

## A Reply to Professors Gould and Yamey

Robert H. Bork\*

In replying to Professor Gould and Professor Yamey, I must necessarily assume that the reader is generally familiar with the main outlines of my previous article.<sup>1</sup> It may be useful, nevertheless, to restate the core of my argument very briefly. In the previous article, I urged the legality of certain types of price fixing and market division, both horizontal and vertical. Professors Gould and Yamey are concerned here only with one aspect of that article's thesis: my assertion that vertical price fixing or resale price maintenance, when it is not used as the tool of a cartel among resellers or among manufacturers, can only result from the manufacturer's desire to increase efficiency, and, further, that courts should accept that motivation as conclusive of the effect of such resale price maintenance. (Hereafter, unless otherwise indicated, references to resale price maintenance, or r.p.m., should be taken to indicate only this variety of manufacturer-desired r.p.m.)

In its briefest terms, my argument runs as follows: No manufacturer will desire r.p.m. for the mere purpose of giving his resellers a greater-than-competitive return. The extra return would be money out of his pocket and we may safely assume that manufacturers are rarely moved to engage in that variety of philanthropy. The manufacturer who imposes r.p.m., therefore, must be attempting to purchase something for it. What he gets is usually increased activity by the reseller in providing information, promotional services, and the like. These are means of increasing distributive efficiency and should be permitted on grounds of efficient resource allocation. The case is no different than if the manufacturer owned the resellers and required his reseller employees to perform the same functions. R.p.m. is simply a partial integration and is often more efficient than full integration by ownership or contract.<sup>2</sup>

Since we have isolated a practice which is engaged in for the pur-

\* Professor of Law, Yale University. B.A. 1948, J.D. 1953, University of Chicago.

1. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966). The first installment of this article, which appeared at 74 YALE L.J. 775 (1965), is of only peripheral relevance to the present discussion.

2. These arguments are set out more fully at 75 YALE L.J. 373, 397-405 (concerning the absence of restriction of output), and 453-65 (concerning the efficiencies that may be created by price fixing).

pose of creating efficiency, courts and legislatures ought to view r.p.m. as no different from any other normal business decision. Courts and legislatures are no more competent to judge the manufacturer's self-interest in this case than they are in any other, e.g., the purchase of machinery for a particular plant.<sup>3</sup>

Professor Gould and Professor Yamey agree that r.p.m. may create efficiency but they argue that it does not necessarily do so. I will attempt to reply to their specific objections in sections which parallel the divisions of their paper. But I would suggest preliminarily that their objections, even if valid, do not constitute adequate support for their policy recommendation. Since Gould and Yamey think manufacturer-desired r.p.m., depending on the circumstances, may either increase or decrease output, their first task should be to ask whether these varieties can be segregated and handled differently at an enforcement cost which is justified by the benefits. If not, their second task should be to estimate whether on balance consumers would be benefited by outlawing all manufacturer-desired r.p.m. or none. Professors Gould and Yamey do not appear to have built this bridge between their objections to my thesis and their suggested public policy.

I turn next to an examination of Gould and Yamey's specific objections.

## I.

The first section of the Gould and Yamey paper offers four "counter-examples" to show that r.p.m. can restrict output. Analysis demonstrates, however, that these counter-examples do not make the showing the authors suppose.

*The first counter-example* supposes a manufacturer contemplating an advertising campaign through trade journals and the institution of r.p.m. as alternative means of gaining reseller support. Gould and Yamey contend that the advertising campaign, being a "fixed cost" because independent of output, could not lead to a reduction in the number of items sold, while r.p.m., being an addition to marginal cost, could.

This argument contains, I believe, two fallacies: (a) that the advertising campaign is a fixed cost; and (b) that in the r.p.m. example, a restriction of output has occurred.

3. *Id.* at 404.

## Reply to Professors Gould and Yamey

The costs of the advertising campaign seem clearly classifiable as marginal. The manufacturer hypothesized by Gould and Yamey is certainly not faced with a stated and invariable expense for his advertising. His alternatives will range from a single one-line notice to multi-page, color advertisements running in every issue of the trade journal. The manufacturer will attempt to choose that combination which will result in an equation of his marginal costs and marginal revenue. In predicting this result, he will necessarily take into account the different costs of the different amounts of advertising. Within the limits allowed by his agreement with the trade journal, moreover, he will vary the amount of his advertising as the campaign proceeds and results exceed or fall below his expectations. Thus, advertising outlay will vary with sales. The added advertising cost of selling additional items must be calculated in making the total output decision. The same is concededly true of r.p.m. used as an inducement for retailers to provide additional promotional efforts. Both advertising and the purchase of promotional efforts through r.p.m., therefore, deserve to be classified as marginal costs.

Assuming success, both an advertising campaign and r.p.m. will shift the final demand and marginal revenue curves up and to the right and the manufacturer's total marginal cost curve (including the reseller's costs and markup) up and to the left. The new intersection of marginal cost and marginal revenue seems likely, on intuitive grounds it must be admitted, to lie to the right of the old intersection, signifying a larger production and sale of the manufactured article. My argument, however, does not depend upon the probability of this result. Admittedly, the curves can be drawn so that the new intersection is to the left of the old, signifying a smaller production and sale of the manufactured article. This situation may, moreover, be more profitable to the manufacturer. It follows that, in some circumstances, both advertising and r.p.m. might conceivably lead to fewer sales of the manufactured article, and individual consumers would then pay more, than if advertising and r.p.m. had not been used. It does *not* follow, however, that output is lower or prices higher. The composition of the product has changed. Using r.p.m. as the example, the manufacturer has purchased and added to his manufactured article the information and promotion supplied by the reseller. This change in the composition of the product offered the consumer will require that resources be bid away from other employments. Perhaps some resources will be released to other employments. But if the new product proves more profitable

it means that consumers prefer the new allocation of resources. That in turn means the output of the economy has increased.<sup>4</sup>

Such changes in product composition are a general means of economic progress. Thus, when a truck manufacturer switches from selling trucks to selling trucks plus reseller-provided information, it is precisely the same thing as if he had switched from offering a stripped-down model to a model with a variety of extra features. This, in turn, is no different from the changeover in the razor blade industry from carbon steel to stainless steel blades. Perhaps these changes would in some cases lead to the sale of fewer trucks and fewer razor blades, but it would be fallacious to contend that output had been restricted and that the law should require the manufacturers to switch back to the stripped-down truck and the carbon steel razor blade. The analysis is the same when r.p.m. is used to get resellers to perform functions they would not otherwise perform.<sup>5</sup>

*The second counter-example* assumes a case in which all manufacturers independently use r.p.m. as a sales-increasing device but find that they have neutralized each other's efforts so that industry sales and profitability decline. The fallacy of this counter-example lies, I believe, in the assumption that the new, less profitable situation can be stable. Since we have assumed that all manufacturers are worse off after the institution of r.p.m., the situation portrayed must be one in which not all consumer demand is primarily information- or promotion-elastic; rather, a significant segment of demand must be primarily price-elastic. It will, therefore, pay at least some manufacturers and some retailers to offer some articles without r.p.m. Some manufacturers may, as is common, take advantage of both segments of consumer demand by

4. A source of confusion here is the failure to distinguish between cases in which it is meaningful to regard the production and sale of fewer items as a restriction of output and those in which it is not. We speak of a cartel as restricting output, but we are referring to the means by which it creates or increases a divergence between price and marginal cost and so makes the value of the marginal product of resources in the cartelized industry higher than their value elsewhere. This misallocation of resources does not occur when the number of units produced declines because of a change in the composition of the product with a concomitant increase in its price. In such cases, the relevant output change is not that of the industry, but that of the economy, and that change is inevitably upward. (The theory of second best suggests exceptions to this statement, but I attempt to show at pp. 740-42, *infra*, why second best must be regarded as irrelevant to the enforcement of the antitrust laws.)

5. In note 6 of their paper, Gould and Yamey state that r.p.m. may push outward the upper part of the demand curve and make it less price-elastic. They conclude incorrectly that this permits the possibility that the profitable institution of r.p.m. leads to a lower output. They have overlooked here the same point discussed in the text: the addition of services creating prestige or giving information is a change in the composition of the product the consumer buys. In this example, too, the number of physical items sold may conceivably decrease, but the total output of the economy will increase.

offering one brand that is price maintained and one that is not. Many retailers will find it profitable to carry both types of goods, reserving their selling effort for the price-maintained brands. It is hardly to be believed that where a significant price-elastic demand exists both manufacturers and retailers will refuse to maximize returns by meeting it.<sup>6</sup>

*The third counter-example* is designed to show that "a monopolist manufacturer can use r.p.m. to preserve or strengthen his monopoly position and so restrict output." I do not think the case is made. Gould and Yamey advance the argument that the manufacturer may use r.p.m. to slow the growth or impede the entry of large-scale resellers, who can prevent him from extracting monopoly returns by threatening to develop alternative sources of supply. In such a situation, one may agree, the monopolist manufacturer would like to impede the entry or further growth of large-scale resellers. But r.p.m. seems an inappropriate tool for that purpose. The possibility of entry at both the manufacturing and retailing levels is necessarily assumed, and the use of r.p.m. seems, if anything, likely to hasten such entry.

The fallacy of this counter-example is seen most clearly if we look at a case in which, but for alleged entry-barring effects, the monopolist manufacturer would not use r.p.m. because his product is best sold by price appeal alone. The least costly method would be to set the resale price so that small resellers were given only a competitive return. Large-scale resellers, who by hypothesis are able to pay less to the monopolist but are subject to the same resale price restrictions, would then make a greater-than-competitive return on each unit sold. Both classes of resellers, however, would welcome a new entrant in manufacturing.

Small resellers would prefer a new entrant because rivalry in manufacturing would lower the price they pay. Gould and Yamey do not explain why such resellers are not able to encourage alternative sources of supply. Nor do they explain why encouragement is needed. The existence of a monopoly return on sales to small resellers should be encouragement enough to potential entrants in manufacturing. Large-scale resellers, though enjoying a higher margin per unit, would be unable because of r.p.m. to use lower resale prices to achieve the large volume which was the sole purpose of their large scale. Many of these resellers will want a supplier of non-price-maintained goods. The mo-

6. In an aside, Gould and Yamey (at note 7 of their paper) remark that my statement that "reseller pressure for a manufacturer-imposed restraint" cannot be effective "without actual reseller cartelization" is "not convincing." It could conceivably be bias, but upon rereading my argument (75 *YALE L.J.* 373, 410 n.73), I find it compelling.

nopolist manufacturer's use of r.p.m. in these circumstances would appear to be a blunder since it would make small resellers no less receptive to a new entrant and large-scale resellers more so.

Nor is the analysis changed if the large-scale resellers have not appeared but are about to do so. Such outlets (e.g., discount stores) typically sell a wide range of items and the existence in some lines of monopolist manufacturers using r.p.m. should merely whet their appetites to enter, develop alternative sources of supply (their ability to do so is crucial to Gould and Yamey's counter-example), and take advantage of all resellers encumbered by r.p.m.

The monopolist manufacturer's use of r.p.m. might also make entry more attractive at the manufacturing level. The manufacturing entrant's resellers would be able to undersell the r.p.m.-encumbered resellers of the ex-monopolist and hence expand the new manufacturer's share of the market more rapidly. If the potential entrant foresaw that the monopolist manufacturer would abandon r.p.m. as soon as a rival appeared, the use of r.p.m. would be neutral. Thus, in no case does r.p.m. seem to discourage entry and in some it seems likely to make entry more rapid.<sup>7</sup>

7. The analysis here also disposes of the suggestion in note 8 to Gould and Yamey's paper that oligopolists might non-collusively employ r.p.m. to impede entry.

In note 9 Gould and Yamey cite MONOPOLIES COMMISSION, REPORT ON THE SUPPLY OF WALLPAPER (London 1964) for "a discussion of a different way in which r.p.m. practised by a monopolist can serve to preserve a monopoly position." The facts offered by the Commission, however, suggest that the "monopoly" in one mode of distribution was due to the superior efficiency attributable to r.p.m. and the scale of operation of the dominant manufacturer. Wallpaper is sold to the English public through decorators and through retail shops. A purchaser from a decorator chooses from a pattern book and the decorator orders the chosen design from a pattern book merchant, paying retail price less a discount, and charging his client retail price. The dominant wallpaper manufacturer fixes the price at which its paper is sold by the merchant to the decorator. The reason seems plain from the description of the merchant's functions. The merchant buys the wallpaper for his pattern books, pays for printing a number and price on the back of each pattern, pays for covering and binding the books, and distributes them free of charge to decorators. The pattern books remain current for two years and during that period the merchant accepts the obligation to supply decorators on short notice with room-size quantities of any pattern in the book. He also accepts the loss of selling off at very low prices any stock left on hand at the end of the period. R.p.m. seems the most efficient way the manufacturer can make sure the merchant is compensated for performing these functions. He would surely not perform them if decorators could accept his services and then purchase elsewhere at lower prices from a merchant who had incurred no such costs. This is the familiar use of r.p.m. to prevent the "free ride." See citation in note 8 *infra*.

The Commission objected to the dominant manufacturer's use of r.p.m. for two reasons: (1) Smaller manufacturers with fewer patterns could not readily set some aside for price-maintained distribution through pattern book merchants to decorators; and (2) this form of distribution was declining rapidly and r.p.m. should not be permitted to prop it up. The first objection is to an economy of scale. From a consumer viewpoint it makes no sense to destroy the efficiency of a particular mode of distribution merely because only one manufacturer has the resources to engage in it. Such a policy forces the results of monopoly upon consumers for the sake of avoiding the appearance of monopoly. The Commission's second point contradicts its first, for we are told decorator distribution is losing the competitive struggle with retail shop distribution. If so, the amount of

## Reply to Professors Gould and Yamey

Perhaps Professors Gould and Yamey have misinterpreted the common phenomenon of a manufacturer struggling to enforce r.p.m. upon new discount houses. Unfortunately for their explanation, many such manufacturers can, by no stretch of the imagination, be called monopolists. A more likely explanation than theirs is that the manufacturers involved were attempting to obtain promotional efforts through r.p.m. which the discounters were not geared to provide. The discounters obtained a free ride on the efforts of other resellers and the effect was to decrease the reseller sales effort below the level desired by the manufacturers.<sup>8</sup>

*The fourth counter-example* is said to show that oligopolistic manufacturers may employ r.p.m. non-collusively to eliminate the alleged instability in the manufacturers' price level arising from competition at the retail level. Gould and Yamey appear generally to agree with my argument that r.p.m. would rarely be used as a means of policing a manufacturers' cartel. Yet the argument against the collusive use of r.p.m. to police a cartel is essentially the same as the argument against the non-collusive but consciously parallel adoption of r.p.m. to stabilize oligopolistic pricing. In fact, the use of r.p.m. in the latter case is even less likely since the added returns to oligopoly behavior are probably less than the returns added by cartel behavior and the costs of r.p.m. may be greater in the oligopoly situation.<sup>9</sup>

The argument in both the oligopoly and the cartel situation against the likelihood of producers using r.p.m. to stabilize non-competitive situations has two aspects. First, r.p.m. would not satisfactorily eliminate competition among retailers for consumer patronage or among manufacturers for favorable treatment by retailers. R.p.m.'s value to manufacturers lies precisely in the fact that retailers who may not compete

decorator distribution at any given moment still reflects the preference of some consumers for the services thus provided. There is no intelligible reason to destroy the efficiency of that mode of distribution on the ground that only a minority of consumers want it. The Commission ignores the market's function of satisfying minority as well as majority preferences.

The Monopolies Commission's discussion does not make the point Gould and Yamey suggest. Rather it provides an example of the creation of efficiency by r.p.m. and of a mistaken governmental policy of destroying that efficiency for the sake of smaller manufacturers.

8. 75 YALE L.J. 373, 453-54, 430-38.

9. Returns are likely to be less because rational oligopolistic behavior without collusion is hardly likely to arrive at the best output and price decisions. Not only is this theoretically true but it derives empirical support from the instances in which oligopolistic firms, presumably enjoying the added returns of oligopolistic behavior, find it worthwhile nonetheless to engage in illegal explicit collusion. Costs are likely to be higher because consciously parallel behavior will be less likely to adjust r.p.m. as rapidly or as accurately to changing demand and cost conditions as could be accomplished by actual collusion.

on price are induced or forced to compete by offering information, promotional services, and the like. This automatic effect gives r.p.m. its value as an efficiency-creating device and tends to destroy its value as a competition-suppressing technique. Since competition at the retailer level would continue, any resultant instability at the manufacturing level would also persist. A manufacturer tempted to shade prices to help retailers meet price competition would be tempted under r.p.m. to shade prices to induce retailers to engage in promotional and other competition on his behalf. In the second place, the use of r.p.m. solely to eliminate competition would be attended by serious costs likely to swamp any slight gains in stabilization. To cite only two instances, some retailers would be getting more-than-competitive returns at the manufacturers' expense and adjustments to changing market conditions would be delayed and complicated by the necessity of arriving at a new, difficult-to-predict, oligopoly solution.

These arguments closely parallel those made in my prior article about the use of r.p.m. to stabilize a manufacturers' cartel<sup>10</sup> and I will not lengthen this reply by repeating them in full. The modifications necessary to adopt the arguments to the oligopoly situation suggested by Gould and Yamey seem minor and obvious.

The four counter-examples deployed by Professors Gould and Yamey do not, it seems to me, withstand analysis. I believe, therefore, that they leave intact my thesis that manufacturer-desired r.p.m. does not reduce output and should be lawful.

## II.

In the second section of their paper, Gould and Yamey advance four arguments to support the propriety of judicial supervision of r.p.m. even where it is practiced with the purpose of creating efficiency. The four arguments are: (1) Courts may properly supervise and correct the decision of a manufacturer to use r.p.m. because r.p.m. involves manufacturer supervision of reseller business decisions; (2) though r.p.m. may create efficiency when first instituted, it may be difficult for the manufacturer to get rid of when changing conditions make it inefficient; (3) if all manufacturers in an industry use r.p.m., none of them is experimenting with other modes of distribution; and (4) manufacturers who institute r.p.m. are usually, perhaps even always, wrong about their own best interests. I will discuss these points in order.

10. *Id.* at 411-15.



(1) Gould and Yamey appear to have misconceived my argument on this point. My thesis is that the decision to use r.p.m. in order to attain distributive efficiency is like any other management decision related to the most efficient method of production or sales. Courts are hardly equipped to act as super managements and ratify or reject normal business judgments. Such a notion, generally applied, would turn the antitrust laws into a mandate for the judiciary, of all inconceivable institutions, to manage the now private sector of the economy. Antitrust can only perform a useful function if the courts confine themselves to striking down such practices as appear likely to restrict output. When analysis suggests the practice has no such potentiality the courts should not attempt to instruct business managements on how to maximize net revenues.

Judicial supervision of managements' normal business judgment is in no way the same phenomenon as manufacturer control of resellers' prices. When the manufacturer finds r.p.m. profitable, r.p.m. is in the best interest of the consumers. The fact that some resellers would prefer to be free of r.p.m. in such cases is of no significance since each reseller's interest is parochial. The manufacturer's more general judgment should prevail. This argument rests upon the idea of consumer sovereignty. It does not depend in any way upon a notion that the resellers may be said to have "agreed" to r.p.m. Not only should non-signer clauses be lawful but the manufacturer should be permitted to control resale prices by notice without the purely symbolic act of signing an r.p.m. agreement with at least one reseller.

(2) This objection rests on two assumptions: that manufacturers will probably make long-range mistakes about the efficiency of r.p.m.; and that when altered conditions make r.p.m. inefficient manufacturers will be unable to abandon it. Both of these assumptions seem invalid. It is, it seems to me, completely implausible that we know better than business management how they may best serve their own interests. Should a particular r.p.m. system become inefficient due to unforeseen changes, moreover, it will be to the interest of resellers as a group, as well as the manufacturer, to discontinue the practice. I fail to see the impossibility of getting rid of r.p.m. under such circumstances.

There may, of course, be some reseller resistance to the abolition of r.p.m. on a product, but so may there be to the institution of r.p.m. I see no reason why the resistance is likely to be more difficult to overcome in one case than in the other. The fact that incorrect decisions cannot be reversed painlessly and costlessly is no argument against leaving businessmen power to make decisions. I would suppose that an

unwise investment in plant facilities would often prove more costly to reverse than an unwise decision to try r.p.m.

(3) Where all manufacturers in an industry use r.p.m. it is by definition true that none of them is currently experimenting with non-r.p.m. What that proves I do not know. It might also be remarked that where the law forbids r.p.m. none of the manufacturers is experimenting with r.p.m. At least in the former situation any manufacturer is free to try another policy any time he thinks the experiment worthwhile, and he may do so in selected areas or on a distinct brand without committing himself generally. That seems infinitely preferable to a rule, argued in terms of discovery of information, which prohibits the discovery of information.

(4) I confess I do not know what to make of the suggestion that manufacturers are persistently wrong in using r.p.m. Gould and Yamey cite no evidence of such invariable error. If that were true, one should expect only gratitude and relief from businessmen who have had their r.p.m. systems dismantled by law. Instead, one often finds such businessmen curiously eager to repeat their "mistake" and striving to use other legal devices, such as agency and consignment sales, to achieve control of their outlets' prices. If r.p.m. really is always a mistake, we can account for this repetitive self-destructive behavior only by postulating for businessmen some instinctual force that draws them to r.p.m. the way lemmings are drawn into the sea.

### III.

Professors Gould and Yamey suggest that the criterion I use for judging the desirability of r.p.m.—its effect upon output—is too simple. I argued in the first installment of my article that output effect is a valid criterion because it is related to consumer welfare and provides rules suitable for principled administration by courts.<sup>11</sup> Gould and Yamey note that I have grounded this test in welfare economics but object that I did not "make sufficiently clear . . . the restrictive nature of the assumptions underpinning this welfare proposition." They note that the "necessary qualifications" to the output-effect criterion are "numerous and their discussion highly technical and somewhat esoteric." Though the authors do not indicate what the "necessary qualifications" are or how they would modify my policy conclusions, I take them to be suggesting that welfare economics would require expansion

11. See 74 YALE L.J. 775, 829-47.

of my criterion to account for income effects and second best theory. For several reasons, I believe this suggestion should be rejected.

I do not, of course, claim that effect upon output is the sole test supported by welfare economics. I do contend that it is the only appropriate criterion for antitrust law. I will attempt very briefly to show why that is true.

Every action or inaction in the business world has income effects, that is, alters or confirms the existing distribution of income. Antitrust law could not deal with income effects without undertaking to judge every business action (plant location, machinery purchase, wage determination, inventory control, and so on). Several insuperable objections to an income-effect criterion in antitrust are at once apparent: the present structure of antitrust does not contemplate judicial regulation of all aspects of business activity; detailed judicial regulation of this variety would be disastrous for the economy; courts do not have the equipment to trace income effects; and a court is not the appropriate organ of government to make the intensely political determination of which income effects are desirable and which undesirable, that is, how income should be redistributed in our society. The political choice between potential income recipients is obviously a task for the legislature, and that body has tools, such as taxes and subsidies, which are far more direct, comprehensive, and effective in dealing with income distribution than antitrust can ever be.

The theory of second best indicates that some restrictions of output may be beneficial because they narrow relative divergences between price and marginal cost. The difficulty is that we are unable to apply this insight to specific cases. Take a manufacturer's use of r.p.m. as an illustration. In order to apply second best theory, the court would first have to measure the gap between price and marginal cost. That would be an exceedingly difficult task—probably one that is generally impossible since the measurement of marginal cost with any accuracy is usually impossible. Next, the court would have to inquire whether prohibiting r.p.m. would be likely to widen or narrow the divergence, thus adding utter conjecture to its initially suspect measurement. Third, the court would have to inquire whether there existed divergences between marginal cost and price in all industries making substitutes or complements and in all industries to and from which resources might move if r.p.m. in the case before it were struck down, and whether the divergences in such industries would thereby be increased or lessened. Finally, the court would have to judge whether the new equilibrium, across all affected industries, was likely to be

better or worse for society. This, I suggest, is a task courts could not conceivably perform. I do not believe any institution could. To bring second best into antitrust, therefore, would accomplish nothing of value but would make the discovery and trial process so interminable and expensive that antitrust would be largely unenforceable.

I find it rather odd that Professors Gould and Yamey should recommend a rule against all r.p.m. because r.p.m. may restrict output, and, in the same paper, object that my thesis fails to take into account a theory which suggests that such restrictions may be desirable. Perhaps their remarks on welfare economics are simply a digression and not offered as relevant to the issue of r.p.m. If so, I hope I have adequately explained why, despite the qualifications one might wish were feasible, the output-effect criterion is the only criterion related to consumer welfare which is suitable for judicial employment.

Two further points are made by Gould and Yamey: (1) r.p.m. inhibits the freedom of resellers to experiment with new forms of retailing, thereby interfering with innovation and experiment; and (2) r.p.m. restricts the range of consumer choice.

The first point is a curious one, for Gould and Yamey urge the need for innovation and experiment in retailing in support of a rule against r.p.m. which chokes off innovation and experiment.<sup>12</sup> The consideration they raise really supports the rule I propose: making r.p.m. optional for the manufacturer. The manufacturer's interest in distributive efficiency is the same as the consumer's. When he decides whether to use r.p.m., the manufacturer must weigh the gains against the losses, including the loss of reseller experimentation. The courts should accept the manufacturer's judgment on the question as they should whenever a judgment as to comparative efficiencies is all that is involved. Under the rule I propose, moreover, innovation and experimentation by resellers need not be cut off. The manufacturer may, if he wishes, permit reseller experimentation in test markets or on particular products. Under the rule proposed by Gould and Yamey all experimentation involving r.p.m. would be closed off.

The second point raised by Gould and Yamey, the restriction of consumer choice, rests on the peculiar thought that only those consumers who prefer a product without r.p.m. are entitled to freedom of choice. If we admit that all consumers are entitled to vote with their dollars, we see that consumer choice will dictate the use or non-use of

12. This is essentially the same point as the third argument set forth by Gould and Yamey under section II.

## Reply to Professors Gould and Yamey

r.p.m. When r.p.m. is the more profitable course for the manufacturer of product  $x$ , we know that consumers as a whole prefer product  $x$  with the reseller-provided information and service that is purchased by r.p.m. It is the point about the composition of the product all over again. When a detergent manufacturer adds bleach crystals to his product those consumers who prefer his detergent without bleach have had their choice restricted. But if the change proves profitable to the manufacturer, we may assume that consumers as a whole are better satisfied.<sup>13</sup> A law prohibiting the addition of bleach crystals would not widen the range of consumer choice but would restrict it. The same analysis applies to r.p.m. and the addition of reseller effort to the physical product.<sup>14</sup> The consideration of consumer choice supports the proposal to legalize manufacturer-desired r.p.m.

13. See note 4 *supra* and accompanying text.

14. See 75 YALE L.J. 373, 473.

# The Yale Law Journal

Volume 76, Number 4, March 1967

<i>Editor-in-Chief</i>	LEONARD M. ROSS
<i>Note &amp; Comment Editors</i>	H. JEFF GREENFIELD SIMON LAZARUS III JOSEPH N. ONEK SILAS WASSERSTROM
<i>Projects Editor</i>	MICHAEL S. WALD
<i>Article &amp; Book Review Editors</i>	LEONARD CHAZEN PHILIP GORDON SCHRAG
<i>Topics Editor</i>	CHARLES H. HERZ
<i>Managing Editor</i>	THOMAS HAMILTON CHILDERS, JR.

BRUCE A. ACKERMAN	ALAN C. HOOKER	LEONARD RUBINOWITZ
LEONARD H. BECKER	WILLIAM IVERSON	THOMAS SCARLETT
JAMES T. BETTS	DANIEL M. LEWIS	MARK SCHANTZ
STEPHEN V. BOMSE	PHILIP R. LOCHNER, JR.	ERIC SCHNAPPER
RUSSELL CARPENTER	RICHARD S. MARKOVITS	JOHN E. SCHULZ
ALLAN CHAPIN	MELVIN MASUDA	ALAN D. SISITSKY
RICHARD COTTON	CHRISTOPHER MAY	ALLAN G. SPERLING
BARRY G. CRAIG	ALAN ROBERTS MCFARLAND	JAMES SPETH
JOHN DAUM	ROBERT MCMANUS	MICHAEL T. STAPLETON
MARVIN J. DIAMOND	THEODORE N. MILLER	JOEL W. STERNMAN
ARDEN DOSS, JR.	MICHAEL MUKASEY	EDWARD L. STROHBEHN, JR.
GEOFFREY DRURY	JOHN E. NATHAN	ROBERT B. TANNER
VIRGINIA B. EISENSTEIN	HAMILTON OSBORNE, JR.	DAVID T. TILLOTSON
RICHARD EPSTEIN	DONALDSON PILLSBURY	GARY C. WALKER
JOHN MILES EVANS	CHARLES PULASKI	CHARLES H. WHITEBREAD II
WALTER JOHN GLANCY	MICHAEL REISS	HARDY WIETING, JR.
RICHARD GOODYEAR	JOHN TOWNSEND RICH	JEFFREY WOOD
THOMAS GREY	JOHN C. ROBERTS	HENRY L. WOODWARD
JULIAN DEAN HELLER	EDMUND PENDLETON	ROBERT JAMES WOOLSEY, JR.
DAVID W. HESS	ROGERS III	MATTHEW ZWERLING

*Business Secretaries* M. OLIVE BUTTERFIELD, ETHEL MORIARTY

## *Student Contributors to This Issue*

Eric Schnapper, *Consumer Legislation and the Poor*  
Nelson Luria, *The Accumulated Earnings Tax*  
Henry L. Woodward, *Borrowed Servants and the Theory of Enterprise Liability*  
Robert James Woolsey, Jr., *Program Budgeting for Police Departments*  
Joel W. Sternman, *Self-Incrimination and the Federal Excise Tax on Wagering*