discrimination in a monopoly context. Insofar as the discriminating monopolist can charge a higher than competitive price, the scarce resources of purchasers are diverted into the discriminator's market.[66] Additionally, and perhaps more importantly, it has been suggested that the existence or expectation of monopoly profits will attract resources into the market of the monopolist until the price which the monopolist can charge for his product is reduced to a normal level.[67] Since this equilibration is produced not by a decline in profit but an increase in costs, the resources thus attracted into the monopolized market are wasted from the standpoint of economic efficiency.[68] Additional resource wastage may be incurred by the discriminatory monopolist's attempts to prevent resales between purchasers in different priced markets, for example by "hold-them-in-line" type price discrimination[69] which may cause anti-competitive harm at the secondary level of competition.

C. *Market Structure and Competition Effects*

The price discrimination prerequisite of market power assumes a fairly concentrated market structure in which the discriminator is either a monopolist or a cartel. The alleged evils of market concentration[70] cannot be attributed to price discrimination which is a conse-

65. For example, the "protect-the-middleman" type, *see* text accompanying note 48 *supra*, ignores the reality of functional integration and involves a misallocation of resources to the extent that an integrated wholesaler-retailer receives no reward for performing a wholesaling function after incurring the expense of establishing a wholesaling capacity.

66. *See* text accompanying notes 59-60 *supra*.

67. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

68. This wastage consists of the expenditures incurred by a person entering a market to attract customers away from the monopolist. Since the higher monopoly price induced the entry of competitors into the market, the competition for customers will not involve the reduction of prices but will involve, for example, expenditures on advertising. *See* O. FIRESTONE, THE ECONOMIC IMPLICATIONS OF ADVERTISING (1967).

69. *See* note 49 and accompanying text supra; Yamey, *Monopolistic Price Discrimination and Economic Welfare*, 17 J.L. & ECON. 377 (1974).

70. Market concentration is said to serve as a barrier to market entry by potential competitors, thereby causing excessive profits in the hands of the market dominator, rising

quence of that concentration, not a determinant of it. However, the ability to discriminate in price, by increasing the expected gains of market concentration, makes monopolization a more profitable activity than it would be if only a single price had to be charged. The increased expenditures made to obtain market power must also represent a deadweight social cost in excess of the social costs usually associated with monopoly pricing. These increased costs to society of market concentration may of course be bearable if society wishes to use monopoly pricing as a device for inducing a greater expenditure on innovation than would otherwise be forthcoming, such as the discriminatory pricing by patentees.

In evaluating the market structure and competition effects of price discrimination, the important distinction between sporadic discrimination and the more systematic forms of the practice must be remembered. Some sporadic forms of price discrimination are made possible by customer inertia and by the time lag attending the spread of price information among buyers. The factum of time lag has been used to account for price discrimination in the labor market,[71] housing market,[72] and in the automobile market.[73] This form of price discrimination is inevitably evanescent and can have little ultimate effect upon market structure. Some sporadic price discrimination, however, is often an indicium of effective price competition and, indeed, a natural concomitant of dynamic economic life. A case example is a seller experiencing a heightened intensity of demand for his product in one geographic locality. Before he can construct additional capacity to take up the demand, he may consider it a convenient form of product rationing to charge a higher price in the area where demand is most intense, or he may shift his output to the area of intense demand and pro tanto withdraw from the less remunerative areas. Either form of discrimination will attract the attention of trade rivals who will either move into the area of greater remuneration or acquire some of the seller's unwanted customers in the areas of lower remuneration. In either event, the seller will have to reduce capacity or seek to capture new

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inflation, and a serious misallocation of resources. An evaluation of these allegations is contained in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H. Goldschmid, H. Mann & J. Watson eds. 1974).

71. Alchian, *Information Costs, Pricing and Resource Unemployment*, in E. PHELPS, MICRO-ECONOMIC FOUNDATIONS OF EMPLOYMENT AND INFORMATION THEORY 27-52 (1970); McCall, *Economics of Information and Job Search*, 84 Q.J. ECON. 113 (1970); Stigler, *Information in the Labour Market*, 70 J. POL. ECON. SUPP. 94 (1962).

72. Fenton, *Price Discrimination Under Non-Monopolistic Conditions*, 8 APPLIED ECON. 135 (1976).

73. Jung, *Price Variations Among Automobile Dealers in Metropolitan Chicago*, 33 J. BUS. 31 (1960).

customers from his trade rivals. The spiral of price competition precipitated by the original price discrimination will have effectively restored a uniform equilibrium price.

In other words, as long as there is any profit differential making some customers, products, localities, or channels of supply more remunerative than others, there will be a natural incentive to discriminate until the differential has been completely removed. In the meantime, of course, other changes in market conditions may have created new differentials calling forth new discriminations.[74]

Sporadic discriminatory pricing can also be an essential experimental technique by firms selectively probing the market before initiating more comprehensive price changes. A seller's reluctance to make price cuts may result from membership of a price cartel which maintains a uniform price list. Where market information is imperfect, some members of the cartel may be prepared to grant secret concessions to aggressive buyers in order to utilize capacity more fully in "give-in-if-you-must" price discrimination.[75] Internecine price competition may then develop between cartel members as they are played off, one against the other, by their customers. List prices will become increasingly unrealistic and will progressively be abandoned. The consequent undermining of oligopolistic discipline and morale may make future cartel organization impossible.

The same effect will be experienced in an oligopolized industry consisting of a few sellers of a standard commodity, without close substitutes, who can supply the total market. Even without a price agreement between industry members, prices will tend to become "sticky" so that any seller's price initiatives would quickly be emulated by the others, leaving little incentive for individual price changes. In this context, a discriminatory price cut granted to one customer may be the crack which spreads to others and crumbles the industry's rigid price wall. The competition effects of sporadic price discrimination are thus eloquently summarized by Adelman who declares that "sporadic, unsystematic discrimination is one of the most powerful forces of competition in modern industrial markets. Like a high wind it seizes on small openings and crevices in an 'orderly' price structure and tears it apart."[76]

The conceptual distinction between sporadic price discrimination and systematic price discrimination is critical: systematic price discrimination is invariably anti-competitive in effect. The most obvious example of the anti-competitive evil of systematic price

74. *See* Adelman, note 17 *supra.*

75. *See* note 30 and accompanying text *supra.*

76. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1331-32 (1948).

discrimination is the "kill-the-rival"[77] type where a seller, drawing on market power in one market, can utilize these assured revenues to finance predatory price cuts in another market, which local rivals without comparably secure resources may find impossible to match. Upon their consequent demise, the predator will have obtained a new reservoir of market power from which to generate further predation.

A discriminator may use similar techniques to entrench its market position by raising barriers to the entry of new competitors. For example, *United Shoe Machinery Corp.* depicts how a firm preserved its eighty-five percent share of the market by accepting much lower rates of return on shoe machinery which faced competition than on that which it supplied in the absence of competition.[78] In this way the corporation made it difficult for rivals to enter the industry, thereby remaining the only manufacturer offering a complete range of shoe machinery. This itself was a further barrier to entry into the industry as rival entrants would have to offer the full range of machinery to attract business away from the corporation.

As well as the impairment of competition at the seller level, systematic discrimination may also produce anti-competitive effects at the buyer level and beyond. For example, discrimination according to customer location involving the absorption of cost differentials, by eliminating the competitive advantage of the more spatially proximate customer, would tend to inhibit inter-customer competition.[79] Similarly, "hold-them-in-line"[80] price discrimination would produce the economic evils of resale price maintenance, while "protect-the-middleman"[81] discrimination would impair functional integration and inhibit the realization of customer's scale economies. General competitive distortion would be experienced at the buyer level by all the various forms of group price discrimination which cluster buyers in functional or location categories that do not reflect any cost differences in dealing with those categories.[82]

Applying the touchstone criteria of income distribution effects, efficiency effects, and market structure and competition effects, a tenable case has been made out for the legal prohibition of systematic, as opposed to sporadic, price discrimination.

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77. *See* note 42 and accompaning text *supra.*

78. C. KAYSEN, UNITED STATES V. UNITED SHOE MACHINERY CORPORATION (1956).

79. *See* notes 32-39 and accompanying text *supra.*

80. *See* note 49 and accompanying text *supra.*

81. *See* note 48 and accompanying text *supra.*

82. Group discriminations which do not reflect the different costs of dealing with those groups will not, of course, be able to form the basis of a cost justification defense under the Robinson-Patman Act. *See* United States v. Borden Co., 370 U.S. 460, 469 (1962).

IV. THE LEGAL REGULATION OF PRICE DISCRIMINATION

There is a considerable body of scholarship indicating a lack of confidence in the law and legal procedures to regulate effectively the various economic phenomena collectively described as restrictive trade practices.[83] Much of this scholarship tends to overestimate the efficacy of economics as a regulatory tool[84] and tends to ignore evaluative criteria other than the economic objective of the promotion of effective competition, such as the political and social objectives of antitrust law.[85] Assuming, however, the primacy of the promotion of competition as an objective of antitrust law, a brief assessment ought to be made as to whether the Robinson-Patman Act adopts the most appropriate statutory form to reflect this emphasis.

The legislative history of the Robinson-Patman Act suggests that the congressional sponsors of the Act were not concerned about seller discriminations so much as the extortion of favorable trading terms by the chain stores at the expense of small businesses.[86] With this objective in mind, it is surprising that the prohibition by section 2(f) of buyer abuses was seemingly inserted as an after-thought.[87] The definition of prohibited buyer abuses by that provision as, *inter alia*, the inducement of prohibited seller abuses, resembles the Imperial Chinese edict which sought to abolish kidnaping by making the payment of ransoms a capital offense.

The protection of small business is apparently secured by the prohibition in the statute of discriminations which cause injury to individuals rather than to competition at large. Interestingly, research seems to indicate that enforcement of the Act has been targeted disproportionately against small businesses,[88] although it seems that

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83. *See* the authorities cited at note 57 *supra*; P. ASCH, ECONOMIC THEORY AND THE ANTITRUST DILEMMA (1970); J. BLAIR, ECONOMIC CONCENTRATION: STRUCTURE BEHAVIOUR AND PUBLIC POLICY (1972); Brennan, *A Legal-Economic Dichotomy: Contribution to Failure in Regulatory Policy*, 14 AM. BUS. L.J. 53 (1976).

84. For a timely corrective to the imperial pretensions of economics, see Cranston, *Creeping Economism: Some Thoughts on Law and Society*, 4 BRIT. J.L. & ECON. 103 (1977); Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655 (1974).

85. *See* Pitofsky, note 57 *supra*; Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?* 125 U. PA. L. REV. 1214 (1977).

86. *See* notes 2, 20, 21 *supra*.

87. *See*, ROWE, *supra* note 2, at 423-25.

88. *See* Banta & Field, *supra* note 21, at 89.

their enthusiasm for the Act has not abated.[89] The reason for this enforcement pattern has been the attempts by small businesses to combine to solicit the same discriminatory advantages secured by their chain store opponents.[90] From an economist's point of view, the protection of small business against competition from the chain stores would seem to be inconsistent with the general objective of promoting competition as a whole, since the elimination of a small business may simply be an incident of competition and reflect a more efficient market place, assuming the departing business to be the least efficient performer. Merely softening competition in favor of small business will not overcome their relative disadvantages in such matters as availability of capital, commercial and management expertise, and budgetary and cost controls, but simply fosters inefficient enterprises with the consequent misallocation of resources.

To some extent this inconsistency in antitrust objectives is overcome by the Australian legislature's insistence in its price discrimination statute that only those discriminations which "substantially lessen competition in a market for goods" are prohibited.[91] In focusing upon anti-competitive discriminations only, the Australian statute[92] also effectively distinguishes between the unobjectionable sporadic forms of discrimination as opposed to the systematic forms which are likely to produce anti-competitive harm. Further emphasis is given to this selection by the fact that the Australian statute expressly proscribes discriminations which are of a "recurring or systematic character,"[93] although it also proscribes a single discrimination "of such magnitude" that it is likely also to have an impact upon competition.

An alternative to the Australo-American approach of prohibiting price discriminations which have proscribed *effects* is to prohibit those

89. *See Report of the Ad-Hoc Sub-Committee on Antitrust, the Robinson-Patman Act and Related Matters* (1976) *reprinted in* H.R. REP. No. 1738, 94th Cong. 2d Sess. 107-08, 121 (1976).

90. *See* J. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION (1935); Fulda, *Food Distribution in the United States, The Struggle Between Independents and Chains*, 99 U. PA. L. REV. 1051 (1951); Kintner, Romano & Filippini, *Cooperative Buying and Antitrust Policy: The Search for Competitive Equality*, 41 GEO. WASH. L. REV. 971 (1973); Mezings, *Group Buying—When is it Permitted Under the Robinson-Patman Act?* 44 N.Y.U. L. REV. 729 (1969); Palmer, *Buying Groups Under the Robinson-Patman Act*, 42 CHI. KENT L. REV. 143 (1965).

91. Trade Practices Act 1974 § 49(1); *see* note 6 *supra.*

92. For a general discussion of Australian price discrimination law, see B. DONALD & J. HEYDON, 1 TRADE PRACTICES LAW ch. 8 (1978); G. TAPERELL, R. VERMEESCH & D. HARLAND, TRADE PRACTICES AND CONSUMER PROTECTION ch. 9 (2d ed. 1978); Mnookin, *An American Lawyer's View of Section 49 of the Trade Practices Act*, 1 U.N.S.W.L.J. 121 (1975).

93. *See* note 85 *supra.*

discriminatory activities which have prohibited *purposes*. Thus, for example, discriminations which have the purpose of eliminating competitors or competition could be prohibited. This approach has formed the basis of various suggestions for a predatory pricing statute.[94] Given the invariable difficulties of proving a prohibited purpose, economic analysis would suggest that the relevant purpose be inferred from systematic conduct.

A less extreme approach than this is contained in the Canadian Combines Investigation Act[95] which in section 34 imposes criminal liability upon "[e]very one engaged in business who . . . is a party or privy to, or assists in, any sale that discriminates to his knowledge. . . ."[96] As a general model for emulation, the Canadian statute is defective in that it is unconcerned with the impact of the relevant discriminations upon competition.[97]

The approach adopted in France and West Germany is to eschew considerations of effect or purpose and to focus on conduct. Both Article 37 of the French Prices Ordinance[98] and section 26(3) of the West

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94. *See, e.g.*, Campbell & Emanuel, *A Proposal for a Revised Price Discrimination and Predatory Pricing Statute*, 13 HARV. J. LEGIS. 125 (1975); Elias, *Robinson-Patman: Time for Rechiseling*, 26 MERCER L. REV. 689 (1975).

95. S.C., 1935, c. 56, s. 9 re-enacted 1953-54, c. 51, s. 412; transferred by s.c., 1960, c.45 (currently codified at CAN. REV. STAT. ch. C-23, § 34 (1970)).

96. Section 34 provides:

(1) Every one engaged in a business who (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to such purchaser, is available to such competitors in respect of a sale of articles of like quality and quantity;

. . .

is guilty of an indictable offense and is liable to imprisonment for two years. CAN. REV. STAT. ch. C-23, § 34 (1970).

97. For a general discussion of the Canadian position, see Nozick, *The Regulation of Price Discrimination Under the Combines Investigation Act*, 54 CAN. B. REV. 309 (1976).

98. Price Ordinance No. 45-1483 of June 30, 1945, art. 37 provides:

It shall be deemed to be an illegal practice in connection with prices:

(1) for any producer, trader, person engaged in industry, or craftsman

(a) to refuse to supply to the best of his ability and upon the customary trade terms any request for the purchase of goods or the performance of services which has no abnormal character and is made in good faith, and provided that the sale of such goods or the performance of such services is not forbidden by law or government regulation, or habitually to apply discriminatory conditions of sale or discriminatory price increases which are not warranted by an equivalent increase in the cost of production or the cost of performing the service . . . .

German Act Against Restraints of Competition[99] detail the conduct which they deem to constitute illegal discriminatory practices. The two statutes share with the Robinson-Patman Act the "folly" inherent "in attempting to define sin in detail,"[100] in that the inevitable drafting complexities create more problems than they solve.[101]

It was suggested above that one of the preconditions for systematic price discrimination was the possession by the discriminator of a degree of market power which could be used as a basis of underwriting predatory assault in another market.[102] This suggestion forms the basis of the prohibition of price discrimination by Article 86(c) of the Treaty of Rome,[103] the constitutive document of the E.E.C.,[104] which prohibits discriminations[105] involving the abuse of a position of market dominance.[106]

A final approach is, of course, to assimilate each of the regulatory techniques suggested by the various national legislatures to prohibit discriminatory conduct having the purpose or effect of substantially

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99. Section 26(2) of the Act provides:

> Market dominating enterprises, associations of enterprises . . . and enterprises fixing prices . . . shall not hinder, directly or indirectly, another enterprise in business activities which are usually open to similar enterprises, nor in the absence of facts justifying such discrimination, treat such enterprise, directly or indirectly in a manner different from the treatment accorded similar enterprises.

100. A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 468 (2d ed. 1970).

101. For criticism of the textual anfractuosities of the Robinson-Patman Act, see Adelman, *The Inconsistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3 (1953); Austern, *Difficult and Diffusive Decades: An Historical Plaint About the Robinson-Patman Act*, 41 N.Y.U. L. REV. 897 (1966); Note, *Eine Kleine Juristische Schlummergeschichte*, 79 HARV. L. REV. 921 (1966).

102. *See* Cassady, *Some Economic Aspects of Price-Discrimination under Non-Perfect Market Conditions*, 11 J. MKT. 7, 15 (1946).

103. Article 86 of the Treaty of Rome provides:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:
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> . . . .
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

104. *See* note 12 *supra*.

105. *See generally* van Hecke, *The Prohibition Against Discrimination in the European Economic Community Treaty*, in CARTEL AND MONOPOLY IN MODERN LAW 340 (1960) (reports presented to the International Conference on Restraints of Competition at Frankfurt am Main).

106. For a definition of market dominance under the Treaty of Rome, see the authorities cited in Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position Within the Common Market*, 53 NOTRE DAME LAW. 768 (1978).

lessening competition, which conduct involves an abuse of a position of market power. In this way, it is probable that the objectionable systematic forms of price discrimination will be eliminated while the unobjectionable, or even pro-competitive, discriminatory practices will be preserved. The "instruments" which come closest to this position are found in the competition guidelines formulated by the Organization for Economic Co-operation and Development[107] for multi-national enterprises. Guideline 1 declares that enterprises should

> I. refrain from actions which would adversely affect competition in the relevant market by abusing a dominant position of market power, by means of, for example,
>
> . . .
>
> (e) discriminatory (i.e., unreasonably differentiated) pricing and using such pricing transactions between affiliated enterprises as a means of adversely affecting competition outside these enterprises . . . .[108]

The limited applicability of subsection (e) is apparent from the clear wording of the specific competition guideline; it denounces only "unreasonably differentiated" pricing, not all instances in which different prices are exacted from purchasers in one or more nations. Moreover, the scope of the prohibition extends only to the seller in a dominant position in a particular market and only to discriminatory pricing which would adversely affect competition in that market. The specific guideline incorporates two important considerations with which this article has been concerned: the distinction between systematic and transient price differences and the scholarly criticism of such anti-discrimination statutes as the Robinson-Patman Act on the basis of their restriction on competitive pricing. The guideline culls from price differences in general only those which are attributable to the kind of systematic discrimination which is abusive of market power and anti-competitive in effect. As opposed to the simplistic approach to price discrimination which characterizes the failings of the Robinson-Patman Act, in that it inclines the market structure towards uniform pricing, the guideline allows for sufficient flexibility in pricing to reflect the natural fluctuations within a competitive market. Therefore, while the Robinson-Patman Act has served as a model for a number of price discrimination statutes,[109] the lessons learned from its inadequacies may be more valuable in the refinement of the pro-competitive objectives of such statutes.

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107. *See* note 15 *supra.*

108. OECD Doc. 21(76) 04/1 (1976), *discussed in* Davidow, *Some Reflections on the OECD Competition Guidelines*, 22 ANTITRUST BULL. 441, 445-46 (1977).

109. *See* text accompanying note 6 *supra.*