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Abstract:

The purpose of this annotated bibliography is to survey the relatively recent literature on entrepreneurship and antitrust. This bibliography is organized into three sections: (1) Defining Entrepreneurship; (2) Entrepreneurship in Various Disciplines; and (3) Entrepreneurship, Competition and Antitrust. Included are articles, reports, commentaries and testimonies addressing one or more of the main categories into which the bibliography is organized. We welcome suggestions for additional relevant resources.

Keywords:

entrepreneurship, antitrust, competition, entrepreneurial environment, entry, growth, startup

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ENTREPRENEURSHIP AND ANTITRUST: AN ANNOTATED BIBLIOGRAPHY

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I. Introduction

The purpose of this annotated bibliography is to survey the relatively recent literature on entrepreneurship and antitrust. This bibliography is organized into three sections: (1) Defining Entrepreneurship; (2) Entrepreneurship in Various Disciplines; and (3) Entrepreneurship, Competition, and Antitrust. Included are articles, reports, commentaries, and testimonies addressing one or more of the main categories into which the bibliography is organized.

While many articles reviewed did not make specific distinctions between the ideas of entrepreneurship and innovation, some (included in the bibliography) have pointed out that entrepreneurship can be discussed outside the innovation context. Nadim Ahmad and Richard G. Seymour's *Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data* from the OECD statistics working papers discusses in detail the different approaches to defining entrepreneurship.

Entries are organized first by category, and each author is listed alphabetically within each category that their work is listed. Accompanying each entry is a brief summary of the subject matter or central points discussed in the article and any additional features of interest. Where available, links to each respective article are provided. An alphabetical author index provides references to all entries for each author.

In compiling the bibliography, relevant material was identified by conducting searches of Westlaw, LexisNexis, the Social Science Research Network (SSRN) Electronic Library (<http://www.ssrn.com>), and Google Scholar (<http://scholar.google.com>).

¹ Ms. Lee served as Research Fellow, American Antitrust Institute, from September 1, 2014 to February 23, 2015.

II. Bibliography

A. Defining Entrepreneurship

- 1. D. Gordon Smith and Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533 (2013)²**

This article discusses the concept of “entrepreneurial opportunity” in detail. The authors introduce the various scholarship views on the relationship between existing resources and the entrepreneur’s act of creation that turns resources into new entrepreneurial opportunities. The article then analyzes the creative process in entrepreneurship based on psychology literature.

The last part of this article argues that legal rules encourage the creation of entrepreneurial opportunities by assuring market participants that they can retain many of the benefits of their success while reducing the costs associated with transacting, especially where the transactions fail. On retaining the benefits of success, the article discusses patent law and fiduciary law. On reducing the risks of venturing, barriers to entry, bankruptcy laws and limited liability and asset partitioning are reviewed.

- 2. Benjamin Means, *A Lens for Law and Entrepreneurship*, 6 ENTREPREN. BUS. L.J. 1 (2011)³**

The author quotes Darian M. Ibrahim and D. Gordon Smith, stating that entrepreneurship is “novelty as applied to opportunities,” and additionally suggests that most new business ventures fall into “strong” and “weak” entrepreneurial categories: “Entrepreneurial opportunities may be novel in a strong sense, which typically implies a technological breakthrough backed by venture capital financing, or they may be novel in a weak sense, such as opening a new restaurant in a vacant building.”

The author points out that the vast majority of new businesses are decidedly low-tech and do not seek to capitalize on the creation of new information. Strong entrepreneurship extends not much further than the range of scholarship concerning venture capital. It is also argued that there are no distinctive legal rules required to regulate the area of entrepreneurship, even if this could be properly defined.

The article suggests that better approach would be to approach entrepreneurship from a critical perspective. By avoiding the conceptual difficulties inherent in identifying categories, scholars can focus instead on core questions concerning the relationship of law, innovation, and opportunity.

² Available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3286&context=clr>

³ Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029864.

3. Nadim Ahmad and Richard G. Seymour, *Defining Entrepreneurial Activity: Definitions Supporting Frameworks for Data Collection* (OECD, Working Papers No. 2008/1, 2008)⁴

The authors introduce the different approaches to defining entrepreneurship beginning with Schumpeter's definition of an entrepreneur in 1934. They suggest taking both the "bottom-top" approach and the "top-down" approach to defining entrepreneurial activity, entrepreneur and entrepreneurship. The "bottom-top" approach is defined as representing or measuring entrepreneurial activity, entrepreneur and entrepreneurship using concretely defined statistics or indicators. The authors also include the "top-down" approach which is based on a philosophical perspective so as to ensure relevance.

For the bottom-top approach, the authors rely on the key characteristics or indicators summarized in the OECD's Entrepreneurship Indicators Project (Ahmad and Hoffman, 2007). This includes employer enterprise birth rates, rate of high-growth firms based on employment and turnover growth, gazelle rates based on employment and turnover, employer enterprise deaths, business churn, etc. The list of indicators points to the following characteristics of entrepreneurs: (i) entrepreneurs are in the business of doing something different and (ii) entrepreneurs are also involved in the day-to-day running of the company. For entrepreneurship -- in addition to the creation of a new idea -- there needs to be some concrete manifestation of the idea and a reflection of the idea in the creation of a business.

The article introduces the existing conflicting definitions of entrepreneurs in regard to the top-down approach. The authors note that there are also commonalities among the different opinions, such as the risk-taking role of the entrepreneur, the role of innovation, the creation of something new, the arbitrage role of the entrepreneur, etc.

Based on the above, the authors propose that "entrepreneurs" be defined as those persons (business owners) who seek to generate value, through the creation or expansion of economic activity, or by identifying and exploiting new products, processes or markets. "Entrepreneurial activity" is defined as the enterprising human action in pursuit of the generation of value, through the creation or expansion of economic activity, by identifying and exploiting new products, processes or markets, and that "entrepreneurship" is the phenomenon associated with entrepreneurial activity.

4. William J. Baumol, Robert E. Litan and Carl J. Schramm, *Sustaining Entrepreneurial Capitalism*, 2 CAPITALISM AND SOCIETY, no. 2, 2007, at 1.⁵

This article defines "innovative" and "productive" entrepreneurs as individuals who launch enterprises that commercialize new products, services, or processes that contribute to economic growth. The authors look at entrepreneurial capitalism from various legal and regulatory

⁴ Available at <http://www.oecd.org/std/business-stats/39651330.pdf>.

⁵ Available at

<http://capitalism.columbia.edu/files/ccs/William%20J.%20Baumol,%20Robert%20E%20Litan,%20Carl%20J%20Schramm.pdf>.

perspectives, including tax, the patent system, health insurance, corporate governance and capital markets regulation, and bankruptcy law. The authors discuss and seek ways to promote “productive” entrepreneurs and disincentivize “unproductive” entrepreneurs on the various legal fronts.

The article has a section named “Competition and Innovation Arms Races: Keeping Winners on Their Toes.” The authors emphasize that to ensure a steady stream of innovation and technological progress, it is important for large firms (who have won in competition) to continue to innovate. This is what the authors refer to as the “innovation arms’ race.” In order to achieve this, the authors maintain that antitrust enforcement authorities should give more weight to the benefits of certain sorts of cooperation among firms that serve the public interest.

The article suggests that a “relaxed rule of reason” should be applied when weighing the competitive and anti-competitive effects of research joint ventures, research consortia, and even mergers in high-technology industries (as these are socially optimal responses to market failures that beset the production and dissemination of knowledge). While the current DOJ and FTC Intellectual Property Guidelines include a mention of the virtues of cooperation, this standard should be more formally announced to clear away remaining legal uncertainties. The authors also touch on subjects such as free trade, transfer of foreign technology, immigration policies, etc. as factors affecting competition and innovation.

B. Entrepreneurship in Various Disciplines

5. Avshalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (2002)⁶

This article offers a behavioral analysis of decision-making that explains empirical findings about entry. This behavioral analysis replaces the perfectly rational actor contemplated in the traditional law and economics school of thought with a “boundedly rational” decision maker who, apart from being affected by emotion and motivation, has only limited cognitive resources.

According to the author, (i) prevalence of excess entry, (ii) the relative insensitivity of entrants to market predictors of success, and (iii) the inferior performance of startup entrants, as compared to those who enter by diversification, all result from the operation of the various processes of entrant overconfidence, most notably, optimistic and desirability related biases. It is also noted by the author that although intense competition eliminates many boundedly rational actors, competitive forces inevitably select some other such actors for success. Consequently, boundedly rational actors become overrepresented, as a group, among the ranks of successful entrants. It is therefore important to understand the role of boundedly rational action for the legal regulation of economic phenomena, including the important topic of entry competition specifically.

The role of financiers and government in curbing entrant overconfidence is also discussed. The author argues that an effort to regulate boundedly rational entry is impractical because of the difficulty of identifying negative expected value entry, determining when exactly to limit it at the

⁶ Available at http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1136&context=law_faculty_scholarship.

margin, and finding an effective means of doing so. The article also finds that although overconfident entrants generate social and private losses, they facilitate economic growth and expand the range of consumer choice, as well as make significant long term contributions to the disciplining of incumbent firms.

On the antitrust front, the article suggests that the role assigned to entry barriers in judicial and regulatory determinations of market power should be modified. This is because, even when such barriers create only a limited impediment to entry, they may still protect incumbents by making post-entry survival less likely.

C. Entrepreneurship, Competition and Antitrust

6. Robert M. Feinberg, *State Antitrust Activity's Impact on Small Business Entry* (US Small Business Administration Office of Advocacy, Working Paper No. SBAHQ-11-Q-0029, 2012)⁷

This article examines entry reactions to state antitrust enforcement by firms within three small-business categories: 1-19 employees; 20-99 employees; 100-499 employees. Differences in behavior by broad business sector are also explored.

In terms of antitrust effects, the author shows that there is a weak entry-encouraging impact of state antitrust enforcement actions. However, these results are only from horizontal case filings, actions among firms in the same industry who are attempting to collude or otherwise limit competition among themselves. Investigations of cartel-type activity may not be viewed unfavorably by businesses that are considering expansion within a state, or entry into a state. They may in fact be viewed as a desirable element of the state's law enforcement regime, especially by smaller firms.

With regard to industry sectors, the author shows that the smallest retail and wholesale firms favor vigorous antitrust activity, especially enforcement targeted against cartel behavior by suppliers in regard to entry. The largest small-firm retailers and wholesalers (those with 100-499 employees) seem somewhat threatened by such activity. Retailers and wholesalers, especially small firms, are also more likely to operate within a single state, and focus on antitrust policy at that state level. In contrast, manufacturers more often sell across state lines and may be more concerned with federal antitrust enforcement than state-level activity.

7. Richard M. Steuer, *Jobs and Antitrust*, 23 ANTITRUST 98 (2009)⁸

The author states that consumers need sufficient new entry to make markets increasingly competitive and to create new jobs. Producers need efficiency gains, which require innovation, and greater consumption, which requires more domestic jobs, in the long run. In this regard, sustaining efficient jobs by promoting the expansion of output through greater competition, entry,

⁷ Available at <https://www.sba.gov/sites/default/files/advocacy/rs395tot.pdf>.

⁸ Available at http://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-545095-00047/545095-00047.pdf.

and innovation is an integral part of economic welfare itself. Neither allocative efficiency nor productive efficiency can be maximized without such growth.

In regard to mergers, the author comments that if an anticompetitive merger reduces the number of rivals in the market -- resulting in the loss of efficient, productive jobs at rival firms -- this can result in a loss in overall economic welfare. The analysis of welfare effects includes consideration of the long term impact on quality competition, innovation, and new entry, all of which would impact jobs.

The author notes that the existing standards for assessing joint ventures aptly distinguish between pro-competitive and anticompetitive collaborations among competitors. This approach should produce the right result, including maximizing economic welfare, including the impact on jobs.

Cartels and boycotts can hurt both new entrants and the jobs they would create. Current legal standards regarding monopolization and attempted monopolization should be consistent with preserving not only competition, but also entry opportunities and job opportunities. Vertical agreements that foreclose competitors, such as exclusive dealing and tying agreements, may also reduce jobs if they result in anticompetitive foreclosure.

8. *Small Business Competition Policy: Are Markets Open for Entrepreneurs? Hearing Before the H. Comm. On Small Businesses, 110th Cong. (September 25, 2008) (statement of David A. Balto, A Progressive Vision for Antitrust Enforcement to Protect the Opportunities for Small Businesses and to Protect Consumers)*⁹

Former Policy Director of the Bureau of Competition at the Federal Trade Commission, David A. Balto, points out that antitrust enforcers have been increasingly unresponsive to the concerns raised by small businesses and entrepreneurs. He puts forth the following progressive view on how to reverse the unintended bias against small business and entrepreneurs in the interpretation and enforcement of the antitrust laws.

David A. Balto maintains that the DOJ's approach towards dominant firm conduct is misguided. Dominant firms can engage in a wide variety of practices that limit the ability of entrepreneurs to either enter or expand. He criticizes the DOJ report titled '*Competition and Monopoly: Single-Firm Competition Under Section 2 of the Sherman Act*' (September 2008) on grounds that the report gives monopolists free reign to crush new or existing rivals. Balto sides with the FTC's comments on flaws in the report, noting that the report is chiefly concerned with monopoly firms rather than consumer welfare, and that it would have the effect of radically weakening the effect of Section 2 of the Sherman Act. The DOJ report was subsequently withdrawn.

Balto also points out that enforcement agencies fail to recognize the problem of dominant buyer power (especially in healthcare and agriculture markets) and have not taken sufficient enforcement action against mergers of dominant buyers and in price discrimination cases. While there are opinions on the abolishment of the Robinson-Patman Act, which regulates price discrimination against non-dominant buyers, anticompetitive harm caused by such price

⁹ Available at https://cdn.americanprogress.org/wp-content/uploads/issues/2008/pdf/balto_smallbusiness.pdf.

discrimination cannot be addressed by other antitrust statutes.

9. Robin Mason and Helen Weeds, *Merger Policy, Entry, and Entrepreneurship*, (University of Essex, Department of Economics, Discussion Paper No. 634, 2007)¹⁰

The authors argue that merger policy has certain effects on the incentives for entry and *ex ante* investment decisions in general. By facilitating exit and thus raising the value of entry, more lenient merger policy may stimulate entry sufficiently that welfare is increased overall. This could also be characterized as extending the existing failing firm defense to ailing (as well as imminently failing) firms.

The authors challenge the current assumptions made by policy makers. They argue that the consumerist policy maker such as a competition authority should be the one adopting the most lenient merger policy, because entry increases consumer welfare. They also argue that the positive effect on entry of more permissive merger policy is greater in cases where a larger share of merger surplus goes to the entrant or firm being acquired. Lastly, mergers whereby the firm being acquired has a stronger bargaining position, should be treated by more lenient standards, as the party to such merger will gain a greater share of the merger surpluses and its entry decision will be more sensitive to merger policy.

The article also models a number of plausible strategies for manipulating the optimal merger policy and concludes that such factors do not undermine the fundamental argument. Subsidizing entry is also discussed as an alternative to merger. However, the authors point out that this option also has its drawbacks.

¹⁰ Available at <http://www.essex.ac.uk/economics/discussion-papers/papers-text/dp634.pdf>.