

# Conditional Pricing Practices: The Use and Misuse of Analogies

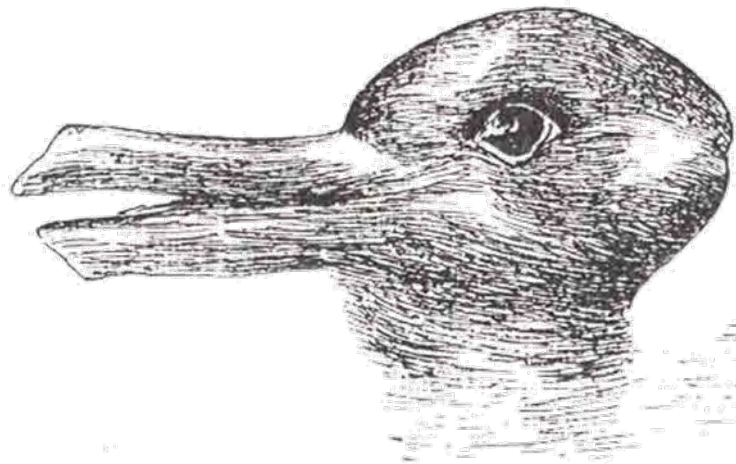
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# Analogical Reasoning

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- Debate regarding the proper legal construct (predatory pricing, exclusive dealing, tying) is not about putting conditional pricing practices into a “box.”
- Analogical reasoning is a powerful tool used in every intellectual endeavor. Scientists use it. Economists use it. Judges use it.
- ***But how do we tell the good from the bad?***



# Mapping

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- **Analogical reasoning maps similarities in relational structures, allowing inferences based on relational pattern completion.**
  - Gaining consensus among antitrust lawyers is like herding cats.
  - An electrical circuit is like a plumbing system.
- **A good analogy maps the elements of the analog to the target such that relational structures are preserved.**

# Conditional Pricing Analogies

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- **Conditional pricing practice analogies focus on the conduct.**
  - Rebates are like price discounts. Predatory pricing involves price discounts.
  - Bundled rebates are conditioned on purchasing multiple products. Tying involves sales conditioned on purchasing multiple products.
    - We therefore infer the same economic effect.
    - We therefore apply the same legal rule.
- **But antitrust rules are a blend of economic, policy, and prudential concerns.**
  - Concerns must map to the target to justify analogous legal rule.
  - If concerns do not map, no inference that same legal rule should apply.

# Predatory Pricing

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- The economic, policy, and prudential concerns animating the predatory pricing price-cost test:
  - The price-cost test is *not driven by economics*. Above-cost pricing may reduce economic welfare.
  - The price-cost test is driven by *skepticism that predatory pricing is a viable strategy* – “rarely tried, and even more rarely successful” – because recoupment may be thwarted by competitive entry.
  - The price-cost test is driven by *prudential concerns* that the exclusionary effect of above-cost pricing may be “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.”

# Mapping Predatory Pricing

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- **Does the skepticism regarding predatory pricing map to conditional pricing?**
  - Conditional pricing faces no recoupment problem. “Recoupment” is simultaneous.
  - Based on the evidence, we cannot say that conditional pricing practices are “rarely tried, and even more rarely successful.”
- **Do the prudential concerns map to conditional pricing?**
  - Extreme caution is merited in the case of unconditioned price discounts.
    - Price cutting is at the heart of the competition – the “very conduct the antitrust laws were intended to protect.”
  - Difficult to characterize conditional pricing as an irreducible element of competition. Firms have procompetitive alternatives to conditional pricing.
    - Decision-theoretic arguments fail to account for alternatives.
  - Supposed “chilling effect” by other legal rules is not empirically supported.

# Conclusions

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*Though analogy is often misleading,  
it is the least misleading thing we have.*

*Samuel Butler*



*Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts, 79 Antitrust L.J. 99 (2013)*