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BEHAVIORAL ECONOMICS AND ITS MEANING FOR ANTITRUST AGENCY DECISION MAKING

James C. Cooper & William E. Kovacic¹

INTRODUCTION

Of all fields of regulation in the United States, antitrust law relies most heavily on economics to inform the design and application of legal rules.² When drafting antitrust statutes in the late 19th and early 20th centuries, Congress anticipated that courts and enforcement agencies would formulate and adjust operational standards to account for new learning.³ The field of economics—especially industrial organization economics—would give broad statutory commands much of their analytical content.⁴

In principle, the flexibility of U.S. antitrust statutes makes competition policy adaptable and accommodates for upgrades over time.⁵ This evolutionary process is only effective if antitrust institutions can identify significant advances in economic learning and refine enforcement policy and doctrine accordingly. Owing to their expertise in economics and law, the two federal antitrust agencies—the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—are crucial instruments of adaption.⁶ The antitrust system’s quality depends on the agencies’

¹ Cooper: Law & Economics Center, George Mason University School of Law. Kovacic: George Washington University Law School. This article is adapted in part from James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REG. ECON. 41 (2012). The authors thank Angela Diveley for superb research assistance.

² On this characteristic of the U.S. antitrust system, see generally William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294 (1992); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

³ This is most evident in the adoption of the Federal Trade Commission Act in 1914 and the establishment of an administrative agency, the Federal Trade Commission, to enforce the statute’s prohibition against “unfair methods of competition.” Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45 (2006)). On rationale for the Federal Trade Commission Act and the design of the FTC, see Marc Winerman, *The Origins of the Federal Trade Commission: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

⁴ See Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1 (2003).

⁵ The operative terms of the U.S. antitrust statutes are relatively open-ended, and the legislative texts do not define them. For example, Section 2 of the Sherman Act makes it an offense—indeed, a criminal transgression—to “monopolize” commerce. 15 U.S.C. § 2 (2006).

⁶ On the formative role of the two U.S. federal antitrust agencies in shaping norms of business behavior, see DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT* 27-48 (2011).

commitment to reassess existing doctrine and policy in light of new developments.

The emergence of the field known as behavioral economics (BE) provides the most recent occasion to examine how the antitrust agencies perform this adaptive function.⁷ Modern BE scholarship examines the implications for decision making when actors suffer from documented psychological biases,⁸ BE replacing the assumption of rationality with one of “bounded rationality.” Under this theory, consumers’ actions are affected by their initial endowments, tastes for fairness, inability to appreciate future costs, lack of self-control, and general use of flawed heuristics.

The notion that human behavior reflects the influence of varied emotional and psychological impulses is neither novel nor surprising. Modern BE literature does not displace the knowledge gained from earlier applications of psychology to the study of consumer behavior. Instead, it builds upon and extends insights from earlier work, often by using newer analytical techniques, including methods developed in the field of experimental economics. Modern BE literature also engages in a more systematic consideration of how departures from traditional assumptions about bounded rationality should affect public policy.

One question posed by BE researchers is whether antitrust agencies should alter enforcement policy to incorporate perspectives that depart from the rationality assumption. BE has influenced a new body of antitrust scholarship that prescribes greater skepticism of claims that market entry ordinarily is an effective means for correcting anticompetitive markets, that cartels are inherently unstable, that bundling typically yields net efficiencies, and that limits on intra-brand price competition promote inter-brand competition in non-price dimensions.⁹ These views have inspired an active debate about future antitrust policy. The BE-oriented antitrust literature has elicited counterarguments from a number of scholars who doubt that BE

⁷ For example, the application of BE to antitrust law is a focal point of modern policy analysis within the FTC. See e.g., Bureau of Economics, Federal Trade Commission, A Conference on the Economics of Drip Pricing (2012) (conference description and agenda), <http://www.ftc.gov/be/workshops/drippricing/index.shtml>. The FTC also has convened proceedings to analyze how insights from BE might affect consumer protection policy. See e.g., Bureau of Economics, Federal Trade Commission, A Conference on Behavioral Economics and Consumer Policy (Sept. 2007) (conference agenda and transcripts), <http://www.ftc.gov/be/consumerbehavior/docs/agenda.shtml>.

⁸ For a collection of essays discussing behavioral economics, see generally THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR (Francesco Parisi & Vernon L. Smith eds., 2005). For a useful survey by one of the founders of modern study in this field, see generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

⁹ Prominent examples include, Maurice E. Stucke, *Behavioral Economics at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482 (2002); Avishalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason After Leegin*, 2011 U. ILL. L. REV. 805.

dictates significant changes in existing antitrust analysis or other forms of regulatory policy-making.¹⁰

The literature we sketch above deals chiefly with the behavior of individual consumers and with firms. In this Article, we focus on a second, different set of implications of the BE scholarship for antitrust policy and regulation more generally. We consider how concepts of bounded rationality and other BE insights might improve our understanding of regulatory agencies and explain the behavior of individual regulators. For example, what does BE tell us about the likelihood that the DOJ and the FTC will make skillful, timely adjustments in policy to account for new learning in economics? Are agencies generally capable of making wise policy choices, or do the various behavioral phenomena that affect the decisions of individuals routinely distort the execution of policymaking tasks by public officials?

Our work benefits from some important antecedents. Several BE scholars have recognized that BE phenomena can influence regulatory decisions.¹¹ For the most part, these works treat the possibilities for distortion in regulatory agency decision making as a second-order problem compared to the effect of likely consumer biases.¹² There is also substantial literature examining the causes of what appears to be irrational behavior by public institutions. This literature generally is not cast in the language of BE, yet it explains failed decision making by various government institutions as a function of what could be called behavioral tendencies—such as confirmation bias¹³—that figure prominently in modern BE literature.¹⁴

¹⁰ E.g., Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality*, 90 MINN. L. REV. 1620 (2006); Douglas H. Ginsburg & Derek W. Moore, *The Future of Behavioral Economics in Antitrust Jurisprudence*, 6 COMPETITION POL'Y INT'L 89 (2010); Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J.L. & LIBERTY 470 (2007); Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2011).

¹¹ See e.g., Matthew Bennett et al., *What Does Behavioral Economics Mean for Competition Policy?*, 6 COMPETITION POL'Y INT'L 111 (2010); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

¹² One notable exception is Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002). Rachlinski and Farina compare the positive and normative implications of both BE and public choice theory for institutional design, with specific focus on the interaction between Congress, the executive, courts, and regulators. Our work allows public choice theory and BE to simultaneously shape policy outcomes.

¹³ See *infra* note 36 and accompanying text (describing concept of confirmation bias).

¹⁴ This is a prominent theme of Graham Allison's formative study of foreign policy in the context of the Cuban Missile Crisis. See generally, GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971). Numerous studies examine how military organizations and intelligence agencies adhere to specific policies despite the accumulation of evidence that belies the premises of such policies. See e.g., RONALD H. SPECTOR, *EAGLE AGAINST THE SUN – THE AMERICAN WAR WITH JAPAN* (1985) (describing how U.S. Navy offices responsible for naval torpedoes ignored operational evidence that revealed serious design flaws); ERNEST R. MAY, *STRANGE VICTORY – HITLER'S*

We aim to fill what we see as a gap in the BE literature by directly applying BE concepts to understand the behavior of government regulators. Our experience working for the FTC and dealing with other regulators in the United States and overseas has shown us the considerable value in applying BE concepts to explain past regulatory decisions and to anticipate future regulatory actions.¹⁵ One of us saw first-hand how a path dependent commitment to specific policies caused the FTC to persist in prosecuting cases whose conceptual foundations had significantly eroded in light of new developments in economic analysis.¹⁶ We also have noticed the strong temptation for public officials to engage in hyperbolic discounting—to take measures that facilitate immediate opportunities for claiming credit while disregarding the long-term costs to the agency and to social welfare.¹⁷

In this Article, we posit a simple model of a regulator who serves as an agent to a political overseer. The regulator chooses a policy that balances her desire to pursue what she believes is the optimal long-run policy against the rewards that she receives from the political overseer for taking actions that increase the overseer's odds of reelection. These objectives may coincide, but they more likely conflict as we assume that the political overseer will have a relative preference for policies that maximize outputs or otherwise convey the appearance of action. We use this framework to explore the effects of bounded rationality on policymaking, with particular emphasis on competition policy.

We find that flawed heuristics (e.g., availability, representativeness, optimism, and hindsight) and myopia are likely to lead regulators to adopt policies closer to those preferred by political overseers than they otherwise would. The effect of status quo and confirmation biases is less clear, and depends on initial policy positions, the order and veracity of information

CONQUEST OF FRANCE (2000) (discussing how French military authorities in 1940 brushed aside proof that German army units were mobilizing for the invasion of France).

¹⁵ Kovacic served at the FTC as a staff attorney from 1979 to 1983, as general counsel from 2001 to 2004, as a commissioner from 2006 to 2011, and as the agency's chairman from March 2008 to March 2009. Cooper was the deputy director with the FTC's Office of Policy Planning from 2006 to 2008 and was its acting director from January 2009 to May 2009. Cooper also served as an advisor to Kovacic from 2009 to 2011.

¹⁶ See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 457-60 (2003) (discussing FTC programs in the 1970s to challenge single-firm exclusionary conduct and shared monopolization).

¹⁷ Commentators and journalists often evaluate the effectiveness of antitrust agencies according to the number of cases they prosecute rather than by the economic outcomes their programs have yielded. See, e.g., GLOBAL COMPETITION REVIEW, RATING ENFORCEMENT: THE ANNUAL RANKING OF THE WORLD'S LEADING COMPETITION AUTHORITIES 2-3 (2012) (emphasizing statistics on the prosecution of cases as the metric to evaluate the performance of competition authorities). This can impart a bias to initiate cases without adequate regard for their longer term consequences. This tendency is described in William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 918-23 (2009); William E. Kovacic, Hugh M. Hollman & Patricia Grant, *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25, 27-30 (2011).

flows, and the regulator's priors (or first piece of evidence). We conjecture, however, that confirmation bias may create a weak tendency to adopt politically expedient policies given that the first piece of evidence a regulator views on a matter likely will be a call to action.

We argue that unlike the case of firms that face competition, the incentive structure for regulators is likely to reward those who adopt politically expedient policies, either intentionally, due to a desire to please the political overseer, or accidentally, due to bounded rationality. These incentives are likely to lead to a cadre of regulators who focus excessively on outputs rather than outcomes. Thus, our analysis suggests that careful thought should be given to calls for greater state intervention, especially when those calls are directed at firm biases. We also conjecture that instituting internal, external, or both types of teams to review policy, and focusing rewards on outcomes rather than outputs, can help ameliorate regulatory biases.

The Article proceeds as follows: Section II presents a simple model of regulation and explores the implications of bounded rationality in policy making. Section III considers how likely regulators are to suffer biases. Section IV suggests ways to design decision making structure to ameliorate these biases.

I. A FRAMEWORK OF REGULATORY ACTION

We begin by assuming that the regulator—the person who ultimately must approve a market intervention¹⁸—chooses a policy to maximize her utility.¹⁹ The regulatory receives utility from “doing the right thing,” which we assume consists of pursuing policies that, in the regulator's judgment, will maximize long-run consumer welfare. Being human, however, the regulator also receives utility from political rewards that accrue as a result of adopting policies that political overseers—e.g., committee chairs, the President—prefer. Political overseers want to maximize their chances of reelection, and they employ the carrots, e.g., larger budgets, and sticks, e.g., oversight hearings, at their disposal to get regulators to hew to their preferred policies. On occasion, these reelection-maximizing strategies may coincide with those that maximize consumer welfare. We assume, however, that political overseers will favor politically expedient policies that focus on the appearance of “action” to solve perceived problems.

The disconnect between welfare maximizing and politically popular policies arises for two principle reasons in our framework. First, their constituents may suffer from various biases that cause them to demand short-

¹⁸ Rachlinski & Farina, *supra* note 12 at 567-68, distinguish between career bureaucrats and agency heads in terms of expertise. We focus on agency leaders who must approve interventions.

¹⁹ For a more technical treatment, see James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications of Regulatory Behavior*, 41 J. REG. ECON. 41 (2012).

sighted policies. As Cass Sunstein has argued, for example, politicians exploit their constituents' availability bias to convince them that problems exist and then provide short-run solutions to these non-problems.²⁰ In this manner, the political overseers act as transparent middlemen, who convert boundedly rational constituents' preferences into policy demands. Second, as with any agent who produces hard-to-observe outputs for her principal, politicians will try to signal worth by maximizing observable action. One way to accomplish this is again to pursue policies that focus on resource use and "action"—e.g., increase in law enforcement actions or regulations promulgated—rather than on ultimate benefits for consumers.²¹

To create the impression of action, politically expedient policies typically focus on output or resource use, rather than outcomes. Such policies, for example, could include investigations of market manipulation, anti-price gouging laws, or price controls imposed in response to a surge in gasoline prices.²² Each of these policies allows the politician to appear to take action to counteract the high gasoline prices. The politician who embraces such measures increases the probability of reelection relative to a politician who took no action and tried to explain that retail gasoline prices were the function of supply and demand on world markets for crude oil and that regulatory measures to lower the price (e.g., a prohibition on price-gouging) likely will cause harm.

The regulator's optimal policy choice is a weighted average of the one she believes best for society's long-run interests and the one that garners the most political support for the political overseer, with the weights being exogenously determined based on the regulator's innate preferences for maximizing social welfare and receiving political rewards. Of course, as we discuss in detail below, the policy the regulator truly believes to maximize long-run welfare may also be flawed due to cognitive biases. In this manner, departures from the long-run efficiency benchmark may enter policy

²⁰ Jolls, Sunstein, and Thaler explain the creation of Superfund as an appeal to biased voters by "availability entrepreneurs." Jolls et al., *supra* note 11, at 1509-10. A more recent example consistent with politicians taking advantage of the "availability bias" includes the recent German decision to abandon nuclear power in the wake of the Japanese nuclear crisis. See Judy Dempsey, *Merkel Asks Lawmakers to Back Shift from Nuclear*, N. Y. TIMES, June 22, 2011, <http://www.nytimes.com/2011/06/10/world/europe/10iht-germany10.html>. Of course, this assumes that politicians are not themselves biased when estimating policies that will get them reelected. E.g., Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. ECON. LITERATURE 315 (2009) (arguing that politicians are likely to be rational and constituents are likely to be biased).

²¹ See, e.g., Anthony Pratt & Richard Zeckhauser, *Action Bias and Environmental Decisions*, 21 J. RISK & UNCERTAINTY 45 (2000). See also Michael Bar-Eli et al., *Action Bias Among Elite Soccer Goalkeepers: The Case of Penalty Kicks*, 28 J. ECON. PSYCHOLOGY 606 (2007) (finding evidence that although staying still is the optimal strategy for a soccer goalie facing a penalty kick, movement is the most observed action).

²² The capacity of these measures to induce regulators to act in a politically expedient matter is discussed in Timothy J. Muris & Bilal K. Sayyed, *The Long Shadow of Standard Oil: Policy, Petroleum, and Politics at the Federal Trade Commission*, 85 S. CAL. L. REV. 843, 902-14 (2012).

through two channels: indirectly via political overseers' preferences, and directly through a biased regulator's preferences.

A regulator will adopt the optimal policy choice if either she places no weight on political rewards or if the politician cannot translate constituency support into support (or punishment) for the regulator. On the other hand, the regulator who weighs political advancement heavily or is subject to a powerful political overseer will be more likely to choose the politically expedient policy. In what follows, we use this simple framework to examine how commonly cited biases might affect policy outcomes.

A. *Flawed Heuristics and Myopia*

Regulators, like consumers, are likely to use heuristics—or mental shortcuts—to estimate the optimal long-run policy choice. These shortcuts save time but may yield systematic decision making errors. Experimental research has documented the existence of several flawed heuristics, which are likely to bias regulators against accounting for long-run considerations when forming policy.²³

First, the “availability” heuristic leads people to overemphasize recent, particularly salient events when estimating the overall prevalence of those events. A person who recently saw a neighbor's house burn down, for example, is likely to overestimate the odds that his house will burn in the future. Second, the “representativeness” heuristic causes people to form unduly high estimates of posterior probabilities by ignoring low baseline probabilities and small sample sizes. The canonical example of this bias comes from an experiment in which Daniel Kahneman and Amos Tversky asked consumers whether it was more likely that a hypothetical woman was a bank teller or a feminist bank teller.²⁴ The former category contains the latter, but most subjects placed a higher probability on the latter category. Third, people suffering from hindsight bias tend to overestimate the *ex ante* probability of an event occurring, given that it has actually occurred. For example, a jury considering a negligence case may be too likely to find the defendant's actions were unreasonable *ex ante* knowing that an accident resulted. Finally, optimism bias causes individuals to underestimate their own probability of experiencing a bad outcome.

²³ See Christine Jolls, *Behavioral Law and Economics*, in BEHAVIORAL ECONOMICS & ITS APPLICATIONS 115 (Peter A. Diamond & Hannu Vartiainen eds., 2007); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1084 (2000).

²⁴ Daniel Kahneman & Amos Tversky, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

Apart from flawed estimation strategies for unlikely events, regulators also may suffer from myopia, which can arise due to cognitive inabilities to process life-cycle costs or self-control problems. Xavier Gabaix and David Laibson model myopic consumers who cannot understand a durable good's full life-cycle cost, and they find that even under competitive conditions, firms may lack incentives to educate myopic individuals and will offer low up-front pricing and supra-competitive aftermarket prices in equilibrium.²⁵ Rachlinski and Farina posit that myopia works not only in a temporal dimension but also across subject matters; when designing policies, experts may focus narrowly on their specific areas of responsibilities and ignore spillover effects.²⁶

In a similar vein, some have examined the inability of actors to bind themselves to take future action that maximizes long-run utility, as viewed from the initial period. Laibson develops a theory of time-inconsistent or hyperbolic discounting to explain why consumers consistently contribute less to their retirement accounts than a rational actor model would predict.²⁷ Professors DellaVigna and Malmender present a formal model in which agents plagued by hyperbolic discounting make multi-period decisions and derive an equilibrium in which firms may be able to take advantage of consumers who underestimate their future will power.²⁸ They find support for their model in observed contracts and consumer behavior in the credit and health club markets.

Together, myopic regulators who use flawed heuristics are likely to make imprecise estimates of the optimal policy choice, which they use to form policy. In what follows, we assume that these biases are likely to lead the regulator to favor policies that focus excessively on short-run considerations. Although we recognize that this assumption risks converting our model into a tautology, we argue that this assumption is grounded in reality and more plausible than the alternative that biases lead regulators to focus more sharply on optimal long-run policies.

Jolls, Sunstein, and Thaler, for example, argue that the availability bias gives rise to the "pollutant of the month syndrome," which leads regulators to pursue overly stringent environmental regulation based on highly publicized events.²⁹ Further, representativeness bias may cause a competition authority to ignore the prevalence of a business practice (e.g., exclusive dealing) in competitive industries—and the low prior odds that markets are uncompetitive—when that authority attempts to judge the probability that

²⁵ Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505, 531-32 (2006).

²⁶ Rachlinski & Farina, *supra* note 12 at 571-82.

²⁷ David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. ECON. 443 (1997).

²⁸ Stefano DellaVigna & Ulrike Malmendier, *Contract Design and Self Control: Theory and Evidence*, 119 Q. J. ECON. 353 (2004).

²⁹ Jolls et al., *supra* note 11, at 1518.

this practice will reduce a market's competitiveness. Similarly, in the context of the quasi-negligence determinations involved in certain consumer protection violations, hindsight bias is likely to cause an agency to look more skeptically on practices that led to harm *ex post*. Finally, optimism bias may cause regulators to hold an unduly optimistic view of the likely success of a policy choice. More generally, to the extent that regulators are better characterized as "lay" rather than "expert" decisions-makers, Rachlinski and Farina's warning that representativeness, availability bias, and loss aversions likely will cause Congress to focus on the wrong problems and the wrong set of solutions, which is also applicable to regulators.³⁰

Because the effects of bounded rationality and a taste for political rewards work in the same direction, it may difficult, if not impossible, to identify these effects separately.³¹ Even an unbiased regulator has an incentive to choose populist policies due to the political rewards that come from instant action, especially with limited time horizons. Of course, biases will exacerbate any pre-existing tendency towards populist policies.

B. *Status Quo Bias*³²

Various cognitive errors together tend irrationally to wed people to the status quo. First, due to what is known as the "endowment effect," experimental subjects seem to require more compensation to part with an endowment than they are willing to pay to gain it.³³ Korobkin and Ulen observe that the willingness-to-accept (WTA)/willingness-to-pay (WTP) gap suggests that people are more averse to losing what they already possess than rational choice theory predicts.³⁴ Second, loss aversion suggests that how decisions are framed matters because people place a higher negative value on expected losses than on expected gains of equivalent value. Relatedly, the omission/commission bias leads subjects to be more concerned with errors associated with action than inaction. Together, these cognitive shortcomings create inertia to maintain a current course of action rather than to take new action that would increase expected utility. Concern about this bias has inspired vigorous debate on proper default rules for consumer choices involving retirement plans, insurance coverage, and privacy poli-

³⁰ Rachlinski & Farina, *supra* note 12, at 562. These scholars also contend that specialization from committees and learning from incumbency may ameliorate the effects of these biases.

³¹ This result flows directly from our assumption that biases tend to focus regulators on short-term, rather than long-term, solutions.

³² See generally, Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL'Y 25, 26-30 (2006).

³³ Korobkin & Ulen, *supra* note 23, at 1107-08.

³⁴ *Id.*

cies, and has raised questions about the efficiency of Coasian solutions to property rights issues.³⁵

Following this argument, the class of cognitive shortcomings that make regulators reluctant to alter the status quo will tend to make policies “sticky” around initial policies. The direction in which the status quo bias will steer policy is indeterminate theoretically, and will depend on the initial policy endowment and the direction of the changes. From this stickiness emerges a path dependency in policy choice, where policies adopted in the past have a lingering impact on future policy adoption.

C. *Confirmation Bias*

A large body of experimental research suggests that individuals tend to become irrationally wedded to their early impressions about an initially ambiguous situation.³⁶ This bias comes about either because subjects ignore all new evidence once they have made up their minds, or because they erroneously interpret evidence contradicting their beliefs as supporting their beliefs. Like the status quo bias described above in Section B, confirmation bias can entrench a regulator’s existing policies regardless of changes in the state of the art of theory or empirical knowledge that ought to compel individuals to rethink their positions.

In regulatory settings, confirmation bias leads to overconfidence in one’s estimates of optimal policy. At the micro level, regulators may misread or ignore evidence that conflicts with the theory of a case or policy initiative. For example, a team challenging a merger as likely to harm competition may tend to interpret documents from the merging parties that objectively tend to cast the merger in a competitive light as either neutral or supportive of their case. Several experimental studies find that litigants tend to interpret ambiguous evidence as supporting their view of the case.³⁷ This leads to the counterintuitive finding that greater information revelation can actually reduce the possibility of settlement.

At the macro level, the regulator may misread evidence to confirm priors regarding larger policy choices, such as adopting an interventionist or laissez-faire attitude toward certain business practices. The FTC’s treatment of non-price vertical restraints in the 1960s and 1970s illustrates how confirmation bias can make enforcement policy unresponsive to changes in

³⁵ See, e.g., Korobkin & Ulen, *supra* note 23, at 1109-11; Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetric Paternalism’*, 151 U. PA. L. REV. 1211, 1226-30 (2003).

³⁶ Several researchers have documented this bias in experimental settings involving litigants. See, e.g., Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337 (1995); George Lowenstein & Don A. Moore, *When Ignorance Is Bliss: Information Exchange and Inefficiency in Bargaining*, 33 J. OF LEGAL STUD. 37 (2004).

³⁷ Jolls, *supra* note 23.

the understanding of economics. In the 1960s, the litigation programs of the DOJ and the FTC succeeded in establishing strict prohibitions against non-price vertical restraints.³⁸ Through the mid-1970s, the prosecution of non-price vertical restraints remained a core element of FTC enforcement practice.³⁹ The Commission's active pursuit of these matters took place despite the emergence of a body of economic literature that relied on transaction costs considerations to suggest a more tolerant treatment of vertical non-price restrictions.⁴⁰ Only after the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*⁴¹—which overruled *Schwinn* and held that the rule of reason would govern non-price vertical restraints—did the FTC rethink its vertical restraints enforcement program. The exogenous shock of a judicial decision in a private antitrust case—not an internal reassessment inspired by the application of the Commission's economic analysis capability—caused a change in enforcement policy.⁴²

Regulators with incorrect priors cause more harm than their counterparts who are irrationally wedded to the correct decision. For example, assume that the correct prior for vertical restraints is a laissez-faire posture.⁴³ A regulator with strong priors that vertical restraints are anticompetitive is likely to misinterpret evidence to confirm this belief, leading to welfare-reducing interventions. On the other hand, a regulator with correct priors may be too pessimistic about the odds that a given vertical practice is anticompetitive, but nonetheless will make the correct policy choice. Given a distribution of policy decisions, at the margin, a regulator with such a bias will bring too few vertical cases, but because her bias is toward the correct

³⁸ See *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (holding that the per se rule of illegality applies to vertical restraints that assign exclusive territories to distributors); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966) (applying Section 5 of the FTC Act to condemn an exclusive dealing arrangement that yielded a vertical foreclosure of less than one percent). In this period, Donald Turner, the Assistant Attorney General for Antitrust, said he approached vertical "territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law." Donald F. Turner, *Some Reflections on Antitrust*, in 1966 *N.Y. State Bar Association Antitrust Law Symposium* 1, 1-2 (1966).

³⁹ See, e.g., *Coca-Cola Co.*, 91 F.T.C. 517 (1978) (condemning use of exclusive territories in the soft drink bottling industry), remanded for dismissal, 642 F.2d 1387 (D.C. Cir. 1981).

⁴⁰ These developments are summarized in Oliver E. Williamson, *Transaction Cost Economics*, 1 HANDBOOK OF INDUS. ORG. 136 (Richard Schmalensee & Robert D. Willig eds., 1989).

⁴¹ 433 U.S. 36 (1977).

⁴² Some evidence suggests that the DOJ responded more quickly to the changing consensus in the economic literature and took steps before the *Sylvania* decision to allocate fewer resources to prosecuting non-price vertical restraints cases. During Kauper's tenure as Assistant Attorney General from 1974 to 1976, the Antitrust Division believed the per se prohibition of *Schwinn* "made no economic sense" and curtailed its challenges to non-price vertical restraints. See Thomas E. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 99 (1990).

⁴³ In a Bayesian framework, this would mean that the ratio of the probability that a given vertical restraint harms competition to the probability that it benefits competition (or is benign) is less than one.

decision, overconfidence will have a smaller effect on the efficacy of ultimate policy choices.

If a regulator begins with a truly blank slate, the first piece of information she receives about a matter will shape her bias in the interpretation of future evidence. Thus, theoretically, there is no way to identify the direction of the bias. In practice, however, the first piece of information a regulator is likely to see is some form of evidence supporting action (e.g., initiating an investigation or issuing a proposed rule); agency decision makers are likely to learn of a policy issue only when staff or a political overseer calls for intervention. For example, an antitrust decision maker often learns for the first time of a possible anticompetitive merger or business practice when she reads a staff memorandum that seeks compulsory process to investigate the matter. By their nature, these memoranda present a case for investigation. The investigation targets, however, are unlikely to present their views to the decision maker until much later in the process. Similarly, the first piece of evidence can come from political overseers calling for an investigation into a practice, again leaving the target no opportunity to counter the charges until much later in the process. If these requests for action become the anchoring point from which the regulator interprets subsequent evidence to estimate the optimal policy, this will lead to an intervention bias, even where the regulator places a large weight on long-run welfare.

The possibilities identified above help explain a trend we observed during our time at the FTC in the behavior of firms subject to the agency's antitrust or consumer protection authority. We noticed an increasing tendency of firms to meet individually with members of the Commission and provide briefings outside the context of a pending FTC investigation or other law enforcement proceeding. With greater frequency, firms would arrange visits to discuss important commercial developments (such as the introduction of new products or services) or to provide what amounted to tutorials about their operations. These can be interpreted as efforts to frame the thinking of the Commission or to counteract the bias that might be developing within the agency that would favor intervention. If a firm waits until after formal proceedings are initiated, it may be too late to alter a pro-intervention perspective. Our impression from these experiences is that the practice of lobbying and government relations involves a heavier emphasis on what might be called precautionary de-biasing advocacy before federal regulatory authorities. Again, this is consistent with the intuition that firms see such activity as an antidote to possible internal agency biases that press in the direction of intervention.

In practice, we doubt that a regulator begins with a truly blank slate. More realistically, regulators come to decisions with priors, or a "mental model" of how the world works. This model likely correlates with political

beliefs, education, and experience.⁴⁴ Like the Bayesian “blank slate” updating framework, the regulator screens out or discounts information that does not conform to her pre-existing worldview due to a desire to achieve policy outcomes that conform to her model. The key difference is that the regulator does not begin as an empty vessel when faced with each policy choice, but rather evaluates even the first piece of information with potential bias. Thus, an antitrust regulator who views markets as generally self-correcting is less likely to find evidence sufficient to support intervention than a counterpart who is skeptical of business practices. Unlike the “blank slate” model, even if the first piece of information is a call for action from staff or a political overseer, the skeptical regulator will not process future information to confirm the call for action, but rather through his existing framework. Consequently, the regulator skeptical of the efficacy of intervention will require more “pro-intervention” information to arrive at a decision to intervene than a regulator operating with a truly blank slate.

Publicly stated positions also can anchor policy. Once a regulator takes a position on a particular policy, she will want to filter future matters in a way that supports her initial wisdom. These public pronouncements will represent the regulator’s true belief of the optimal policy blended with the influence of political patrons—for example, promises made during confirmation hearings to assure support. In this way, the policy underlying the initial public announcement is not itself biased. Future policy decisions, however, are, to the extent that future estimates of optimal long-run policy are the product of confirmation bias anchored on the policy initially announced. As with loss aversion, this type of anchoring can lead to path dependency in regulatory policy adoption.

Finally, confirmation bias also can reinforce preferences for short-sighted decisions that derive from the flawed heuristics and myopia introduced in Section A. For example, as discussed above, a myopic regulator is more likely than a rational regulator to invest sub-optimally in policy development. This decision will form the regulator’s priors, and non-conforming subsequent evidence will have a minimal effect on changing the regulator’s view of the world. In this manner, myopia and confirmation bias can reinforce one another. For a boundedly rational regulator affected by confirmation bias, the decision to initiate litigation or rulemaking due to insufficient consideration of long term costs and benefits will shape the interpretation of subsequent information in a manner that tends to cast the decision in a favorable light.

⁴⁴ Yoram Wind & Colin Crook, *From Mental Models to Transformation: Overcoming Inhibitors to Change*, ROTMAN MAG., Spring 2009.

II. WILL REGULATORS SUFFER FROM BIASES IN THE LONG RUN?

A threshold question, which we have yet to address, is to what extent are regulators actually likely to suffer from these biases? On one hand, if regulatory institutions operate like firms, there are reasons to believe that regulators mostly may escape the cognitive problems that plague consumer decision making. The consensus within BE scholarship, for example, appears to be that firms are unlikely to make systematically biased decisions in the long run. DellaVigna explains how consumers and firms differ:

Experience is the key difference. Unlike individual consumers, firms can specialize, hire consultants, and obtain feedback from large data sets and capital markets. . . . Compared to consumers, therefore, firms are less likely to be affected by biases (except for principal-agent problems), and we expect them to be close to profit maximization.⁴⁵

Recent evidence also suggests that consumers who initially display biases can learn to overcome them with marketplace experience.⁴⁶ Is it reasonable to assume that because regulators often are “experts” and repeatedly face similar problems they will be able to make unbiased policy decisions? Even if agency heads who make decisions are political appointees and not true field experts, agency career staff can provide expertise and experience.⁴⁷

The analogy between firms and regulatory institutions extends only so far; the feedback mechanism that facilitates learning differs significantly between firms and regulators. Unlike the marketplace, which quickly gives firms feedback in the form of prices, profits, and output, the link between policy decisions and outcomes is more attenuated. For example, accurate measurement of a policy’s welfare effects is difficult and somewhat rare. Even when effects are determined, the lag from policy choice to policy execution can be long; cases and rulemaking can take several years from their initiation through final appeals in the courts. As the link between a decision and feedback weakens, the ability to learn diminishes.

Another consideration is that the cost to the regulator of policy mistakes is low compared to those of a firm. Generally speaking, a company that systematically errs is more likely to exit than a regulatory body that continually adopts welfare-reducing policies. The head of such an agency may continue to enjoy rewards as long as she increases outputs on margins that political overseers care about—action that maximizes the probability of

⁴⁵ DellaVigna, *supra* note 20, at 361.

⁴⁶ John List finds evidence that the endowment effect fades as agents become more experienced traders. John A. List, *Neoclassical Theory Versus Prospect Theory: Evidence from the Marketplace*, 72 *ECONOMETRICA* 615 (2004); John A. List, *Does Market Experience Eliminate Market Anomalies?*, 118 *Q. J. OF ECON.* 41 (2003).

⁴⁷ Rachlinski & Farina, *supra* note 12, at 579.

reelection. When competition among regulatory bodies occurs, it is likely to assume that they compete on the form of activities (e.g., protection of jurisdictional boundaries, the output of observable policy interventions) that have no necessary correlation with positive welfare outcomes.

The weak connection between welfare and regulatory rewards can yield a cadre of regulators who are biased toward short-run politically expedient policies. The regulator with a weak preference for maximizing long-term social welfare will tend to enjoy policy rewards. The regulator with a strong preference for maximizing long-term social welfare but who suffers from myopia or confirmation bias, however, may accidentally receive more support than an unbiased regulator with a similar taste for long-run welfare maximization. A biased regulator who sees herself as independent from political control, for example, may nonetheless bring a large number of headline-grabbing, but welfare-reducing, cases. Although viewed as welfare-maximizing policy by the regulator, an objective observer would see these as politically expedient policies, which please the political overseer. Thus, regulators with short-term biases—both due to high political weighting and bias—are likely to be over represented in the population of regulators.

In sum, it appears that the regulatory feedback structure makes it unlikely that regulators will learn to overcome their biases. This distinction between regulatory and market feedback cannot be overstated: marketplace performance is a direct measurement of consumer benefit from actions, whereas regulatory outputs have no necessary relationship to consumer welfare. Even if rewards were tied more closely with outcomes, the time lags and measurement problems discussed above make it difficult to link clear regulatory failures to specific regulators, especially given their short tenures.

These observations warrant caution in assuming the efficacy of intervention to correct perceived firm biases. For example, Professors Stucke and Tor argue that because firms may overestimate their chances of successful entry into a market, antitrust authorities should place less confidence on entry as a means to ameliorate potential anticompetitive effects.⁴⁸ Tor and Rinner suggest that the rule of reason be applied more stringently to minimum resale price maintenance agreements to account for the possibility that biases lead firms to overestimate the profit-reducing effects of price competition.⁴⁹ These normative prescriptions for enhanced intervention implicitly assume that the decisions of regulators to intervene will not themselves stem from biases. When these biases guide policy choices, it is not evident that regulators will be able to intervene successfully to “correct” firms’ entry and vertical contracting decisions. Comparing the limitations

⁴⁸ Stucke, *supra* note 9; Tor, *supra* note 9.

⁴⁹ Tor & Rinner, *supra* note 9.

of private and public decision making, market feedback is more likely to be effective in correcting biases than regulatory feedback.

The role of markets in correcting firm biases also suggests an important role for antitrust enforcement. Although regulatory biases have the potential to exacerbate already-existing tendencies for antitrust authorities to intervene in markets too often, a competitive market is a necessary condition for firms to correct their biases. If firms are to learn from the market, mistakes need to be costly. A rational firm generally will earn higher profits than a biased firm, conditional on the competitiveness of the market in which it operates.⁵⁰ However, the feedback from poor decisions—and hence the incentive to correct biases—is stronger for a biased firm operating in a competitive market than one facing little competition. In this manner, sound competition enforcement directly ameliorates welfare losses from the illegal exercise of market power and indirectly may improve market performance in the spirit of Hayek by enhancing the information flows that firms need to identify and correct biases.

How often biases survive is a function of the costs of being wrong. When it is difficult to detect wrong decisions and the costs of being wrong are small, there is little incentive to invest in correcting biases. In the next section, we discuss how improved accountability—linking outcomes to rewards—can help ameliorate this problem.

III. POSSIBLE CORRECTING MECHANISMS

As shown in Section II, not all biases predict the same policy drift; some tend to temper others. For example, availability, representativeness, optimism, and myopia probably push regulators to adopt more politically expedient policies. Although we posit that information coming to regulators is likely to take the form of calls for intervention, the effect of confirmation bias is uncertain, depending on the regulators' priors, and the order and relative veracity of information flows. Finally, the status quo bias can tend to stabilize policies around a focal point, but there is no *a priori* means to determine whether a policy is stuck closer to a long-run optimal policy or to a politically expedient one.

For example, imagine a regulator who suffers from all the biases we have cataloged and inherits an agency with a relatively interventionist policy stance. Assume also that her priors are weighted toward long-run welfare maximizing policies. The biases of availability, representativeness, myopia, and overconfidence could pull the regulator's estimate of the optimal policy closer to the political overseers' preferred position. Given her

⁵⁰ Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Terms: A Primer*, 6 COMPETITION POL'Y INT'L 3 (2010) (describing instances where "irrational" firms may earn higher profits than rational ones).

priors, however, the regulator would tend to overly discount calls from staff and political overseers calling for intervention, and to misinterpret evidence that supports intervention as evidence in favor of non-intervention. At the same time, because the status quo is assumed to be one of relative intervention, she may hesitate to disturb the agency's current posture.

The point is that we cannot predict how a boundedly rational regulator suffering from a collection of biases will act. We can say that her actions will have no systematic correlation with optimal long-run policy; if they happen to mesh, it is due only to chance. Accordingly, if there is value to predictable policy, the elimination of regulatory bias is desirable. This section explores the potential of two strategies for ameliorating the harm associated with these biases: insulation and de-biasing.

A. *Insulation*

Insulation involves a "choice architect" eliminating (or making more difficult to choose) poor alternatives (e.g., smoking, fatty foods, payday borrowing, etc.) from the choice set, thereby protecting the biased decision maker from bad decisions. Much BE literature advocates this type of paternalistic solution in the context of flawed consumer decision making. It is unclear how insulation would work to eliminate regulatory bias.

In practice, legislatures and courts limit regulatory discretion. For example, legislation directing agency action (e.g., rulemaking or law enforcement) defines the scope—sometimes narrowly—of the agency's authority to act. Some have written on the need for legislatures to implement *ex ante* statutory constraints to curb *ex post* opportunism by regulators.⁵¹ Courts also police agencies to assure fealty to congressional intent, the Administrative Procedure Act, and constitutional strictures. In theory, legislatures and courts could use the same tools to eliminate poor choices from the regulator's set. To the extent that insulation strategies bind regulators to certain future actions to maximize welfare, they avoid suffering the "consumer sovereignty" issues that plague choice architecture directed at myopic consumers.

To employ these *ex ante* and *ex post* restraints to insulate agencies from poor regulatory choices, one must establish objectively "correct"

⁵¹ Two scholars note:

Since it is well known that regulatory authorities cannot be forced into welfare-maximising behavior, the question arises whether opportunistic behaviour can be excluded by the design and implementation of adequate hostages. . . . Regulatory authorities as part of the bureaucracy cannot be fined for inadequate behavior. As a consequence, it is only by means of a statutory constraint that opportunist behaviour by the regulatory authority can be disciplined.

Gunter Kneips & Hans-Jorg Weib, Reduction of Regulatory Risk: A Network Economic Approach, 6-7 (Institute für Verkehrswissenschaft und Regionalpolitik: Discussion Paper No. 117, 2007), available at <http://www.vwl.uni-freiburg.de/fakultaet/vw/publikationen/diskussionspapiere/Disk117.pdf>.

choices. To do so requires an unbiased choice architect. For the reasons detailed in Section II, there is no reason to believe that legislatures could systematically identify and limit poor choices from the regulator's set. Instead, they are likely to encourage them. The *seriatim* nature of judicial decision making, focused on particular parties and unique facts, is likely to diminish a court's ability to escape cognitive bias through learning, particularly when dealing with complex regulations.⁵² Because courts stake out positions in their published decisions, they may be especially susceptible to confirmation bias anchored on their previous rulings.

Even if one could find an unbiased architect, the informational demands to establish the optimal future regulatory choice set may be insurmountable. Deciding to block or restrict certain regulatory paths is a far more complex task than placing the fruit in front of the fries in the cafeteria. Any insulation strategy involving *ex post* review by courts almost necessarily would engage judges in ranking regulatory choices based on normative criteria. This contradicts established legal doctrines that direct courts to focus on agency adherence to procedural mandates, as well as constitutional and legislative restraints, rather than assess the wisdom of regulatory policy choices.⁵³

B. *De-biasing*

A second way to limit the impact of regulatory bias is to take steps to enable boundedly rational agents to make decisions as rational agents. De-biasing can include the complete elimination of biases or measures that lead naive regulators—i.e., those who are unaware of their biases—to account for their biases when making choices. For example, Jolls notes that in some experiments, showing jurors pictures of Tiger Woods before deliberation may act to eliminate unconscious racial bias.⁵⁴ Similarly, taking advantage of the availability heuristic by publicizing the most severe adverse effects associated with smoking may help counteract the over-optimism bias in smoking decisions. Below, we examine two de-biasing strategies in the regulatory context: routine adversarial review of policies, and making regulators more accountable for outcomes.

⁵² Farina & Rachlinski, *supra* note 12, at 578.

⁵³ See *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Olsen v. Nebraska*, 313 U.S. 236, 243 (1941); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502, 537-38 (1934).

⁵⁴ Jolls, *supra* note 23, at 138.

1. Adversarial Review

As explained above, regulatory institutions are unlikely to feature competition that corrects biases. One way to generate needed feedback is to establish an internal adversarial process; a serious internal critique of regulatory proposals can help punish irrational policy choices before they take effect, to some extent replicating the negative feedback the marketplace provides firms that act irrationally. Professors Jolls and Sunstein discuss research suggesting that outside directors on corporate boards help to ameliorate overly optimistic inside directors.⁵⁵ Some studies show that litigants who are forced to consider a case from their adversaries' perspectives are less likely to suffer from undue optimism or confirmation bias.⁵⁶

An agency could implement this "B-Team" approach by assigning staff members to act as defense counsel in a proposed case. This approach would provide an alternative narrative to explain documentary and statistical evidence. The adversary team may be biased as well, but anchoring would be in the opposite direction, forcing the two biases to compete. The B-Team could provide internal memoranda mustering the best arguments against the case contemporaneously with the staff's recommendation. In some instances, the two internal teams could take part in a mock trial. A complementary method, used by the FTC, is to have the Bureau of Economics provide a recommendation separate from the attorney case handlers.⁵⁷ The welfare-centered approach of economics provides a distinct perspective from those of attorneys who have investigated a case or researched a proposed rule often from a legal perspective. This would explain why a growing number of competition agencies have given economists greater autonomy to make recommendations directly to top agency leadership. By contrast, making economists subordinate to the lawyers in charge of cases or rulemaking mutes the de-biasing effect.

Ex ante review by external parties also may help to counteract biases in regulatory decision making. The Office of Management and Budget must approve proposed rules and certain research projects before an agency can proceed, although it does not apply to cases.⁵⁸ *Ex ante* peer review by a panel of experts, as now used in scientific policy making, could also be imported to the competition policy arena. Some statutes that require agency

⁵⁵ Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUDIES 199, 217 (2006).

⁵⁶ Jolls, *supra* note 23, at 137-38.

⁵⁷ Luke M. Froeb et al., *Economics at the FTC: Cases and Research, with Focus on Petroleum*, 27 REV. OF INDUS. ORG. 227 (2005).

⁵⁸ Rachlinski & Farina, *supra* note 12, at 597-98, criticize OMB review as merely a means to assure conformity with the President's political agenda, rather than to satisfy objective welfare criteria.

reports compel the agencies to consult with various other regulatory entities that are likely to have expertise in the subject area.⁵⁹

In rulemaking, *ex post* review by courts may force agencies to engage in this type of de-biasing. Established legal doctrines require agencies to open their decision making process to public participation, which acts to solicit multiple opposing viewpoints for most proposed regulations. Agencies also must show that they considered the record established during the rulemaking and articulate a plausible nexus between the rule ultimately adopted and the record evidence.⁶⁰ As Rachlinski and Farina explain, “[h]aving to assess the force of criticisms coming from a variety of perspectives, and craft a persuasive response to those criticisms that are (or may be viewed by a reviewing court as) significant, helps an agency to step outside of the decision making process.”⁶¹ This *ex post* review, however, does not apply to internal decisions to engage in law enforcement or less formal policy initiatives.

Altering the decision making structure also may ameliorate biases. Some evidence involving corporate governance suggests that multimember boards with heterogeneous priors will act more rationally than a unitary decision maker.⁶² Public agencies with bipartisan boards (e.g., the FTC) may be less susceptible to biases than executive branch agencies with one decision maker.

2. Greater Accountability: Focus on Outcomes Rather Than Outputs

The moral hazard that exists with respect to regulatory decision making serves to maintain biases. Creating an institutional framework that makes regulators more accountable for the welfare effects of their policies may help provide the feedback needed to correct or ameliorate biases.⁶³ As noted earlier, creating this framework is easier said than done. Measuring the welfare effects of a policy is a daunting task. Nonetheless, if agencies devoted additional resources to perform *ex post* evaluations of interventions, with budgets and other rewards (e.g., fewer hearings, good publicity) tied more closely to these results rather than outputs, regulators might internalize more of the costs associated with their biases rather than merely imposing them upon consumers. As a complement to this policy, longer ten-

⁵⁹ See, e.g., Postal Accountability and Enhancement Act § 703, 39 U.S.C. § 3633 (requiring the FTC to consult with GAO, the USPS, and the Treasury Department for its report).

⁶⁰ See, e.g., *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (internal citations omitted).

⁶¹ Rachlinski & Farina, *supra* note 12, at 588-89.

⁶² Any gains from de-biasing must be weighed against the decision making costs associated with a multi-member decision making processes.

⁶³ See William E. Kovacic, *Using Ex Post Evaluation to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006).

ures for regulators would make it difficult for them to obfuscate their connection with a failed policy.

A focus on outcomes also can act as a commitment device to mitigate the effects of myopia. Consider a regulator who in period one has a choice between announcing a case and initiating a rulemaking prematurely. The publicity surrounding the announcement and the impression that “something is being done” garners the regulator immediate political benefits. Because action is taken prematurely, however, it will provide diminished benefits to consumers in period two. Alternatively, if the regulator waits until period two to make a decision on the policy—thus allowing more time for research, discovery, etc.—the decision will create greater consumer benefits in period two.⁶⁴ Thus, if the regulator chooses to consume greater political benefits in period one, she will cause consumers to suffer harm in period two. We assume immediate action is more likely to garner political support.

As suggested by DellaVigna and Malmendier, suppose that the regulator has a time-inconsistent, quasi-hyperbolic discount rate.⁶⁵ Hyperbolic discounting can lead to time-inconsistent decisions in which the regulator at time zero does not want to see the case commence in period one, but changes her mind when period one arrives because the immediate benefits are now more attractive due to a more heavily discounted period two cost.

If the regulator were to have a time-consistent discount rate, the appropriate rule for commencing action in period one would be the same as the rule for the hyperbolic-discounting regulator at time zero. As expected, with or without hyperbolic discounting, probability of bringing the case prematurely is a positive function of the political benefit from current action and the relative weight that the regulator places on political rewards versus social welfare. Hyperbolic discounting, however, implies both a greater propensity for time inconsistency as well as increased incentives to commence the case prematurely relative to an unbiased regulator.

A framework that ties rewards to outcomes, rather than outputs, would act to provide internal disutility and would reduce future rewards. In theory, the regulator would act as if she were completely de-biased. In this manner, a focus on outcomes in period two can help make the period zero regulator credibly commit to bringing a case only when long term social gains are maximized. Of course, this de-biasing strategy does not lead to optimal long-run policies—as long as the regulator values political rewards, she will always have some incentives to take premature action. Only strategies that also reduce political influence or increase tastes for long-run welfare can reduce the public choice influence on policy making.

⁶⁴ This decision may include taking no action.

⁶⁵ DellaVigna & Malmendier, *supra* note 28, at 318.

CONCLUSION

Much work in the nascent field of behavioral antitrust prescribes expanded use of competition law to correct consumer harm that arises from biased firm behavior. If regulators, who are human after all, suffer from the same biases, our analysis suggests a greater skepticism of these calls for increased intervention. Although regulators are likely to have an edge over consumers in terms of experience and expertise, it is not clear that they will be able to intervene in ways that systematically improve welfare. The model we present shows that political pressure will cause rational regulators to choose policies that are not optimal from a consumer standpoint, and that in a large number of circumstances regulatory bias will exacerbate this tendency.

We also suggest special caution when attempting to correct firm behavior, for regulatory bias appears likely more durable than firm bias because the market provides a much stronger feedback mechanism than exists in the regulatory environment. To the extent that we can de-bias regulators—either through a greater use of internal and external adversarial review or by making a closer nexus between outcomes and rewards—they will become more effective at welfare-enhancing interventions.

IS INTENT RELEVANT?

*Maurice E. Stucke**

INTRODUCTION

What are you looking for? The question helps define our moral and ethical purpose. The question also inquires about our intent. The law has long considered a person's intent for specific actions. According to Justice Jackson:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.¹

Besides criminal liability, courts consider one's intent in civil contexts, including business torts and unfair competition claims.² Even for various torts where the defendant's conduct is evaluated under an objective standard, intent can play a role.³ Thus, one would expect intent to be relevant in federal antitrust cases.

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¹ *Morrisette v. United States*, 342 U.S. 246, 250-51 (1952); *see also* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) ("We start with the familiar proposition that '[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951))); LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD LAWS* 206 (2011) ("Intent is so central to criminal liability that a person with bad intent can be sent to jail even if she harms no one.").

² *See, e.g.*, RESTATEMENT (THIRD) OF LAW: UNFAIR COMPETITION § 36, cmt. j (1995) ("defendant's intent is an important factor in determining the relief that is appropriate in both trademark infringement and deceptive marketing cases").

³ Even if intent is not relevant for one cause of action—e.g., a court's reluctance to find a general tort of intentional breach of contract—a defendant's subjective intent can subject him or her to another cause of action—e.g., the defendant's liability for misrepresentation when the defendant stated his or her present intent to carry out a future action and the defendant in reality had no such intent when making this representation. *Milwaukee Auction Galleries Ltd. v. Chalk*, 13 F.3d 1107, 1109 (7th Cir. 1994); RESTATEMENT (SECOND) OF TORTS § 530, cmt. d (1977) ("The intention that is necessary to make the

Intent is an element in certain antitrust related civil actions—for example, conspiracy to monopolize and attempt to monopolize—and in criminal antitrust prosecutions. But the role of intent in other civil antitrust cases has been characterized as “unsettled,”⁴ “under attack,”⁵ and “controversial.”⁶ Many lower courts,⁷ scholars,⁸ and practitioners⁹ recognize that in-

rule stated in this Section applicable is the intention of the promisor when the agreement was entered into.”).

⁴ David L. Meyer, *The FTC’s New “Rule of Reason”: Realcomp and the Expanding Scope of “Inherently Suspect” Analysis*, ANTITRUST, Spring 2010, at 47, 54.

⁵ Okeoghene Odudu, *The Role of Specific Intent in Section 1 of the Sherman Act: A Market Power Test?*, 25 WORLD COMPETITION 463, 463 (2002).

⁶ John E. Lopatka, *Assessing Microsoft From a Distance*, 75 ANTITRUST L.J. 811, 842 (2009); Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 745 (2001).

⁷ See, e.g., *JamSports & Entm’t, LLC v. Paradama Productions, Inc.*, 336 F. Supp. 2d 824, 842 (N.D. Ill. 2004) (“The Supreme Court has unambiguously stated that intent to monopolize is ‘relevant to the question of whether the challenged conduct is fairly characterized as “exclusionary” or “anticompetitive”—to use the words in the trial court’s instructions—or “predatory,” to use a word that scholars seem to favor.” (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985)); *LePage’s Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (adopting interpretation of *Microsoft* as “[c]onduct that intentionally, significantly, and without business justification excludes a potential competitor from outlets (even though not in the relevant market), where access to those outlets is a necessary though not sufficient condition to waging a challenge to a monopolist and fear of the challenge prompts the conduct, is ‘anticompetitive’” (quoting Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371, 390 (2002))); *United States v. Microsoft Corp.*, 253 F.3d 34, 77 (D.C. Cir. 2001) (“Microsoft’s internal documents and deposition testimony confirm both the anticompetitive effect and intent of its actions.”); *Image Technical Services, Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997) (“A plaintiff may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual.”); *United States v. Brown University*, 5 F.3d 658, 672 (3d Cir. 1993) (If the defendant’s action were “not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative’s practices, an inference of anticompetitive animus might be appropriate.”); *Safeway Inc. v. Abbott Labs*, C 07-05470 CW, 2010 WL 147988 (N.D. Cal. Jan. 12, 2010) (“Taken together, *Aspen Skiing* and *Verizon* demonstrate that liability under Section 2 can arise when a defendant voluntarily alters a course of dealing and ‘anticompetitive malice’ motivates the defendant’s conduct.”), motion to certify appeal denied, C 07-05470 CW, 2010 WL 2228546 (N.D. Cal. June 1, 2010); *United States v. Nat’l Ass’n. of Realtors*, 05 C 5140, 2006 WL 3434263 (N.D. Ill. Nov. 27, 2006) (Defendant’s initial policy “is relevant, at least for discovery purposes, because, for example, issues about the intent of the NAR in passing it will potentially help to illuminate Defendant’s intent generally as either benign or improper.”); 3A FED. JURY PRAC. & INSTR. § 150.31 (5th ed.) (“The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was willfully and intentionally acquired and maintained.”).

⁸ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 357 (1993) (“For antitrust cases, however, it is difficult to imagine a situation in which a specific intent to monopolize or restrain trade would not be an essential element of the case.”); Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. (forthcoming 2012), available at http://works.bepress.com/thomas_horton/2/; Thomas A. Piraino, Jr., *An Antitrust Common Law for the Twenty-First Century*, 2009 UTAH L. REV. 635, 641 (2009) (“[The] court should not hold a monopolist liable until after it has confirmed that the monopolist had an anticompetitive intent to engage in the

tent evidence is relevant in predicting consequences and interpreting facts. The Supreme Court has long recognized the relevance of the antitrust defendant's intent,¹⁰ which can be inferred from the defendant's anticompetitive conduct,¹¹ or lack of a valid non-pretextual justification.¹²

relevant conduct.”); Marina Lao, *Aspen Skiing and Trinko: Antitrust Intent and “Sacrifice,”* 73 ANTITRUST L.J. 171 (2005) [hereinafter Lao, *Aspen Ski*]; Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. U. L. REV. 151 (2004) [hereinafter Lao, *Reclaiming a Role*]; Thomas L. Greaney, *Chicago’s Procrustean Bed: Applying Antitrust Law in Health Care*, 71 ANTITRUST L.J. 857, 878-79 (2004) (“The case law’s devaluation of market participants’ perceptions reflects more than a knee-jerk reaction to opinion and intent evidence. In several ways it betrays the courts’ failure to grasp the underlying market conditions—particularly agency relationships—in which hospital services are purchased.”); Robert Pitofsky, *The Essential Facilities Doctrine Under United States Antitrust Law*, 708 PLI/Pat 775, 785 (2002) (finding it “unsurprising that anticompetitive animus is relevant to application of the essential facilities doctrine. Numerous United States courts have held that a refusal to deal coupled with an anticompetitive intent may support a finding of antitrust liability even absent proof that the withheld input constitutes an ‘essential facility.’”); Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 334-35 (2001); William S. Comanor & H.E. Frech III, *Predatory Pricing and the Meaning of Intent*, 38 ANTITRUST BULL. 293, 294 (1993) (arguing that “intent is a critical factor in distinguishing between competitive and predatory conduct”); Richard S. Wirtz, *Purpose and Effect in Sherman Act Conspiracies*, 57 WASH. L. REV. 1, 4 (1981) (“In section 1 cases, proof of a purpose to injure competition is relevant, but it is not essential: the Act condemns agreements that are unreasonably anticompetitive in *purpose or effect.*”) (emphasis in original); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373, 389 (1965) (“If trustworthy evidence indicates that the defendants’ primary expectation of gain lay in the elimination of competition, that should be a conclusive demonstration of the arrangement’s illegality.”); Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 48-53 (1953).

⁹ I ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 242 (6th ed. 2007) (“The intentions underlying the defendant’s conduct have long played an important role in Sherman 2 cases.”); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 6.4c (4th ed. 2011) (describing instances where intent evidence can and cannot be helpful); W. Michael Schuster, *Subjective Intent in the Determination of Antitrust Violations by Patent Holders*, 49 S. TEX. L. REV. 507, 526 (2007) (“A rule that takes into consideration an actor’s subjective intent is consistent with prior antitrust case law because there is a significant history in antitrust jurisprudence of the consideration of an actor’s subjective intent.”); Tyler A. Baker, *Lessons from Microsoft*, 2 SEDONA CONF. J. 41, 68 (2001) (noting that “without the extensive history of e-mails and memoranda detailing why Microsoft was taking the actions that it took, the conclusion that it had acted anticompetitively would have been far harder to sustain” and the trial court’s use of intent evidence was “consistent with established law that intent can inform other relevant facts.”).

¹⁰ See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *Chi. Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.”); *Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 375 (1927) (“‘Clearly,’ as was said by the Court of Appeals, ‘it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly.’”); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-226, n.59 (1940); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 798 (1946) (holding

that the “jury’s verdicts also found a power and intent on the part of the petitioners to exclude competition to a substantial extent in the tobacco industry”); *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 614 (1953) (“For purposes of § 1, ‘[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.” (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948))); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978) (holding that it is a “general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect”); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980) (holding that “in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect”) (emphasis in original); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 537 n.35 (1983) (holding that it is “well settled that a defendant’s specific intent may sometimes be relevant to the question whether a violation of law has been alleged”); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 103 (1984) (“A conclusion that a restraint of trade is unreasonable may be ‘based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 690 (1978))); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 297 n.7 (1985) (the defendant’s anticompetitive intent appropriately evaluated under the rule-of-reason analysis); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602, 610-11 (1985) (holding that in monopolization cases “evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as ‘exclusionary’ or ‘anticompetitive’[—]to use the words in the trial court’s instructions[—]or ‘predatory,’ to use a word that scholars seem to favor.”); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 450 n.1 (1986) (observing how a 1974 presentation by an official of defendant was “revealing as to the motives underlying the dentists’ resistance to the provision of x rays for use by insurers in making alternative benefits determinations”); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993) (noting that sales below cost and anticompetitive intent are elements of predatory pricing violation of Sherman Act, Clayton Act, and Robinson–Patman Act); cf. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 753-54 (1988) (Stevens, J., dissenting) (observing that “[p]roof of motivation is . . . commonplace in antitrust litigation”).

¹¹ *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 614 (1953) (holding that “the requisite intent is inferred whenever unlawful effects are found, . . . the contracts may yet be banned by § 1 if unreasonable restraint was either their object or effect”); *United States v. Paramount Pictures*, 334 U.S. 131, 173 (1948) (holding that “‘specific intent’ is not necessary to establish a ‘purpose or intent’ to create a monopoly but that the requisite ‘purpose or intent’ is present if monopoly results as a necessary consequence of what was done.” (quoting *United States v. Griffith*, 334 U.S. 100, 105 (1948))); *see also* *Cass & Hylton*, *supra* note 6, at 659 (proposing an objective specific-intent standard that asks “what state of mind can reasonably be attributed to the defendant in light of his actions.”).

¹² *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 484 (1992) (recognizing other reasons to question defendant’s “proffered motive of commitment to quality service” as pretextual); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 297 n.7 (1985) (responding to plaintiff’s claim that defendant’s justification was a pretext and its real motive was to place plaintiff at a competitive disadvantage, the Court observed that “[s]uch a motive might be more troubling” and noted that if defendant’s “action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative’s practices, an inference of anticompetitive animus might be appropriate.”).

Other practitioners,¹³ scholars,¹⁴ and courts,¹⁵ however, argue that intent evidence is irrelevant. For example, the Chicago School jurist Richard Posner said, “We attach rather little weight to internal company documents used to show anticompetitive intent, because, though they sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect.”¹⁶

¹³ See, e.g., R. Hewitt Pate, *Refusals to Deal and Intellectual Property Rights*, 10 GEO. MASON L. REV. 429, 439 (2002) (arguing an “insoluble ambiguity” exists “about anticompetitive intent”—“whether valid business reasons motivate a monopolist’s conduct is a question of fact, and is likely to confuse jurors and complicate litigation. In most cases, the intent to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.”).

¹⁴ PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 601, at 5 (2d ed. 2002); RICHARD A. POSNER, ANTITRUST LAW 214-15 (2d ed. 2001); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 53 (2007) (noting how the Harvard antitrust scholars “discouraged reliance on evidence of subjective intent in large part because consideration of intent evidence too often served to mislead juries”); Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 628 (2005) (arguing that “intent is not nominally an element of antitrust causes of action (except in attempt-to-monopolize cases arising under [S]ection 2 of the Sherman Act)” but noting that “[e]vidence of intent nevertheless plays an important and, again, misleading role in actual antitrust adjudication”); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 277, 327 (2001) (noting how “pre-Chicago antitrust cases tended to emphasize intent over structure and objective plausibility, and juries had a relatively broad role” whereas “[u]nder the post-Chicago regime the trend is in the reverse direction” and observing that when “the focus of the inquiry” is on an antitrust defendant’s intent a court “is almost always asking for trouble”); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 652 (1999) (“Focusing solely on effects is consistent with first principles of antitrust.”); Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and Future*, 75 CALIF. L. REV. 959, 963-65 (1987) (discussing jury-related problems associated with the use of intent evidence to evaluate conduct in monopolization cases); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 977 (1986) (“Objective indicators, not intent, are what matter.”) Louis B. Schwartz, *On the Use of Economics: A Review of the Antitrust Treatises*, 128 U. PA. L. REV. 244, 261-62 (1979) (commenting on Areeda and Turner’s case book, which has “little room for ‘subjective’ factors like exclusionary intent, since idiosyncratic evil inclination is as nothing compared to the omnipresent gravity-like force of profit maximization.”).

¹⁵ *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000) (declining to follow *Image Technical Services*’s holding that the factfinder must evaluate the patentee’s subjective motivation for refusing to sell or license its patented products for pretext); *Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 948 (9th Cir. 2000) (observing that while “smoking gun” evidence of an intent to restrain competition remains relevant to the court’s task of discerning the competitive consequences of a defendant’s actions, “ambiguous indications of intent do not help us ‘predict [the] consequences [of a defendant’s acts]’ and are therefore of no value to a court analyzing a restraint under the rule of reason, where the court’s ultimate role is to determine the net effects of those acts. Under such circumstances, we apply the rule of reason without engaging in the relatively fruitless inquiry into a defendant’s intent.”); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-03 (7th Cir. 1989); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379-80 (7th Cir. 1986); *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588, 595-96 (7th Cir. 1984).

¹⁶ *Gen. Leaseways*, 744 F.2d at 595-96.

The federal antitrust agencies generally believe that intent evidence is relevant. According to the agencies' Merger Guidelines:

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger.¹⁷

Likewise, in evaluating collaboration among competitors, the agencies consider intent evidence, which "may aid in evaluating market power, the likelihood of anticompetitive harm, and claimed procompetitive justifications where an agreement's effects are otherwise ambiguous."¹⁸

But the antitrust agencies at times are inconsistent. In 2002, in a public address, one Department of Justice (DOJ) official was skeptical about intent evidence:

In the United States, we believe that intent is an unreliable guide for deciding the lawfulness of single firm conduct, especially in the hands of a jury. . . . Under our law, if intent is relevant at all, it is to 'help us understand the likely effect of the monopolist's conduct.' Even here, we are cautious in how we use it because we know that intent evidence, especially in the hands of juries, is generally more likely to mislead than to illuminate.¹⁹

But that same year, in a significant antitrust trial, the DOJ emphasized intent evidence's probative value:

Although Dentsply's anticompetitive intent is strong corroborative evidence that its conduct is anticompetitive, Dentsply erroneously contends that the evidence is irrelevant. Dentsply ignores Supreme Court law that exclusionary intent is "relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" . . . Dentsply concedes that its intent behind Dealer Criterion 6 was to "block competitive distribution points," "not allow competition to achieve footholds in dealers," "tie-up dealers," and "not 'free up' key players." . . . Dentsply does not question the testimony of Trubyte's former Director of Sales and Marketing that the sole purpose of the policy was to exclude Dentsply's competitors from dealers, and ignores other evidence of its exclusionary

¹⁷ U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.2.1 (August 19, 2010) [hereinafter MERGER GUIDELINES].

¹⁸ FEDERAL TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 12 n.35 (Apr. 2000), <http://www.justice.gov/atr/public/guidelines/index.html>. Likewise, the European Commission assesses "whether or not an agreement has as its object the restriction of competition," based on "a number of factors," including evidence of the parties' subjective intent. Communication from the Commission, Notice Guidelines on the Application of Article 81(3) of the Treaty (2004/C 101/08) Official Journal of the European Union C 101/97, ¶ 22 (Apr. 27, 2004).

¹⁹ William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, What Is Competition?, Address Before the Seminar on Convergence; Sponsored by the Netherlands Ministry of Economic Affairs, The Hague, Netherlands (Oct. 28, 2002), http://www.justice.gov/atr/public/speeches/200440.htm#N_1_ (footnotes and citations omitted).

intent. . . . Such specific evidence of how Dentsply itself intended for its exclusive dealing to harm competition is far more probative than the general expressions of competitive bravado at issue in the cases Dentsply invokes.

Though a “bad” intent alone would not establish that conduct is anticompetitive where the conduct appears objectively incapable of harming competition, Dentsply’s intent underlying its exclusive dealing is strong evidence corroborating the other evidence of substantial anticompetitive effects.²⁰

The debate over intent evidence’s relevancy is a blessing and curse. The blessing is that one can find antitrust decisions or scholarship to admit, exclude, credit, or disregard intent evidence in civil antitrust litigation. The curse is that this ambiguity enables litigants to dispute the relevancy of intent evidence, its purpose, and the scope of discovery.

Jurists and scholars oriented by neo-classical economic theory have largely objected to admitting intent evidence in civil antitrust trials— “[f]rom an economic perspective, which focuses on effects, an emphasis on intent seems misplaced.”²¹ But economic theory has evolved since these criticisms were first made. Using recent developments in behavioral economics, this Article reexamines the relevancy of intent evidence in civil antitrust cases.

The analysis is organized around two issues: First, is intent legally relevant in civil antitrust cases? Second, if intent evidence is relevant, for what purpose? Intent evidence, as Part I of this Article concludes, is relevant. The behavioral economics experiments confirm, as Part II shows, what jurists and jurors have long accepted—intent matters. But, as Part III discusses, the developments of behavioral economics literature have two important implications. First, intent may be helpful in assessing the likely anticompetitive effects, but to a lesser extent than some courts and scholars assume. Second, intent evidence can be more important than courts may otherwise assume under neo-classical theory—people use intent when coding and punishing behavior as unfair, which in turn can promote a market economy and overall societal welfare.

²⁰ United States’ Reply to Dentsply International, Inc.’s Proposed Findings of Fact and Its Brief in Support, *United States v. Dentsply Int’l*, Civil Action No. 99-005 (SLR) (D. Del. filed Oct. 29, 2003), <http://www.justice.gov/atr/cases/f202000/202051.htm#2b3>. See *United States v. Dentsply Int’l*, 399 F.3d 181, 197 (3d Cir. 2005) (“The record amply supports the District Court’s conclusion that Dentsply’s alleged justification was pretextual and did not excuse its exclusionary practices.”).

²¹ Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in United States v. Microsoft*, 69 *GEO. WASH. L. REV.* 1042, 1092 (2001); see also Cass & Hylton, *supra* note 6, at 660.

I. IS INTENT EVIDENCE RELEVANT?

A. *Defining Intent*

As an initial matter, it is helpful to define intent. Intent is central in many civil and criminal actions, and the courts use different “formulae, if not scientific ones, for the instruction of juries around such terms as ‘felonious intent,’ ‘criminal intent,’ ‘malice aforethought,’ ‘guilty knowledge,’ ‘fraudulent intent,’ ‘wilfulness,’ ‘scienter,’ to denote guilty knowledge, or ‘mens rea,’ to signify an evil purpose or mental culpability.”²² Courts in antitrust cases construe intent as the awareness of “the natural and probable consequences of acts knowingly done or knowingly omitted”²³ as well as ill-will,²⁴ malice,²⁵ and improper motive.²⁶

²² *Morrisette v. United States*, 342 U.S. 246, 250-52 (1952).

²³ 3A KEVIN F. O’MALLEY, JAY E. GRENIG, HON. WILLIAM C. LEE, *FEDERAL JURY PRACTICE AND INSTRUCTIONS—CIVIL* § 150.63 (5th ed.).

²⁴ *See, e.g., James R. Snyder Co., Inc. v. Associated Gen. Contractors of Am., Detroit Chapter, Inc.*, 677 F.2d 1111, 1124 (6th Cir. 1982) (“[T]he evidence did not show any ill will on the part of the defendants, or any intent to drive plaintiffs out of business.”).

²⁵ *Safeway Inc. v. Abbott Labs*, C 07-05470 CW, 2010 WL 147988, at *6 (N.D. Cal. Jan. 12, 2010) (“Taken together, *Aspen Skiing* and *Verizon* demonstrate that liability under Section 2 can arise when a defendant voluntarily alters a course of dealing and ‘anticompetitive malice’ motivates the defendant’s conduct.”), motion to certify appeal denied, C 07-05470 CW, 2010 WL 2228546 (N.D. Cal. June 1, 2010).

²⁶ *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (“In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”) quoting *Colgate*, 250 U.S. at 307) (emphasis omitted); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 297 n.7 (1985) (recognizing that if the defendant’s motive in expelling the plaintiff from the co-op was to place the plaintiff at a competitive disadvantage, then such “a motive might be more troubling”); *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948) (“A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.”); *Smith v. N. Mich. Hosps., Inc.*, 703 F.2d 942, 956 (6th Cir. 1983) (“In the absence of legitimate explanation for conduct a fact finder may be warranted in drawing an inference that the anti-competitive conduct resulted from concerted activity and an improper motive.”); *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 400 (S.D.N.Y. July 18, 2011) (observing that when determining an antitrust injury, “the existence of an improper motive is a relevant consideration, but it ‘is not a panacea that will enable any complaint to withstand a motion to dismiss’”) quoting *Associated Gen.*, 459 U.S. at 537; *Balaklaw v. Lovell*, 14 F.3d 793, 797 n.9 (2d Cir. 1994)); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 401 (S.D.N.Y. 2001) (“The admitted, anticompetitive purpose of limiting brand competition among bank issuers raises serious antitrust and economic concerns.”), *modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff’d*, 344 F.3d 229 (2d Cir. 2003), *aff’d*, 344 F.3d 229 (2d Cir. 2003), *enforced*, 98 CIV. 7076 (BSJ), 2007 WL 1741885 (S.D.N.Y. June 15, 2007); *Ivision Int’l of P.R., Inc. v. Davila-Garcia*, 364 F. Supp. 2d 166, 171 (D.P.R. 2005) (“In their complaint, Plaintiffs allege that Defendants acted intentional-

One problem is that intent and motive have different meanings. Intent refers “to the state of mind with which the act is done or omitted” whereas motive “is what prompts a person to act, or fail to act.”²⁷ The Model Penal Code distinguishes among purposeful,²⁸ knowing,²⁹ and reckless³⁰ conduct.

Tort law also distinguishes between purpose/motive and intent/knowledge.³¹ To intentionally interfere with a contract between plaintiff and a third party, the defendant need only recognize that the contract’s breach is a “necessary consequence of his conduct rather than by his desire to bring it about.”³² The defendant may not seek to harm or have any ill will toward the plaintiff but nonetheless intend to interfere with the contract.³³ The defendant’s motive is relevant in assessing whether defendant’s intentional interference was improper.³⁴

For our purposes, intent relates to three concepts: (1) the actor’s motive for undertaking the action, (2) her awareness of undertaking the action, and (3) her awareness of the action’s natural and probable consequences.

B. *Sherman Act Provisions Are Silent on Intent*

The Sherman Act is silent on intent. It is also silent on the types of conduct that violate § 1 and § 2. Unlike most traditional criminal statutes, the Sherman Act “does not, in clear and categorical terms, precisely identify the conduct [that] it proscribes.”³⁵ Section 1 of the Sherman Act applies

ly, with malice, and for an anti-competitive purpose, all of which suffice to demonstrate an improper motive for Defendants’ actions.”)

²⁷ BLACK’S LAW DICTIONARY 810 (6th ed. 1990).

²⁸ MODEL PENAL CODE § 2.02(2)(a) (“A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.”).

²⁹ *Id.* at § 2.02(2)(b) (“A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.”).

³⁰ *Id.* at § 2.02(2)(c) (“A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”).

³¹ RESTATEMENT (SECOND) OF TORTS § 8A (1965).

³² RESTATEMENT (SECOND) OF TORTS § 767 cmt. d. (1979).

³³ *Id.*

³⁴ *Id.*

³⁵ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

to contracts, combinations, or conspiracies in restraint of trade.³⁶ Since most contracts restrain trade, the Court was concerned that § 1, if applied literally, could prohibit nearly every contractual transaction. Therefore, courts construe § 1 to reach only “unreasonable” restraints of trade.³⁷

Section 2 of the Sherman Act prohibits persons from monopolizing, attempting to monopolize, or combining or conspiring to monopolize trade or commerce.³⁸ Section 2 does not prohibit monopolies *per se*. It prohibits, as the legislative history discusses, “the sole engrossing to a man’s self by means which prevent other men from engaging in *fair* competition with him.”³⁹ Congress distinguished how the monopoly was obtained or maintained as either fairly—obtaining the business “merely by superior skill and intelligence”—or unfairly—“the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.”⁴⁰

Senator John Sherman argued that to require the antitrust plaintiff to prove the corporation’s intent would “impose an impossible condition and would defeat the object of the law” while also recognizing that executives could be punished for criminal intentions.⁴¹ Ultimately, Sherman admitted the difficulties in defining the precise line between lawful and unlawful combinations—this task was left for the courts. According to Sherman, “All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law”⁴² The federal courts largely determine both the legal standards that are consistent with, and further, the Act’s general principles as well as whether intent is legally relevant.⁴³

³⁶ 15 U.S.C. § 1.

³⁷ *Am. Needle, Inc. v. Nat’l Football League*, 130 S. Ct. 2201, 2208, 176 L. Ed. 2d 947 (2010) (“Taken literally, the applicability of § 1 to ‘every contract, combination . . . or conspiracy’ could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm’s chief executive telling her subordinate how to price their company’s product. But even though, ‘read literally,’ § 1 would address ‘the entire body of private contract,’ that is not what the statute means.”).

³⁸ 15 U.S.C. § 2.

³⁹ *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 n.15 (1956) (quoting 21 CONG. REC. 3151) (emphasis added).

⁴⁰ *Id.*

⁴¹ 21 CONG. REC. 2455, 2456-57 (1890), reprinted in 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 113, 115 (Earl W. Kintner ed., 1978).

⁴² 21 CONG. REC. 2460 (1890), reprinted in 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 122 (Earl W. Kintner ed., 1978).

⁴³ Early in the Sherman Act’s history, the Court rejected a claim that the statute was unconstitutionally vague. See *Nash v. United States*, 229 U.S. 373, 376 (1913) (holding that “only such contracts and combinations are within the act as, by reason of *intent* or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade”) (emphasis added).

C. *Government Must Prove Intent When Prosecuting Sherman Act Violations Criminally*

The United States can prosecute any Sherman Act violation criminally or civilly. In criminal prosecutions, the government must prove the defendant's intent.⁴⁴ In determining the requisite intent, courts first distinguish whether the conduct is per se illegal.

If the challenged activity is determined to be per se illegal—for example, price fixing, bid rigging, or allocating markets—the prosecutors need only prove the existence of an agreement and that the defendant knowingly entered into the alleged agreement or conspiracy.⁴⁵ The government need not prove the “perpetrator’s knowledge of the anticipated consequences”⁴⁶ or intent to produce the anticompetitive effects. Instead, “a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the per se rule is designed to avoid.”⁴⁷

The DOJ can, but rarely does, prosecute criminally other Sherman Act offenses that fall outside the scope of the Court’s per se illegal standard.⁴⁸ One example is a defendant maintaining a monopoly with exclusionary behavior.⁴⁹ If the government prosecutes these cases criminally, it must show that defendants either (1) intended a clearly illegal result, or (2) acted with knowledge that illegal results, which actually occurred, were “probable.”⁵⁰

⁴⁴ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978).

⁴⁵ *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979) (holding that “in price-fixing conspiracies, where the conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy”).

⁴⁶ *Gypsum*, 438 U.S. at 446.

⁴⁷ *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991) (quoting *United States v. Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir. 1981)) (agreeing “with the express holdings of six other circuits, and the intimations of another, that *Gypsum* does not require proof of a defendant’s intent to produce anti-competitive effects where the defendant is charged with a per se violation of the Sherman Act”).

⁴⁸ U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION MANUAL, Ch. III, C.5 (4th ed. 2008), <http://www.justice.gov/atr/public/divisionmanual/index.html> (“In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations.”).

⁴⁹ See, e.g., *Kan. City Star Co. v. United States*, 240 F.2d 643, 664 (8th Cir. 1957) (prosecuting a company criminally under § 2). The DOJ has brought fewer criminal cases under § 2 than § 1. Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORGAN. 75, 95–96 (2000) (finding that between 1955 and 1997, DOJ brought seventy-five civil and three criminal monopoly or attempt to monopolize cases under § 2). Since the Reagan administration, the DOJ has not prosecuted § 2 violations criminally.

⁵⁰ *Gypsum*, 438 U.S. at 444–46.

D. *Intent is Legally Relevant under the Court's Usual Legal Standard*

In civil cases, intent is generally irrelevant when the court determines that the conduct itself is either per se illegal or legal. Thus, one first must assess to what extent per se standards apply in antitrust cases. The greater the courts' reliance on per se standards, the less relevant intent becomes. As this Section will show, the scope of antitrust per se standards has shrunk over the past thirty years.

1. Few Business Activities Are Per Se Legal

As the Supreme Court said, "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."⁵¹ The statement follows the general principle that an evil motive does not render otherwise lawful conduct unlawful.⁵²

Subjective intent can have important moral and ethical implications—donating to charity for a personal advantage or because it is just. Citizens use subjective intent to determine the virtue of an action. But citizens may not want otherwise lawful activity prosecuted on account of bad intent. This is because the risks resulting from the government patrolling our thoughts outweigh the benefits; whether one whistles a tune out of joy or ill will is immaterial so long as the conduct itself is legal.⁵³

If an evil motive cannot make otherwise lawful conduct unlawful, the issue then is what commercial conduct is per se lawful. The answer is that few safe harbors exist. In a famous state case, *Tuttle v. Buck*, the plaintiff was the village's only barber for over ten years.⁵⁴ The defendant, a banker with wealth and influence in the community, was not otherwise interested in the barber occupation. Nonetheless, the defendant "maliciously" established a barbershop and employed a barber at an agreed salary. The defendant's *sole* design was to injure plaintiff and destroy his barber business; it was not for any other purpose. One can dispose of, or distinguish, the case

⁵¹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

⁵² *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) ("Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham" thereby subjecting defendants' to possible antitrust liability.); *Tuttle v. Buck*, 119 N.W. 946, 947 (Minn. 1909) (The court stated, "It has been said that the law deals only with externals, and that a lawful act cannot be made the foundation of an action because it was done with an evil motive." Its holding, as discussed *infra*, departed from this principle.).

⁵³ Even whistling is not per se legal. See *Davis v. State*, 256 S.W. 866, 867 (Ark. 1923) (finding whistling evidence of participation in a conspiracy when "conspirators were converging on the spot where the still was located, and the whistling was calculated to serve as a signal").

⁵⁴ 119 N.W. 946 (Minn. 1909).

on the defendant's otherwise illegal means to injure the plaintiff barber.⁵⁵ But the state supreme court tackled the more difficult issue: Could defendant be liable solely for competing against the plaintiff out of pure spite? The court, in an opinion subject to criticism,⁵⁶ said yes:

To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.⁵⁷

I mention *Tuttle* not to justify its reasoning but to illustrate how few safe harbors exist when it comes to competitive behavior.⁵⁸ One could argue, as John Stuart Mill did, that the "individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself."⁵⁹ But competitors have relationships with other competitors, suppliers, distributors, and customers. Their behavior invariably affects the interests of others. Thus, the greater the firm's market power, the less likely its behavior, regardless of its purpose, is per se legal.

The Court in *Lorain Journal Co. v. United States*, for example, did not dispute the monopolist's general right in choosing with whom to deal.⁶⁰ But the Court recognized that one competitor, in exercising economic freedom, can impinge another's freedom:

[T]he word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise of a purposeful means of monopolizing interstate commerce is prohibited by the

⁵⁵ *Id.* at 946 (The plaintiff alleged that the defendant made "false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given.").

⁵⁶ See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. c (1995).

⁵⁷ 119 N.W. at 948.

⁵⁸ "The test of whether a business practice is unfair involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Wilner v. Sunset Life Ins. Co.*, 93 Cal. Rptr. 2d 413, 422 (Cal. Ct. App. 2000) (internal quotations omitted).

⁵⁹ JOHN STUART MILL, ON LIBERTY, ch. V, 100 168 (1859).

⁶⁰ 342 U.S. 143, 155 (1951).

Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act.⁶¹

Companies generally can decide with whom they will deal, but they cannot exercise this right for, among other things, the purpose of attaining or maintaining a monopoly.⁶² In many countries, a recent ICN survey found, anticompetitive intent is “not required but is often considered relevant” in deciding a monopolist’s refusal to deal.⁶³

Consequently, besides statutory and implied antitrust immunities, federal antitrust law has few clear safe harbors where conduct is per se legal, regardless of its purpose.⁶⁴

2. Few Business Activities Are Per Se Illegal

Just as bad motives cannot make otherwise legal conduct illegal, so too good motives cannot make otherwise illegal conduct legal.⁶⁵ The defendant’s altruistic motives are legally irrelevant when the conduct itself is per se illegal.⁶⁶

⁶¹ *Id.* (internal citations omitted).

⁶² *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁶³ INT’L COMPETITION NETWORK UNILATERAL CONDUCT WORKING GRP., REPORT ON THE ANALYSIS OF REFUSAL TO DEAL WITH A RIVAL UNDER UNILATERAL CONDUCT LAWS 4, 14-15 (2010).

⁶⁴ *See, e.g., Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 453 (2009) (“At least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost.”).

⁶⁵ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 427 (1990) (“No matter how altruistic the motives of respondents may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services.”); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.23 (1984) (“[It is] well settled that good motives will not validate an otherwise anticompetitive practice.”); *United States v. Griffith*, 334 U.S. 100, 105–106 (1948); *Associated Press v. United States*, 326 U.S. 1, 16, n.15 (1945); *Chi. Board of Trade v. United States*, 246 U.S. at 238; *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 49 (1912); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 342 (1897).

⁶⁶ *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 87 (1950) (“Good intentions, proceeding under plans designed solely for the purpose of exploiting patents, are no defense against a charge of violation by admitted concerted action to fix prices for a producer’s products, whether or not those products are validly patented devices.”); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 496 (1949) (“More than thirty years ago this Court said . . . ‘It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions.’” (quoting *International Harvester Co. v. Missouri*, 234 U.S. 199, 209 (1914))); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-22 (1940) (noting that the Sherman Act “has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination”); *Nash v. United States*, 229 U.S. 373, 377 (1913) (“The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.”); *United States v. Nat’l City Lines*, 186 F.2d 562, 572 (7th Cir. 1951) (“When persons conspire to impose a direct restraint on

The scope of antitrust's per se illegal standard has shrunk over the past thirty years. Today only hard-core cartel behavior—i.e., horizontal price-fixing, bid-rigging, and market allocations—is truly per se illegal. The Court's tests involving group boycotts and tying are more forgiving.⁶⁷

However, as discussed above, even for per se illegal offenses, intent is relevant in criminal prosecutions.⁶⁸ Intent also plays a role when the United States decides whether to prosecute the offense civilly or criminally⁶⁹ and in the courts' categorization of certain conduct as a hard-core offense.⁷⁰

3. Most Conduct Is Evaluated Under the Rule of Reason, Where Intent is Relevant

Antitrust law encompasses few areas where intent is legally irrelevant—where the conduct is either per se legal or illegal. The “prevailing,”⁷¹ “usual,”⁷² and “accepted standard”⁷³ for evaluating conduct under the Sherman Act is the Court's rule of reason. Under this standard, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”⁷⁴ Expressly part of the mix, under Justice Brandeis's formulation in *Chicago Board of Trade v. United States*, is the defendant's intent:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy

interstate commerce, benevolent motives or the activities of third parties do not save them from criminal prosecution for violation of the Sherman law.” (quoting *United States v. General Motors*, 121 F.2d 376, 406 (7th Cir. 1941)); *Transnor (Bermuda) Ltd. v. BP N. Am. Petroleum*, 666 F. Supp. 581, 583 (S.D.N.Y. 1987) (“Indeed, price fixing has been held to be so plainly anticompetitive and without redeeming value that it is a “per se” violation of the antitrust laws, precluding defendants from any attempt to justify their conduct by showing any procompetitive intent.”).

⁶⁷ *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 35 (2006) (“Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the tying product.”); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 285 (1985) (noting that per se rule applies if plaintiff shows that defendants possess market power or exclusive access to an element essential to effective competition).

⁶⁸ *See infra* Part I.C.

⁶⁹ As a practical matter, even for per se illegal antitrust offenses, the DOJ would not prosecute criminally if “there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.” *See* U.S. DEP'T OF JUSTICE, *supra* note 48, at III-20.

⁷⁰ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 13 (1979) (“[The Court was] uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition . . .”).

⁷¹ *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

⁷² *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

⁷³ *Id.* at 885.

⁷⁴ *GTE Sylvania*, 433 U.S. at 49.

competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the *reason for adopting the particular remedy, the purpose or end sought to be attained*, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁷⁵

If the Court's usual standard for evaluating conduct under the Sherman Act is the rule of reason, and if the rule of reason expressly incorporates defendant's intent, then logically, the defendant's intent should be usually relevant.

Many courts, following *Chicago Board of Trade*, evaluate the defendants' intent. The offense of monopolization requires "the *willful* acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."⁷⁶ An attempted monopolization claim requires among other things, proof that the defendant engaged in predatory or exclusionary

⁷⁵ *Chi. Board of Trade v. United States*, 246 U.S. 231, 238 (1918) [hereinafter *CBOT*] (emphasis added); *see also* *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2217, 176 L. Ed. 2d 947 (2010) (describing *CBOT* as the "classic formulation of the Rule of Reason"). In fact, the Court believed "that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962). Courts continue to cite *Poller* on motions to dismiss and summary judgment. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 212 (4th Cir. 2002); *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US LLC*, 8:10-CV-2008-T-33TGW, 2011 WL 3035226 (M.D. Fla. July 25, 2011); *Ohio Willow Wood Co. v. Alps S. LLC*, 2:05-CV-1039, 2011 WL 1237582 (S.D. Ohio Mar. 29, 2011); *Parsons v. Bright House Networks, L.L.C.*, 2:09-CV-0267-AKK, 2010 WL 5094258 (N.D. Ala. Feb. 23, 2010); *Cloverleaf Enters. v. Md. Thoroughbred, Horsemen's Ass'n, Inc.*, 730 F. Supp. 2d 451, 460 (D. Md. 2010); *Fox v. Good Samaritan L.P.*, C 04-0874 RS, 2010 WL 1260203 (N.D. Cal. Mar. 29, 2010); *In re K-Dur Antitrust Litig.*, CIV.A. 01-1652 (JAG), 2007 WL 5297755 (D.N.J. Mar. 1, 2007); *Morton Grove Pharms., Inc. v. Par Pharm. Cos., Inc.*, 04 C 7007, 2006 WL 850873 (N.D. Ill. Mar. 28, 2006) ("A complainant cannot be expected to have knowledge of specific facts in regard to a litigant's motivation or intent prior to discovery."); *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, CIV.A. 02-CV-4373, 2005 WL 724117 (E.D. Pa. Mar. 29, 2005) *amended on reconsideration*, CIV.A.02-4373, 2006 WL 2385519 (E.D. Pa. Aug. 16, 2006) *aff'd*, 530 F.3d 204 (3d Cir. 2008); *Welchlin v. Tenet Healthcare Corp.*, 366 F. Supp. 2d 338, 352 (D.S.C. 2005) ("As in *Poller*, Plaintiffs have presented enough circumstantial evidence to allow the jury to consider whether Defendants' acted collusively with motive and intent to restrain competition."). Other courts have questioned *Poller's* vitality. *Gulf States Reorg. Grp., Inc. v. Nucor Corp.*, 1:02-CV-2600-RDP, 2011 WL 5320620 (N.D. Ala. Sept. 29, 2011) ("Indeed, *Matsushita* stands for the proposition that summary judgment in the antitrust context is equally as valid as in other types of cases."); *Falit v. Provident Life & Accident Ins. Co.*, 3:09CV1593 (JBA), 2010 WL 2710478 (D. Conn. July 7, 2010); *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 344 (S.D.N.Y. 2009) (noting that for antitrust cases in the Second Circuit "summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces").

⁷⁶ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (emphasis added).

conduct with a specific intent to monopolize.⁷⁷ A conspiracy to monopolize claim requires proof that the defendants “entered into such conspiracy with the specific intent to monopolize that commerce.”⁷⁸ Therefore, for § 2 claims, the Court has long recognized the relevancy of intent evidence:

In *Lorain Journal*, the violation of § 2 was an “attempt to monopolize,” rather than monopolization, but the question of intent is relevant to both offenses. In the former case it is necessary to prove a “specific intent” to accomplish the forbidden objective[—]as Judge Hand explained, “an intent which goes beyond the mere intent to do the act.” *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (CA2 1945). In the latter case evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as “exclusionary” or “anticompetitive”[—]to use the words in the trial court’s instructions[—]or “predatory,” to use a word that scholars seem to favor.⁷⁹

Consequently, the Court, since its early formulation of the rule of reason, stated that subjective intent is legally relevant in antitrust cases. Nonetheless, as Part II addresses, some antitrust scholars and jurists argue that a factfinder’s consideration of defendant’s intent is “out of step with modern antitrust analysis’s focus on objective economic aspects of conduct, rather than on motive.”⁸⁰

II. THE IRRELEVANCE OF INTENT UNDER ANTITRUST’S NEO-CLASSICAL ECONOMIC THEORIES

Two influential antitrust jurists have been at the forefront in arguing the irrelevance of the defendant’s intent in civil antitrust cases. They do not propose clearer rules of per se legality or illegality. Instead, they endorse a rule of reason analysis that excludes defendant’s subjective intent.

A. *The Critics’ Assumptions*

The Chicago School jurist Frank Easterbrook concluded that intent plays “no useful role” in the attempted monopolization claim:

Firms “intend” to do all the business they can, to crush their rivals if they can. “[I]ntent to harm’ without more offers too vague a standard in a world where executives may think no

⁷⁷ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 459 (1993) (“Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant’s economic power in that market.”).

⁷⁸ 3A FED. JURY PRAC. & INSTR. § 150.33 (5th ed.).

⁷⁹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985).

⁸⁰ 2 MATERIALS ON ANTITRUST COMPL. § 17:2 (statement of one panelist).

further than ‘Let’s get more business.’” Rivalry is harsh, and consumers gain the most when firms slash costs to the bone and pare price down to cost, all in pursuit of more business. . . . You cannot be a sensible business executive without understanding the link among prices, your firm’s success, and other firms’ distress. If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden “intent”, they run the risk of penalizing the motive forces of competition. [Citations omitted.] Almost all evidence bearing on “intent” tends to show both greed[—]driven desire to succeed and glee at a rival’s predicament. . . . Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. It also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions. Stripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation. Although reference to intent *in principle* could help disambiguate bits of economic evidence in rare cases, *MCI v. AT & T*, 708 F.2d at 1123 n.59, the cost (in money and error) of searching for these rare cases is too high[—]in large measure because the evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate.⁸¹

The Seventh Circuit’s other prominent Chicago School jurist Richard Posner agreed:

Most businessmen don’t like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run. . . . The question therefore is not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did, but whether such withdrawal was an objectively anticompetitive act.⁸²

These jurists believe that courts can objectively determine the legality or illegality of certain restraints without considering the defendant’s intent.⁸³ Neo-classical economic theory can inform the factfinder of the challenged conduct’s actual or likely competitive effects, i.e., whether the defendants’ conduct likely will cause prices to increase above and output to fall below competitive levels.⁸⁴

Posner and Easterbrook’s criticisms of intent evidence rests on several assumptions. First, they, like neo-classical economic theory generally, assume market participants are motivated primarily by self-interest.⁸⁵ Posner

⁸¹ *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989) (citation omitted). For a recent critique of the Chicago School’s influence on antitrust policy, see *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* (Robert Pitofsky ed. 2008).

⁸² *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379-80 (7th Cir. 1986). Some non-Chicago School jurists have also minimized intent’s relevance in antitrust cases. See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.).

⁸³ *Olympia Equipment Leasing*, 797 F.2d at 379 (“If conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors (‘these turkeys’) is irrelevant.”).

⁸⁴ *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) (Easterbrook, J.) (“Antitrust law condemns practices that drive up prices by curtailing output.”).

⁸⁵ Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931 (1979) (the central premise of Chicago School’s economic theory is rational profit maximization).

and Easterbrook initially assume that people have stable preferences.⁸⁶ Otherwise, if people's preferences are unstable—such as desiring money one day, abhorring it the next—then neither neo-classical theory, nor any economic theory, can predict behavior.

Next they, like neo-classical economic theory,⁸⁷ assume that individuals have a stable universal preference of maximizing their financial well-being: “They want to make as much money as possible.”⁸⁸ Posner recognizes that many things can motivate people: “[s]elf-interest should not be confused with selfishness; the happiness (or for that matter the misery) of other people may be part of one's satisfactions.”⁸⁹ But the problem with a vague preference, such as utility maximization, is that the economic theory, while easily explaining behavior retrospectively, cannot predict behavior. The economist can say the passerby who helped or ignored the homeless person did so for the same reason—it maximized his or her utility. But the theory's predictive value diminishes.⁹⁰ If the stable preference encompasses everything between miserliness and benevolence, then the economic theory cannot accurately and objectively predict which behavior, miserliness or benevolence, likely dominates.⁹¹ Ultimately, Posner's “concept of man as a rational maximizer implies that people respond to incentives.”⁹² In particular, people respond to financial incentives and disincentives in a way that can be measured and predicted.⁹³

If people have a stable preference to maximize wealth, then greed predominates.⁹⁴ People should not care about social or moral goals to the ex-

⁸⁶ *Id.* at 931 (stating that Chicago School's theory offers “powerful simplifications,” such as “rationality, profit maximization, [and] the downward sloping demand curve”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (7th ed. 2007) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*] (“The task of economics . . . is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his ‘self-interest.’”).

⁸⁷ Terrence Chorvat & Kevin McCabe, *Neuroeconomics and Rationality*, 80 CHI-KENT L. REV. 1235, 1238 (2005) (“One of the hallmarks of rational decision making, is . . . that preferences, whatever they may be, are stable.”).

⁸⁸ *Olympia Equip. Leasing*, 797 F.2d at 379-80.

⁸⁹ POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 86, at 3-4.

⁹⁰ Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law & Economics*, 88 CAL. L. REV. 1051, 1060-67 (2000) (outlining the spectrum of rational choice theory).

⁹¹ *See id.* at 1065.

⁹² POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 86, at 3.

⁹³ Francesco Parisi, *Introduction* to RICHARD POSNER, *THE ECONOMIC STRUCTURE OF THE LAW* xii (Francesco Parisi ed., Edward Elgar Publishing 2000) (“The simple logic is that if humans are rational maximizers of their wealth or self-interest in all their activities, they will respond to changes in exogenous constraints, such as laws and sanctions, in a way that can be measured and predicted.”).

⁹⁴ Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?* 7 J. ECON. PERSP. 159, 159 (1993) (“the average human being is about [ninety-five] percent selfish in the narrow sense of the term” (quoting GORDON TULLOCK, *THE VOTE MOTIVE* (1976))).

tent they do not maximize wealth.⁹⁵ As Chicago School economist George Stigler wrote, when “self-interest and ethical values with wide verbal allegiance are in conflict, much of the time, most of the time in fact, self-interest theory . . . will win.”⁹⁶

Posner and Easterbrook next assume that one cannot distinguish between good and bad intent. Logically, if everyone is motivated by greed, intent is irrelevant. According to Easterbrook, “Almost all evidence bearing on ‘intent’ tends to show both greed-driven desire to succeed and glee at a rival’s predicament.”⁹⁷ But Posner and Easterbrook do not maintain that greed’s ubiquity renders intent irrelevant. Instead, their concern is that intent evidence invariably makes pro-competitive behavior appear anticompetitive and thereby causes jurors to penalize hard, but socially beneficial, competition. Hatred and greed motivate market participants, spur competition, and thereby promote overall well-being.⁹⁸ Thus, subjective intent, Easterbrook argues, is best left alone:

Wanting harm, even bankruptcy, to come to one’s business rivals is not actionable; hatred is a spur to competition, which serves consumers’ interests. Entrepreneurs are privileged to compete because any effort to separate pure from impure motives would in the end undercut the power of rivalry to promote consumers’ welfare.⁹⁹

Finally, they assume that most, if not all, competition is zero-sum. Competition, to Easterbrook:

[Competition] is a ruthless process. A firm that reduces cost and expands sales injures rivals[—]sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are

⁹⁵ Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, in *ADVANCES IN BEHAVIORAL ECONOMICS* 271, 271 (Colin F. Camerer et al. eds., 2004); see also Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 *J. LEGAL STUD.* 243, 247 (1980) (“Partly because there is no common currency in which to compare happiness, sharing, and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically.”). For criticisms of this theory that wealth maximization does not suffer the same infirmities of measurement as utilitarianism, see Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 *HOFSTRA L. REV.* 509, 521 (1980) and Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 *WIS. L. REV.* 687, 754–60 (1999).

⁹⁶ George J. Stigler, *Economics or Ethics?*, in *THE TANNER LECTURES ON HUMAN VALUES* 143, 176 (Sterling M. McMurrin ed., 1981).

⁹⁷ *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989).

⁹⁸ See *Wilkow v. Forbes, Inc.*, 241 F.3d 552, 557 (7th Cir. 2001); *Kumpf v. Steinhilber*, 779 F.2d 1323, 1326 (7th Cir. 1985).

⁹⁹ *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1255 (7th Cir. 1995).

not balm for rivals' wounds. The antitrust laws are for the benefit of competition, not competitors.¹⁰⁰

“Warfare,” wrote Easterbrook in another opinion, “*is* competition.”¹⁰¹ So with this premise, competition involves unfair, even despicable, acts of hatred and greed among competitors. Easterbrook surmises, “Much competition is unfair, or at least ungentlemanly; it is designed to take sales away from one’s rivals.”¹⁰² Thus, even deception by one competitor against another is countenanced.¹⁰³

B. *Behavioral Economics’ Conditional Reciprocity*

Neither Congress nor the Supreme Court ever endorsed these jurists’ rule of reason sans intent. Other courts need not accept their reasoning. Indeed, other judges in the Seventh Circuit recognize the relevancy of intent evidence in antitrust cases.¹⁰⁴ As this section argues, other courts should not adopt Posner’s and Easterbrook’s argument, given the infirmities of its assumptions.

1. Are Most People Greedy?

Let us first examine neo-classical economic theory’s general assumption that people have a stable preference to maximize wealth. Even if we accept greed as the sole or dominant motivator of human behavior, it does not follow that intent is irrelevant. As Justice Rehnquist noted,

The term ‘economic self-interest’ is a convenient shorthand for describing the economic decision reached by an individual or firm, but does not connote some simple, mechanical formula which determines the input values, or their assigned weight, in the process of economic decisionmaking. The simple fact is that any economic decision is largely subjective.¹⁰⁵

¹⁰⁰ Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986).

¹⁰¹ Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989).

¹⁰² Sanderson v. Culligan Int’l Co., 415 F.3d 620, 623 (7th Cir. 2005).

¹⁰³ For a criticism, see Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception?*, 63 SMU L. REV. 1069 (2010).

¹⁰⁴ See, e.g., Illinois v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991) (“Intent is relevant to the offense of monopolization.”); JamSports & Entm’t, LLC v. Paradama Prods., Inc., 336 F. Supp. 2d 824, 842-43 (N.D. Ill. 2004) (holding that the defendant was “wrong to assume that *Olympia Equipment Leasing* should be read to mean evidence of intent to monopolize is always irrelevant to proving a § 2 claim” as the Supreme Court “unambiguously stated that intent to monopolize is ‘relevant.’”) (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985)).

¹⁰⁵ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 575-76 (1973) (Rehnquist, J., dissenting).

Even under neo-classical economic theory, intent matters. Two economists argue how evidence of a defendant's intent to communicate a predatory commitment to current or potential rivals is relevant.¹⁰⁶ Professor Marina Lao outlines how intent may inform the post-Chicago antitrust theories premised on rational self-interest.¹⁰⁷

Most people, however, are not predictably greedy.¹⁰⁸ To assess and measure people's behavior in specific contexts, behavioral economists use controlled laboratory and field experiments.¹⁰⁹ One popular behavioral experiment, conducted around the world, is the Ultimatum Game. Player 1 is given some money, say \$100, and must offer Player 2 some portion thereof. If Player 2 accepts the offer, both can keep the money. If Player 2 rejects the offer, neither can keep any money. If you were Player 1, how much would you offer? If you were Player 2, what is the lowest amount you would accept?

Neo-classical economic theory predicts you will offer the smallest amount, one cent. If everyone is greedy, Player 1 wants as much money as possible, here \$99.99. Player 2 does not fault Player 1's greed. Player 2 would offer the same if given the chance. Player 2 accepts the penny, which is better than nothing. Player 1's intent is irrelevant to Player 2; both are greedy. Who besides chimpanzees behaves this way?¹¹⁰

Actual experiments of the Ultimatum Game in over twenty countries show the contrary. Most offer significantly more than the nominal amount, ordinarily forty to fifty percent of the total amount available, and recipients often forgo wealth to punish unfair offers, less than twenty percent of the total amount available.¹¹¹ These results cannot be explained as the participants' maximizing their reputation or goodwill. The same results occur in anonymous one-shot games.¹¹² Even when the game is repeated ten times to allow for learning, similar results follow.¹¹³ Even when the stakes equal one day's wages, people offer more than the nominal amount.¹¹⁴

¹⁰⁶ Comanor & Frech, *supra* note 8, at 304-05.

¹⁰⁷ Lao, *Aspen Ski*, *supra* note 8, at 200-12.

¹⁰⁸ Maurice E. Stucke, *Money, Is That What I Want? Competition Policy & the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893, 910-16 (2010).

¹⁰⁹ STOUT, *supra* note 1, at 75-93.

¹¹⁰ Keith Jensen et al., *Chimpanzees Are Rational Maximizers in an Ultimatum Game*, 313 SCIENCE 107 (2007).

¹¹¹ RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 21-25 (1992); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1491-92 (1998); Werner Guth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 371-75 (1982); Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. 285, 291 (1986).

¹¹² Jolls et al., *supra* note 111, at 1492.

¹¹³ *Id.* at 1490.

¹¹⁴ Joseph Henrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, 327 SCIENCE 1480, 1480-84 (2010) [hereinafter Henrich et al., *Markets, Religion*]; Joseph

For many, the results are unsurprising. Adam Smith long ago rejected the assumption of self-interest.¹¹⁵ Even Posner recognized that economic analysis “long ago abandoned the model of hyperrational, emotionless, un-social, supremely egoistic, nonstrategic man (or woman).”¹¹⁶ Most economists today recognize the well-documented deviations from profit-maximization. Today, fairness and other-regarding behavior are hot topics among economists.¹¹⁷ The debate is whether a superior and equally parsimonious framework has emerged for predicting individual and firm behavior.¹¹⁸

The psychological and experimental economic evidence shows that people care about treating others, and being treated, fairly.¹¹⁹ This “strong reciprocity” in human behavior entails “a predisposition to cooperate with others and to punish those who violate the norms of cooperation, at personal cost, even when it is implausible to expect that these costs will be repaid either by others or at a later date.”¹²⁰ Employers, for example, may not reduce wages during times of deflation because workers perceive this wage reduction as unfair, and retaliate by not working as hard.¹²¹ So rather than

Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73, 73-76 (2001) [hereinafter Henrich et al., *Homo Economicus*].

¹¹⁵ ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 1 (Filiquarian Publ'g, LLC 2007) (1759) (“How selfish soever man may be supposed, there are evidently some principles in his nature which interest him in the fortune of others and render their happiness necessary to him though he derives nothing from it except the pleasure of seeing it.”); see also Nava Ashraf et al., *Adam Smith, Behavioral Economist*, 19 J. ECON. PERSP. 131, 134-37 (2005).

¹¹⁶ Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1552 (1998).

¹¹⁷ A search of the EconLit database identified 267 articles with “fairness” or “conditional reciprocity” in the title or abstract compared to 151 articles with only “greed” or “self-interest” in the title or abstract. Search of EconLit database (September 13, 2012) (search results on file with the publishing Journal).

¹¹⁸ See generally STOUT, *supra* note 1, at 98-121 (outlining a three-factor model for prosocial behavior).

¹¹⁹ See generally HERBERT GINTIS ET AL., MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE (2005) [hereinafter MORAL SENTIMENTS]; see also Yochai Benkler, *The Unselfish Gene*, HARV. BUS. REV., July-Aug. 2011, at 79 (“In no society examined under controlled conditions have the majority of people consistently behaved selfishly.”); cf. Ming Hsu et al., *The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency*, 320 SCI. 1092, 1092 (2008) (finding that a sense of fairness is fundamental to distributive justice, but is rooted in emotional processing).

¹²⁰ Herbert Gintis et al., *Explaining Altruistic Behavior in Humans*, 24 EVOLUTION & HUM. BEHAV. 153, 154 (2003) (arguing that “the evolutionary success of our species and the moral sentiments that have led people to value freedom, equality, and representative government are predicated upon strong reciprocity and related motivations that go beyond inclusive fitness and reciprocal altruism”).

¹²¹ See Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS, *supra* note 119, at 32; see also GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM 111–15 (2009).

acting in self-interest, employers appeal to fairness concerns.¹²² Likewise, in the behavioral experiments, people care about resources being equitably distributed, not solely about resources going to those with the greater use.¹²³

Evidence of strong reciprocity and conditional cooperation is also found in other behavioral experiments. The Public Goods game is one example. Suppose Players A and B each possess \$10, which they can either keep or transfer any amount to the other person.¹²⁴ Upon transfer, the recipient gets triple the amount.¹²⁵ So if A and B decide to keep their money, each earns \$10; if both decide to transfer, each earns \$30.¹²⁶ If one transfers her money, but the other does not, then the sharer loses out. She gets nothing, while the recipient gets \$40—the \$30 transferred, plus the \$10 kept. Both are better off if they both contribute the full amount. Neo-classical economic theory predicts that neither player will contribute. If everyone is greedy, A and B assume that the other will contribute nothing. Neo-classical economic theory predicts the suboptimal result: people will keep their \$10 and not cooperate.¹²⁷

People, in actual experiments, cooperate, until they are exploited.¹²⁸ As economist Elinor Ostrom concluded in her Nobel Prize lecture, “the most important lesson for public policy analysis derived from the intellectual journey . . . is that humans have a more complex motivational structure and more capability to solve social dilemmas than posited in earlier rational-choice theory.”¹²⁹ Many people in the public goods experiments do not initially free ride, or to the extent predicted under the neo-classical economic theories: “[P]eople have a tendency to cooperate until experience shows that those with whom they’re interacting are taking advantage of them.”¹³⁰

Not everyone, of course, is trusting or concerned about fairness. Some players in the behavioral experiments are greedy; they free-ride whenever

¹²² See AKERLOF & SHILLER, *supra* note 121, at 19-25; see also Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986).

¹²³ See Matthew Rabin, *A Perspective on Psychology and Economics*, 46 EUR. ECON. REV. 657, 665 (2002).

¹²⁴ Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS, *supra* note 119, at 151, 164-65.

¹²⁵ *Id.* at 165.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (“The self-interest hypothesis predicts, therefore, that both subjects will keep their money. In fact, however, many subjects cooperate in situations like this one.”) (citations omitted); see also Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980, 986-89 (2000).

¹²⁹ Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems—Prize Lecture*, in LES PRIX NOBEL: THE NOBEL PRIZES 2009 435 (Karl Grandin ed., 2010).

¹³⁰ THALER, *supra* note 111, at 14.

they profitably can. Many players in the experiments' early rounds cooperate, but stop when others behave selfishly.¹³¹

Situational factors are also important. Cooperation can vary depending on whether the game is called a Community Game or Wall Street Game.¹³² When selfish individuals and strongly-reciprocal individuals interact, the experiment's outcome can depend on each person's perception of the other person as sharing or selfish,¹³³ the rules of the game,¹³⁴ personal costs of acting unselfishly,¹³⁵ and group identification and in-group preferences.¹³⁶ Furthermore, at least one experiment has shown that expressions of forgiveness can restore trust and cooperation.¹³⁷

Cooperation also increases if one player can punish behavior perceived as selfish or unfair.¹³⁸ Neo-classical economic theory predicts that the punishment mechanism, if it costs the punisher money, should not affect the

¹³¹ See Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS, *supra* note 119, at 169.

¹³² Varda Liberman et al., *The Name of the Game: Predictive Power of Reputations versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1175, 1177 (2004) ("When playing the Community Game, 67% of the most likely to cooperate nominees and 75% of the most likely to defect nominees cooperated on the first round. When playing the Wall Street Game, 33% of participants with each nomination status cooperated."). Overall, cooperation was greater in subsequent rounds of the Cooperation Game, contrary to the predictions of people who knew the players very well.

¹³³ Cooperative individuals in the Trust and Public Goods experiments will act selfishly if they feel they are being taken advantage of and if no penalty provision exists to punish selfish behavior. Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS, *supra* note 119, at 167. If both believe the other will share, both will share. *Id.* If both believe the other is selfish, neither will share. *Id.* Even persons prone to sharing will not share if they believe that the other will defect. *Id.* Thus, the suboptimal equilibrium (defect, defect) arises. *Id.* See also Ostrom, *supra* note 129, at 432; Liberman et al., *supra* note 132, at 1182 (noting that in the Cooperation Game, players expected the other player to cooperate, and cooperated in return; in the Wall Street Game, players who expected the other player to cooperate, sought to exploit that cooperation by defecting).

¹³⁴ If the game's rules are changed so that the selfish players must decide first, the equilibrium shifts. If the first-mover knows that her partner is naturally cooperative, the selfish player will opt for cooperation as the payoff is greater. Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS, *supra* note 119, at 167.

¹³⁵ STOUT, *supra* note 1, at 114-15.

¹³⁶ GEORGE A. AKERLOF & RACHEL E. KRANTON, IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING 28-32 (2010); STOUT, *supra* note 1, at 101.

¹³⁷ Joost M. Leunissen et al., *An Instrumental Perspective on Apologizing in Bargaining: The Importance of Forgiveness to Apologize*, 33 J. ECON. PSYCHOL. 215, 219-20 (2012) (finding that in the Trust Game experiment perpetrators are more likely to apologize when the victim is more likely to forgive).

¹³⁸ Ostrom, *supra* note 129, at 426 (stating that the experiments on common pool resources and public goods "have shown that many predictions of the conventional theory of collective action do not hold. More cooperation occurs than predicted, 'cheap talk' increases cooperation, and subjects invest in sanctioning free-riders. Experiments also establish that motivational heterogeneity exists in harvesting or contribution decisions as well as decisions on sanctioning.").

outcome.¹³⁹ But individuals forgo money to punish unfair offers in the Ultimatum Game.¹⁴⁰ Similarly, when given the option in the Public Goods and Trust experiments, people, at a small personal cost, punish free riding.¹⁴¹ In fact, they derive satisfaction in punishing.¹⁴² Because many people can and do punish free-riding, the punishment mechanism promotes cooperation and deters free-riding.¹⁴³ In repeat games, contributions increase significantly in the round when the punishment mechanism is first introduced, and steadily increase until nearly all participants contribute the maximum amount by the final rounds.¹⁴⁴

Neo-classical economic theory predicts that financial incentives should motivate, and penalties should deter, behavior.¹⁴⁵ People, as the behavioral economic experiments show, are not solely motivated by, and may act contrary to, self-interest.¹⁴⁶ We are also motivated by praise, “shame, guilt, empathy, or sensitivity to social sanction.”¹⁴⁷ At times, financial incentives and ethical norms are complements.¹⁴⁸ But in the behavioral experiments, financial rewards that displace social, moral, or ethical norms decrease, not

¹³⁹ Because punishment is costly for the punisher, which the punisher does not recoup through cooperation, self-interested players would not punish others. Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS, *supra* note 119, at 169. Recognizing this, self-interested players will not contribute to public goods games. Thus, with or without costly punishment mechanisms, the predicted response under neo-classical economic theory is zero contributions. *Id.* at 170.

¹⁴⁰ *Id.* at 169.

¹⁴¹ *Id.*

¹⁴² Dominique J.-F. de Quervain et al., *The Neural Basis of Altruistic Punishment*, 305 SCI. 1254, 1256 (“Taken together, our findings suggest a prominent role of the caudate nucleus, with possible contributions of the thalamus, in processing rewards associated with the satisfaction of the desire to punish the intentional abuse of trust.”).

¹⁴³ Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS, *supra* note 119, at 15.

¹⁴⁴ Ernst Fehr & Urs Fischbacher, *The Economics of Strong Reciprocity*, in MORAL SENTIMENTS, *supra* note 119, at 169–70. In the last few periods of the multi-period games, the rate of punishment is low. *Id.* at 170. Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980, 989 (2000).

¹⁴⁵ Uri Gneezy & Aldo Rustichini, *Incentives, Punishment, and Behavior*, in ADVANCES IN BEHAVIORAL ECONOMICS 574–76 (Colin F. Camerer et al. eds., 2004).

¹⁴⁶ *Id.* at 572.

¹⁴⁷ See Samuel Bowles & Herbert Gintis, *Origins of Human Cooperation*, in GENETIC AND CULTURAL EVOLUTION OF COOPERATION 429, 432–33 (Peter Hammerstein ed., 2003).

¹⁴⁸ Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine “The Moral Sentiments”*: Evidence from Economic Experiments, 320 SCI. 1605, 1606 (“In a few cases, explicit incentives and ethical motives are complements, the former enhancing the salience of the latter. In most cases, though, separability fails in the opposite way: Incentives undermine ethical motives. As is standard in behavioral economics, most of the experiments were played anonymously for real (and often substantial) money stakes.”).

increase, motivation, or the likelihood of achieving the desired results.¹⁴⁹ Appealing to ethical or religious norms can deter unwanted self-interested behavior.¹⁵⁰ At times, highlighting an ethical or religious norm more effectively deters unwanted behavior than other penalties.¹⁵¹ At times, a volunta-

¹⁴⁹ Bowles, *supra* note 148, at 1605–06; Benkler, *supra* note 119, at 79, 83–84. Professor Dan Ariely, for example, did several experiments when social and market norms clashed. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 69–74 (2008). Participants were divided into three groups. Each group performed the same mundane task. One group, the social-norm group, was not compensated, but asked to undertake the task as a favor. In the first study, the social-norm group outperformed the group whose members received five dollars of compensation for the task, which outperformed the group whose members received fifty cents for the task. In the second study, the two groups did not receive cash, but a gift of comparable value—a Snickers bar for the fifty-cent group and a box of Godiva chocolate for the five-dollar group. The two groups performed as well as the social-norm group. When in the third study the gifts were monetized to the two groups—a “[fifty]-cent Snickers bar” or a “[five dollar]-box of Godiva chocolates”—these two groups again devoted less effort than the social-norm group. *Id.* at 73. Similarly, more lawyers volunteered to donate their services for free to needy retirees than when they were offered a relatively small amount—thirty dollars per hour. *Id.* at 71. Voluntary blood donations in Britain declined sharply when a policy of paying donors was instituted alongside the voluntary sector. Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS, *supra* note 119, at 20. Likewise, Uri Gneezy and Aldo Rustichini did an experiment with high school students who collected donations for a public purpose in Israel’s annually publicized “donation days.” Gneezy & Rustichini, *supra* note 145, at 573. One group was given a pep talk of the importance of these donations. *Id.* at 579. A second group, in addition to the pep talk, was promised one percent of the amount collected to be paid from an independent source. *Id.* A third group was promised an even greater financial incentive—ten percent of the amount collected. *Id.* Under neo-classical economic theory, the third group, motivated by the greater financial incentive, should collect the most donations. Instead, the groups promised the one percent and ten percent shares collected a lower average amount—\$153.67 and \$219.33, respectively—than the group not financially compensated but given only the pep talk—\$238.60. *Id.* at 578–80.

¹⁵⁰ In one experiment, MIT students, divided into three groups, were financially rewarded for correct answers on a math test. ARIELY, *supra* note 149, at 211. The control group, which could not cheat, solved on average three problems; the second group could cheat as they self-reported the number of right answers and reported solving on average 5.5 problems on the same test. *Id.* at 212. The third group, like the second group, could cheat, but they signed at the beginning of the test the statement, “I understand that this study falls under the MIT honor system.” *Id.* MIT does not, in fact, have an honor code. The third group self-reported on average three problems, the same number as the control group, which could not cheat. *Id.* at 212–13. In another experiment, a group before being administered a test was asked to write down as many of the Ten Commandments as they could recall. *Id.* at 207. That group could, but did not, cheat, compared to the group asked to recite beforehand ten books they read in high school, which did cheat. *Id.* at 207–08. Thus, reminding participants of moral or ethical norms just before the temptation to cheat proved effective. These behavioral experiments support Federal Rule of Evidence 603’s policy that trial witnesses immediately before testifying take an oath or affirmation “designed to impress that duty on the witness’s conscience.” FED. R. EVID. 603.

¹⁵¹ ARIELY, *supra* note 149, at 207–08. One experiment involved citizens preparing their income tax statements. Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 283–99 (1967). The experiment attempted to compare the effect of penalties to the effect of appeals to conscience. For the penalty group, the emphasis was on the severity of possible jail sentences and the likelihood that tax violators would be apprehended. The “conscience” group was exposed to questions

ry, community-regulated system of restraints is more effective than a financial penalty; the monetary penalty “may be perceived as being unkind or hostile action (especially if the fine is imposed by agents who have an antagonistic relationship with group members).”¹⁵²

Consequently, the empirical literature rejects the assumption that people are solely motivated by greed. Many people care about fairness. The recent bargaining setting experiments summarized by economist Samuel Bowles, systematically show “that substantial fractions of most populations adhere to moral rules, willingly give to others, and punish those who offend standards of appropriate behavior, even at a cost to themselves and with no expectation of material reward.”¹⁵³ Many see this everyday when they donate blood, tip a waiter in a city they are unlikely to revisit, volunteer to help others, or take the time and expense to punish unfair behavior. This leads us to the next issue: Do people care only about outcomes or do they distinguish between good and bad intent?

2. Can and Do People Distinguish Between Good and Bad Intent?

In determining whether behavior is fair or unfair, people do not care solely about the monetary outcome. The behavioral economics experiments

“accentuating moral reasons for compliance with tax law.” *Id.* at 287–88. The conscience appeal, overall, had a stronger effect on income reported than did the threat of penalties. The study’s results gave some evidence that, although the threat of punishment can increase tax compliance, particularly among the wealthiest respondents, appeals to conscience, particularly among the college-educated respondents, can be more effective than threatening penalties for securing tax compliance. *Id.* at 299; see also Kent Greenfield, *Using Behavioral Economics to Show the Power & Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 615–17 (2002) (noting that perceptions of fairness and justice may, in certain situations, play a greater role in motivating behavior than incentives or penalties).

¹⁵² Herbert Gintis et al., *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in MORAL SENTIMENTS, *supra* note 119, at 20. Professors Gneezy and Rustichini considered what impact, if any, a monetary fine had on curbing undesired behavior—parents who were picking up their children late from private day care centers. Gneezy & Rustichini, *supra* note 145, at 581–86. These day care centers originally had no rule governing parents who picked up their children after 4:00 p.m.; generally, a teacher had to wait with the tardy parent’s child. A fine on tardiness was thereafter introduced in some of the day care centers, which, under neo-classical economic theory, should decrease the incidences of tardiness. Instead, the average number of late-arriving parents increased for these day care centers. Moreover, after the fine was canceled, the average number of late-arriving parents did not return to the pre-fine levels. For the control group, on the other hand, for whom no fine was imposed, there was no significant shift of late-arriving parents during this period, and fewer parents reported late in these day care centers than in the day care centers with the fine. So why did the monetary penalty increase the undesired behavior? Perhaps, as the authors conclude, parents before were intrinsically motivated to pick up their children on time. The introduction of the fine monetized lateness into an additional service, offered at a relatively low price.

¹⁵³ Bowles, *supra* note 148, at 1606.

establish what many jurists and lawyers have long recognized: intent matters.¹⁵⁴

For example, in the Ultimatum Game, people distinguish when the offer of a penny came from a person, who can have selfish intent, or a computer.¹⁵⁵ Under neo-classical theory, in a one-shot anonymous game, intent should not matter. The outcome, one penny, is the same whether the offer came from a computer or person. But many players in the Ultimatum Game accept the nominal amount when they know the counterpart is a computer. Likewise, in trust games, most people do not punish, or perceive as unfair, behavior when they know their counterpart lacked the intent to free-ride—e.g., where a random device determined their counterpart's decision.¹⁵⁶

In assessing conduct, both individuals and firms do not focus exclusively on the economic outcome; instead, they focus on whether the benefits, gains, or economic rewards were fair.¹⁵⁷ People can perceive the same monetary payoff differently, depending on the other person's intent.¹⁵⁸ Suppose, for example, I offered you \$20. Your estimation of my kindness would likely differ depending on my options—if I could have offered you only \$0, \$10, or \$20, then you would interpret my intent positively; if I could have offered you any amount up to \$100, then you would likely view my intent negatively.¹⁵⁹

In another experiment, people were quite sensitive to the moral dimensions of a breach of contract, especially the perceived intentions of the breacher.¹⁶⁰ Under neo-classical theory, greed is not only irrelevant, but

¹⁵⁴ Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1337-44 (2011) (observing that subjects readily distinguished purposeful, negligent and blameless conduct and punished purposeful conduct more than negligent and blameless conduct, but did not readily distinguish between knowing and reckless conduct); Nicolas Baumard, *Punishment Is Not a Group Adaptation*, 10 MIND & SOCIETY 1, 4 (2011) (“[E]xperimental research has convincingly shown that humans respond to cooperative acts according to their perception of the motives of the individual: they tend to respond more cooperatively when they perceive the other as cooperating genuinely—that is, voluntarily performing a moral act as an end in itself, without seeking any personal gain.”) (citations omitted); STOUT, *supra* note 1, at 61-64 (discussing studies about human's ability to detect cheating); Horton, *supra* note 8, at 38 (discussing how humans “are evolutionarily hard-wired to quickly judge others' intentions”).

¹⁵⁵ Sally Blount, *When Social Outcomes Aren't Fair: The Effect of Causal Attributions on Preferences*, 63 ORG. BEHAV. & HUM. DECISION PROCESSES 131, 135-36 (1995).

¹⁵⁶ de Quervain et al., *supra* note 142, at 1255-56 (observing that only 3 out of 14 reduced the other player's payoffs, and imposed a small punishment).

¹⁵⁷ See Stephan M. Wagner et al., *Effects of Suppliers' Reputation on the Future of Buyer-Supplier Relationships: The Mediating Roles of Outcome Fairness and Trust*, J. SUPPLY CHAIN MGMT., April 2011, at 30, 42.

¹⁵⁸ Armin Falk & Urs Fischbacher, *Modeling Strong Reciprocity*, in MORAL SENTIMENTS, *supra* note 119, at 196, 197-204.

¹⁵⁹ *Id.* at 199-201 (Table 6.1).

¹⁶⁰ See generally Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

socially beneficial—if it is more efficient to breach the contract, no one should begrudge the breacher. But participants in one experiment distinguished why a contractor breached a contract to renovate a kitchen—to make more money on another project¹⁶¹ or to avoid losing money because of a significant cost increase in materials.¹⁶² The participants were more punitive when greed motivated the contractor than when the contractor breached to avoid a loss.

As Saint Thomas Aquinas observed, “No one is blamed for that which is beyond his power to do or not to do.”¹⁶³ If greed motivated people, no one would fault greed. Religions would not condemn avarice.¹⁶⁴ People in everyday life, as in controlled laboratory experiments, would not punish greedy behavior. Nor would prosecutors¹⁶⁵ and judges¹⁶⁶ decry greed.

¹⁶¹ *Id.* at 413 (“In the Gain condition, subjects read that ‘the contractor learns that there is a shortage of skilled renovators in a nearby area, and he could charge much more there for a similar project. He decides to break his contract in order to take other, more profitable work.’”).

¹⁶² *Id.* (“In the Avoid Loss condition, subjects read that ‘the contractor learns that the price of cabinets and countertop has skyrocketed, and the contract price will barely cover the cost of materials. He decides to break his contract in order to take other, more profitable work.’”).

¹⁶³ SAINT THOMAS AQUINAS, *AQUINAS’S SHORTER SUMMA: ST. THOMAS AQUINAS’S OWN CONCISE VERSION OF HIS SUMMA THEOLOGICA* 224 (Sophia Institute Press 2002); *see also* Christina M. Fong et al., *Reciprocity and the Welfare State*, in *MORAL SENTIMENTS*, *supra* note 119, at 277, 278 (“Abundant evidence from across the social sciences—much of it focusing on the United States with similar findings in smaller quantities from other countries around the world—has shown that when people blame the poor for their poverty, they support less redistribution than when they believe that the poor are poor through no fault of their own.”).

¹⁶⁴ *See, e.g.*, THE NEW JERUSALEM BIBLE (1990), 1 Timothy 6:9-11 (“People who long to be rich are a prey to trial: they get trapped into all sorts of foolish and harmful ambitions which plunge people into ruin and destruction. ‘The love of money is the root of all evils’ and there are some who, pursuing it, have wandered away from the faith and so given their souls any number of fatal wounds.”).

¹⁶⁵ *See, e.g.*, Press Release, U.S. Dep’t of Justice, Bellevue Man and Texas Attorney Each Sentenced to Four Years in Prison for Conspiracy, Wire Fraud: Pair Attempted to Collect Millions From “Selling” Houses They Did Not Own (Apr. 25, 2008), <http://www.justice.gov/usao/waw/press/2008/apr/hawkins.html>. The prosecutor’s sentencing memo stated that the defendant “was motivated by ‘pure greed.’” *Id.* The district court agreed. *Id.*

¹⁶⁶ *See, e.g.*, *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (condemning defendant’s actions “done out of greed by someone in a position of leadership who should have been a role model of proper and right behavior”); *United States v. Gloster*, 423 F. App’x 261, 262-63 (4th Cir. 2011) (finding that the district court was well within its province to make a factual determination that defendant’s greed motivated the offense and to rely on that determination, in part, to justify its decision to increase the sentence); *United States v. Hill*, 643 F.3d 807, 885 (11th Cir. 2011) (finding that a sentence of 336 months was reasonable given the economic pain defendant “inflicted to satisfy his own greed”); *Atlas Flooring, LLC v. Porcelanite S.A. DE C.V.*, 425 F. App’x 629, 634 (9th Cir. 2011) (finding the punitive damages were not excessive when, “although no physical harm occurred, Porcelanite’s selfish conduct was motivated by greed and resulted in profits for Porcelanite at Atlas’s expense”); *X-It Prods., LLC v. Walter Kiddle Portable Equip., Inc.*, 227 F. Supp. 2d 494, 546 (E.D. Va. 2002) (describing the case as “the very epitome of corporate governance in the last decade of the twentieth century—where greed and the resultant pressure on corporate officers to produce results out of line with the actual

Consequently, people are not necessarily self-interested profit-maximizers. People do not assess behavior solely by the economic outcome. Norms of fairness and intent matter. People will incur costs to punish intentional behavior. Not surprisingly, participants in behavioral experiments, like judges and jurors, rely on intent in determining whether the behavior is fair or unfair.

3. Is Intent Relevant in the Competitive Marketplace?

Skeptics of intent evidence may accept that many people are concerned with fairness. Even if humans are not primarily motivated by greed, context matters. When it comes to business strategies, companies naturally will seek to maximize wealth, otherwise they become unprofitable and exit the marketplace. Posner opines that “unusually ‘fair’” people will avoid or be forced out of “roughhouse activities—including highly competitive businesses, trial lawyering, and the academic rat race.”¹⁶⁷ So given the way company executives think about and describe their business strategies, pro-competitive behavior will often sound anticompetitive. Thus, admitting intent evidence in civil antitrust jury trials increases the risk of false positives—penalizing companies for procompetitive behavior. Indeed, Posner’s and Easterbrook’s concerns are greater if jurors, like many people in the behavioral experiments, are fair-minded. They will use bad intent evidence to punish socially beneficial activities like price-cutting or innovation.

First, the argument about false positives cuts both ways. Excluding intent evidence also increases the risk of false positives. Intent evidence can be very helpful when the defendants are not primarily motivated by profits and objectively determining the restraints’ overall welfare effects is difficult.

Massachusetts Institute of Technology (MIT) and the eight Ivy League universities, for example, coordinated for many years on financial aid decisions for successful applicants to two or more of their universities.¹⁶⁸ The DOJ prosecuted the universities under the Sherman Act. All but MIT settled pre-trial. At trial, the court was confronted with the following trade-off: “providing some financial aid to a large number of the most needy students or allowing the free market to bestow the limited financial aid on the very few most talented who may not need financial aid to attain their academic goals.”¹⁶⁹ MIT argued it had noble intentions and lacked economic self-interest; the challenged cooperative agreement among the universities

value of the assets they manage turns those officers into vultures, devouring the very businesses which they are trying to enhance”).

¹⁶⁷ Posner, *supra* note 116, at 1570.

¹⁶⁸ See *United States v. Brown Univ.*, 5 F.3d 658, 662-63 (3d Cir. 1993).

¹⁶⁹ *Id.* at 677.

“was intended, not to obtain an economic profit in the form of greater revenue for the participating schools, but rather to benefit talented but needy prospective students who otherwise could not attend the school of their choice.”¹⁷⁰ The Third Circuit accepted that such social concerns could motivate MIT. Accordingly, the district court on remand was to assess MIT’s motivation: Was MIT motivated to obtain “a more diverse student body (or other legitimate institutional goals)” or economic self-interest?¹⁷¹ As the Third Circuit instructed, “To the extent that economic self-interest or revenue maximization is operative, . . . it too renders MIT’s public interest justification suspect.”¹⁷²

If one assumes that all economic actors pursue their economic self-interest, then this inquiry is wasteful.¹⁷³ MIT and the Ivy League universities should be liable for price-fixing as the Government alleged. But as MIT argued, and economists Gustavo E. Bamberger and Dennis W. Carlton discussed, “not-for-profit firms maximize a multi-attribute objective function, [so] it simply is not possible to predict inevitable consequences from cooperative price setting.”¹⁷⁴ Here, MIT was *not* seeking to justify plainly anticompetitive conduct with its good intent. Rather, assessing objectively the conduct’s economic effects was extremely difficult. Therefore, the court found MIT’s intent quite helpful in determining the conduct’s reasonableness.

Even beyond non-profit universities, the business literature of late is re-examining the assumption that business entities are primarily motivated to maximize profits. After the economic crisis, capitalism is being reconsidered as “one imbued with a social purpose.”¹⁷⁵ One belief is that profit maximization, like happiness, is better achieved indirectly, rather than directly.¹⁷⁶ Businesses pursue a greater, more inspiring purpose—providing products and services that improve others’ welfare.¹⁷⁷ One study found that

¹⁷⁰ *Id.* at 678.

¹⁷¹ *Id.* at 677.

¹⁷² *Id.*

¹⁷³ After the case was remanded, MIT settled. *MIT Settles Price-Fixing Case*, LAWRENCE JOURNAL, Dec. 23, 1993, at 2A.

¹⁷⁴ Gustavo E. Bamberger & Dennis W. Carlton, *Antitrust and Higher Education: MIT Financial Aid (1993)*, in *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY* 196 (John E. Kwoka & Lawrence J. White eds., 3d ed. 1999).

¹⁷⁵ Michael E. Porter & Mark R. Kramer, *Creating Shared Value: How to Reinvent Capitalism—and Unleash a Wave of Innovation and Growth*, HARV. BUS. REV., Jan. 2011, at 77; Ikujiro Nonaka & Hirotaka Takeuchi, *The Big Idea: The Wise Leader*, HARV. BUS. REV., May 2011, at 59 (moral purpose). For an interesting forum on Conscious Capitalism, see James O’Toole & David Vogel, *Two and a Half Cheers for Conscious Capitalism*, CAL. MGMT. REV., Spring 2011, at 60.

¹⁷⁶ JOHN KAY, *OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY* (2010).

¹⁷⁷ Peter Thigpen, *Can We Find Another Cheer: A Response to James O’Toole & David Vogel’s “Two and a Half Cheers for Conscious Capitalism”*, CAL. MGMT. REV., Spring 2011, at 119; Rajendra S. Sisodia, *Conscious Capitalism: A Better Way to Win*, CAL. MGMT. REV., Spring 2011, at 98-100;

companies that adhere to the principles of conscious capitalism outperform the market by a 9:1 ratio over a ten-year period.¹⁷⁸ Thus, going forward, one cannot assume that greed necessarily motivates firms' behavior and intent becomes more relevant in assessing conduct when competitive effects are difficult to assess.

Suppose, for example, the Detroit-area auto dealers want to enable their employees to observe a religious Sabbath. To assure that no dealer obtains an unfair advantage, they agree among themselves to close on Saturday. Are the dealers liable under the Sherman Act? If the court assumes that all auto dealers are profit-maximizers, then motive is irrelevant. A plaintiff can more easily strike down a defendants' agreement by showing "that hours of operation in this business is a means of competition, and that such limitation may be an unreasonable restraint of trade."¹⁷⁹ This is true even without evidence that the Saturday closing actually caused an increase in auto retail prices in the Detroit area, or that the hours reductions increased dealers' gross margins.¹⁸⁰

A skeptic can respond that intent evidence, while at times helpful, is more often unhelpful—i.e., the risk of false positives and costs in admitting intent evidence exceeds the risk of false negatives and costs in barring it. To justify a blanket exclusion of intent evidence, the skeptic must believe that (1) the trial courts cannot reliably exclude the unhelpful intent evidence under Federal Rule of Evidence 403¹⁸¹ or (2) the probative value of intent evidence is always, or almost always, "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."¹⁸²

This argument cannot be directed at intent evidence generally. Intent evidence plays a central role in criminal cases, where the stakes are often higher. The U.S. legal system generally assumes that jurors in criminal

John Mackey, *What Conscious Capitalism Really Is: A Response to James O'Toole & David Vogel's "Two and a Half Cheers for Conscious Capitalism"*, CAL. MGMT. REV., Spring 2011, at 83-84.

¹⁷⁸ Sisodia, *supra* note 177, at 99.

¹⁷⁹ *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 472 (6th Cir. 1992). The FTC successfully challenged the Detroit-area auto dealers, who agreed to restrict their showroom hours, including closing on Saturdays. The Detroit-area auto dealers argued, and the administrative law judge found, that they agreed to close on Saturdays not for religious reasons, but to accomplish labor peace and in response to union and salespersons' pressure. *Id.* at 460. Although the court did not equate limitation of hours to price-fixing, it found no error in the FTC's conclusion that controlling hours of operation in this business is a means of competition, and that this limitation may be an unreasonable restraint of trade. *Id.* at 472.

¹⁸⁰ *Id.* at 471 n.13.

¹⁸¹ *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 698 (7th Cir. 2006) (Easterbrook, J.) (finding that the "district judge sensibly relied on FED. R. EVID. 403" to exclude intent evidence).

¹⁸² FED. R. EVID. 403.

trials will reliably use intent evidence. This argument also cannot be directed at the admissibility of intent evidence in business cases such as economic torts and unfair competition claims. Courts routinely admit intent evidence to assist the fact finder in assessing the firm's behavior.¹⁸³ Instead, the assumption is that in federal antitrust cases, intent evidence will more often confuse jurors into believing that procompetitive, socially beneficial behavior is anticompetitive, undesirable behavior. There is no strong empirical justification for this assumption. Moreover, the assumption, if true, would suggest a far greater market distortion.

As an initial premise, people rely on intent evidence not only in courtrooms or behavioral laboratories, but also in daily encounters with one another.¹⁸⁴ Consumers are angrier and are more willing to punish corporate behavior if they perceive the behavior as intentional, unfair, and motivated by greed.¹⁸⁵ Therefore, even if one assumes that firms primarily seek to maximize wealth, consumers nonetheless consider the firm's intent in distinguishing between fair and unfair competitive behavior.¹⁸⁶

Price gouging is one example. Suppose a hardware store after a large snowstorm raises the price of snow shovels by 33%. Eighty-two percent of respondents, in one study, considered this behavior unfair.¹⁸⁷ Neo-classical economic theory predicts that the hardware store would auction the shovel to the consumer willing to pay the most without fear of customer retribution. But such economically rational behavior is illegal in many states.¹⁸⁸

¹⁸³ See, e.g., *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 419 (S.D.N.Y. 2002) (finding that relevant in trademark cases is "an intent to capitalize on consumer deception or hitch a free ride on plaintiff's good will"); *Pampered Chef, Ltd. v. Magic Kitchen, Inc.*, 12 F. Supp. 2d 785, 795 (N.D. Ill. 1998) ("[T]he relevant 'intent' is not whether defendant intended to use ideas from another's product for use in his own, but whether he intended to pass his product off as that of another in an effort to free-ride off the other's already developed good will, product recognition and customer loyalty.").

¹⁸⁴ Thomas M. Tripp & Yany Grégoire, *When Unhappy Customers Strike Back on the Internet*, 52 MIT SLOAN MGMT. REV. 37, 38-40 (2011); Ellen Garbarino & Sarah Maxwell, *Consumer Response to Norm-Breaking Pricing Events in E-Commerce*, 63 J. BUS. RES. 1066, 1067-68 (2010).

¹⁸⁵ Tripp & Grégoire, *supra* note 184, at 42 (finding that experiment and survey results "showed that inference of motive was the key belief that drove anger and any consequent desires for revenge or reconciliation") (emphasis in original); Garbarino & Maxwell, *supra* note 184, at 1067; Lan Xia & Kent B. Monroe, *Is a Good Deal Always Fair? Examining the Concepts of Transaction Value and Price Fairness*, 31 J. ECON. PSYCHOL. 884, 891 (2010).

¹⁸⁶ Wagner et al., *supra* note 157, at 32-33; Garbarino & Maxwell, *supra* note 184, at 1067 (finding that pricing norm violation will likely impact "consumers' trust in the firm's intention to behave in the customer's best interest"); Lisa E. Bolton et al., *How Do Price Fairness Perceptions Differ Across Culture?*, 47 J. MARKETING RES. 564, 564, 572-74 (2010).

¹⁸⁷ Kahneman et al., *supra* note 122, at 729.

¹⁸⁸ See, e.g., CAL. PENAL CODE § 396 (West 2012) (stating that "public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited . . . during or shortly after a declared state of emergency"); *White v. R.M. Packer Co.*, 635 F.3d 571, 588 (1st Cir. 2011) ("[State price-gouging] rules are generally designed to protect consumers from acute and

Therefore, consumers do not perceive fairness solely on the outcome—the price they paid. Intent matters. Most respondents in the same study did not object to a merchant auctioning off the scarce good to the highest bidder if the proceeds went to charity.¹⁸⁹ Nor did they object if the merchant increased its price because of higher costs.¹⁹⁰

Consequently, customers outside the courtroom rely on intent to evaluate corporate behavior. To promote customer satisfaction, trust, and loyalty, firms in competitive markets should seek to avoid behavior or statements that suggest intentional exploitation. Suppose a retailer violated a pricing norm by charging higher prices to purchasers willing to pay more. One study found such price discrimination led to “significantly lower perceived fairness of the pricing, lower benevolence trust towards the firm, lower intention to purchase from this retailer . . . and marginally higher likelihood of additional search” on competing retailers’ websites.¹⁹¹ Even when participants in one study personally received a better price than other customers, they still perceived the retailer as behaving unfairly, were less inclined to purchase from that retailer again, and were less willing to recommend the retailer to a friend.¹⁹² Because consumers factor a company’s intent in deciding whether to punish the corporate behavior—at times by simply taking their business elsewhere—a positive reputation can provide a competitive advantage.¹⁹³ Indeed, Senator Sherman assumed that competition checked the selfishness of firms and their disregard of consumers’ interests.¹⁹⁴ Accordingly, in competitive markets, firms would be sensitive to social norms of fairness and would consequently promote employee behavior that abided by these values.¹⁹⁵

This is not always the case. In less competitive markets, firms do intentionally violate social norms of fairness and have a poor reputation, but yet enjoy significant market power. Consumers can still retaliate with unethical behavior¹⁹⁶ or group boycotts.¹⁹⁷ For example, Fields Medal winner

unconscionable increases in the prices they must pay for basic consumer goods during times of market emergency.”).

¹⁸⁹ Kahneman et al., *supra* note 122, at 735-36.

¹⁹⁰ *Id.* at 732-33; Garbarino & Maxwell, *supra* note 184, at 1067.

¹⁹¹ Garbarino & Maxwell, *supra* note 184, at 1069.

¹⁹² Xia & Monroe, *supra* note 185, at 891 (finding that study’s “participants indeed conceptually can distinguish a good price from a fair price. A price advantage is preferred as it offers higher transaction value, but they do recognize that the store is behaving unfairly in general and to other customers more specifically. More importantly, the unfairness perceptions have a significant effect on purchase intentions as well as recommendations.”).

¹⁹³ Wagner et al., *supra* note 157, at 29, 30, 42.

¹⁹⁴ 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman (D. Ohio)).

¹⁹⁵ Wagner et al., *supra* note 157, at 43 (noting that to secure competitive advantage, companies, among other things, should “ensure that fairness and trust are part of the training expectations among company representatives that work face-to-face with customers”).

¹⁹⁶ Maurice E. Schweitzer & Donald E. Gibson, *Fairness, Feelings, and Ethical Decision-Making: Consequences of Violating Community Standards of Fairness*, 77 J. BUS. ETHICS 286, 293 (2008).

Timothy Gowers is organizing a boycott of Elsevier B.V. for, among other things, charging too much for its academic journals and bundling subscriptions.¹⁹⁸ As of mid-February 2012, over 6,000 researchers have pledged not to publish, referee, or do editorial work for any Elsevier journal.¹⁹⁹

Thus in behavioral labs, courtrooms, and the marketplace, people assess whether corporate behavior that violates a social norm is intentional. If so, they assess whether kindness or greed motivates the intentional corporate behavior.²⁰⁰ If people regularly rely on intent evidence to assess whether corporate behavior is fair or unfair, then Posner's and Easterbrook's concern appears misplaced. Their concern is not the admissibility of intent evidence in the rare federal antitrust jury trial.²⁰¹ The risk of false positives and costs, even after factoring treble damages, are trivial compared to the competitive distortions and social costs arising from consumers erroneously punishing firms for intentional greedy and unfair behavior. Posner and Easterbrook, however, never claim that the marketplace suffers these distortions. Therefore, consumers are either (1) ineffectual in punishing firms for intentional greedy behavior, which draws into question consumer sovereignty and the strength of competition, or (2) far more adept than Posner and Easterbrook believe in using intent to distinguish fair and unfair competitive behavior.

4. Is Greed Good?

A skeptic may concede that fair-minded consumers factor intent in judging corporate behavior. But few consumers or jurors participate in high-level internal corporate decision-making. Easterbrook surmises that all evidence bearing on "intent" in civil antitrust trials "tends to show both greed-driven desire to succeed and glee at a rival's predicament."²⁰² Thus jurors, seeing how corporate decisions are actually made, may wrongly

¹⁹⁷ Jill Gabrielle Klein et al., *Why We Boycott: Consumer Motivations for Boycott Participation*, J. MARKETING, Jul. 2004, at 96.

¹⁹⁸ Josh Fischman, *Elsevier Publishing Boycott Gathers Steam among Academics*, CHRON. HIGHER EDUC. (Jan. 30, 2012, 6:50 PM), <http://chronicle.com/blogs/wiredcampus/elsevier-publishing-boycott-gathers-steam-among-academics/35216>.

¹⁹⁹ Cost of Knowledge (Aug. 31, 2012), <http://thecostofknowledge.com>.

²⁰⁰ Tripp & Grégoire, *supra* note 84, at 6.

²⁰¹ In 2011, 553 civil antitrust cases were terminated either by settlement or court action; only one case was terminated during or after a jury trial. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2011, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx> (Table C-4). In 2010, seven civil antitrust cases were terminated during or after a jury trial. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2010, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx> (Table C-4).

²⁰² *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989).

penalize intentional greedy behavior that violates the jurors' norms of fairness but nonetheless promotes a market economy and overall well-being.²⁰³ In a business tort case, Easterbrook praised greed:

Greed—the motive Kumpf attributes to Steinhaus—does not violate a “fundamental and well-defined public policy” of Wisconsin. Greed is the foundation of much economic activity, and Adam Smith told us that each person’s pursuit of his own interests drives the economic system to produce more and better goods and services for all. “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”²⁰⁴

Jurors, “not being professional economists,” Easterbrook asserts, “may not have understood that markets respond to deeds rather than thoughts or hopes or words.”²⁰⁵

A quick rejoinder is that greedy behavior—price-fixing being a good example—is not always socially beneficial.²⁰⁶ But the larger point is that jurors' norms of fairness can play a far greater role than greed in supporting a market economy. As Professor Lynn Stout recently discussed, societal norms of fairness and pro-social behavior are both common in, and necessary for, a market economy.²⁰⁷ As she points out, one consequence—if pro-social behavior were absent and people were purely self-interested profit-maximizers—would be “runaway negligence,”²⁰⁸ with more negligent behavior than there currently is and more litigation.

Market economies rely on trust.²⁰⁹ Fairness and trust, the business and economic research shows, “are highly interrelated;” violations of social

²⁰³ See *Wilkow v. Forbes, Inc.*, 241 F.3d 552, 557 (7th Cir. 2001).

²⁰⁴ *Kumpf v. Steinhaus*, 779 F.2d 1323, 1326 (7th Cir. 1985) (quoting ADAM SMITH, *THE WEALTH OF NATIONS* 14 (Modern Library 2000) (1776)).

²⁰⁵ *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 698 (7th Cir. 2006).

²⁰⁶ See, e.g., *United States v. Vandebroke*, 771 F. Supp. 2d 961, 965 (N.D. Iowa 2011) (“Neither defendant, however, suffered from hunger, at least as Pearl Buck knew it, but from insatiable greed, which is all the more shocking because both were already wealthy, multi-millionaire businessmen.”).

²⁰⁷ See STOUT, *supra* note 1, at 19 (“A healthy, productive society cannot rely solely on carrots and sticks. It must also cultivate conscience and tap into the human potential to unselfishly help others and, perhaps more important, to ethically refrain from harming them.”); see also AKERLOF & SHILLER, *supra* note 121, at 25 (“Considerations of fairness are a major motivator in many economic decisions and are related to our sense of confidence and our ability to work effectively together.”); Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 *LOY. U. CHI. L.J.* 469, 517 (2011) (“For our competitive capital system to thrive as an evolutionary economic ecosystem, consumers and businesspersons must be able to trust that suppliers, customers, and competitors will generally behave fairly and morally.”).

²⁰⁸ STOUT, *supra* note 1, at 159.

²⁰⁹ Paola Sapienza & Luigi Zingales, *Trust and Finance*, 2 *NBER REP.* 16, 17 (2011) (“For the development of anonymous markets, though, what matters is generalized trust: the trust that people have in a random member of an identifiable group.”); Lynn A. Stout, *Trust Behavior: The Essential Founda-*

norms of fairness decrease trust and increase retaliation.²¹⁰ How trusting can you be in a world where people will seek whenever possible to profit at your expense? The transaction costs in a world where greed runs amok would be astronomical. Imagine the contract negotiations if you feared that your employer, workers, or customers would shirk whenever profitable. Moreover, suppose a prospective employer offers you a contract that meticulously details the specific requirements expected of you and identifies the penalty for every conceivable transgression or deficient work performance. Would you want to work there? The behavioral experiments show how communicating these penalty provisions can backfire by signaling distrust and engendering less productivity from the experiments' employees.²¹¹

On a macro-level, the empirical evidence does not establish that greed is a prerequisite for a market economy.²¹² Societies with greedier residents do not necessarily have stronger economies.²¹³ Three recent behavioral experiments show how fairness is correlated with more integrated market economies.

In the first study, researchers expanded the Ultimatum Game, and Public Good and Dictator games, beyond university students to fifteen small-scale economies in twelve countries on four continents.²¹⁴ The subjects

tion of Securities Markets, in BEHAVIORAL FINANCE: INVESTORS, CORPORATIONS, AND MARKETS 513 (H. Kent Baker & John R. Nofsinger eds., 2010) ("Faith—or more accurately, trust—is the foundation on which successful public securities markets are built."); see also Horton, *supra* note 207, at 474, 476, 502, 520 (arguing how fundamental human values of fairness and reciprocity not only enhance trust but create a healthier, more stable, more efficient economic ecosystem); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q. J. OF ECON. 1251, 1252, 1260 (1997) (regression analysis of a twenty-nine market economy sample suggests that trust and civic cooperation are associated with stronger economic performance); Wagner et al., *supra* note 157, at 42 (noting that empirical findings support other research that "trust is the most important mediator in business-to-business relationships").

²¹⁰ Garbarino & Maxwell, *supra* note 184, at 1067 ("[T]rust will be destroyed when a trusted seller does not behave according to the social norms of fairness."); Wagner et al., *supra* note 157, at 35 (describing literature on importance of fairness and trust in business-to-business relationships).

²¹¹ Bowles, *supra* note 148, at 1608; see also Srinivasan S. Pillay & Rajendra S. Sisodia, *A Case for Conscious Capitalism: Conscious Leadership Through the Lens of Brain Science*, IVEY BUS. J., Sept.-Oct. 2011, available at <http://www.iveybusinessjournal.com/topics/leadership/a-case-for-conscious-capitalism-conscious-leadership-through-the-lens-of-brain-science> ("[A] leader who leads with an iron fist, a manager who uses intimidation, and a corporate culture that is infused with threat and punishment all [adversely impact decision-making and risk-assessment].").

²¹² See Benkler, *supra* note 119, at 79 ("In no society examined under controlled conditions have the majority of people consistently behaved selfishly."); STOUT, *supra* note 1, at 91-92 ("Although in some contexts [the assumption that people are selfish actors] may be realistic (e.g., anonymous market transactions), a half-century of experimental gaming research demonstrates that in many other contexts, people simply refuse to behave like the 'rational maximizers' economic theory says they should be.").

²¹³ Benkler, *supra* note 119, at 79 ("Dozens of field studies have identified cooperative systems, many of which are more stable and effective than incentive-based ones.").

²¹⁴ Henrich et al., *Homo Economicus*, *supra* note 114. The groups studied included three foraging groups (East Africa's Hadza, the Au and Gnaou of Papua New Guinea, and Indonesia's Lamalera), six

played anonymously in one-shot games, where the amount equaled one to two day's wages. Here too, behavior did not conform to neo-classical economic theory's predictions. No one in the Ultimatum Game offered the nominal amount. Although the group members, like the university students, behaved in a reciprocal manner, the range of offers varied more among members of these fifteen small-scale economies than the range of offers by university students.

So why did the amounts vary across these fifteen economies? The researchers identified group-level differences on two factors: (1) "payoffs to cooperation," or how important and how large is a group's payoffs from cooperation in economic production, and (2) the degree of market integration, or how much do people rely on market exchange in their daily lives. The greater the market integration and the higher the payoffs to cooperation, the greater the level of cooperation and sharing there was in the experimental games. The behavior the researchers observed in the experiments was generally consistent with economic patterns of everyday life in these societies. As the researchers reported:

- The Orma immediately recognized that the public goods game was similar to . . . a locally initiated contribution that households make when a community decides to construct a road or school . . . and [they] gave generously (mean 58% with 25% maximal contributors).
- Among the Au and Gnao, many proposers offered more than half the pie [50%], and many of these "hyperfair" offers were rejected! This reflects the Melanesian culture of status-seeking through gift giving. Making a large gift is a bid for social dominance in everyday life in these societies, and rejecting the gift is a rejection of being subordinate.
- Among the whale hunting Lamalera, 63% of the proposers in the ultimatum game divided the pie equally . . . (the mean offer was 57%). In real life, a large catch, always the product of cooperation among many individual whalers, is meticulously divided into predesignated parts and carefully distributed among the members of the community.
- Among the Aché, 79% of proposers offered either 40% or 50% and 16% offered more than 50%, with no rejected offers. In daily life, the Aché regularly share meat, which is . . . distributed equally among all other households, irrespective of which hunter made the kill.

slash-and-burn horticulturists (the Aché, Machiguenga, Quichua, and Achuar of South America and East Africa's Tsimane and Orma), four nomadic herding groups (the Turguud, Mongols, and Kazakhs of Central Asia, and East Africa's Sangu), and two sedentary, small-scale agricultural societies (South America's Mapuche and Africa's Zimbabwe farmers). *Id.*

- [In contrast,] the Hadza . . . made low offers and had high rejection rates in the ultimatum game. This reflects the tendency of these small-scale foragers to share meat, but a high level of conflict and frequent attempts of hunters to hide their catch from the group.
- Both the Machiguenga and Tsimane made low ultimatum game offers, and there were virtually no rejections. These groups exhibit little cooperation, exchange, or sharing beyond the family unit. Ethnographically, both show little fear of social sanctions and care little about “public opinion.” The Mapuche’s social relations are characterized by mutual suspicion, envy, and fear of being envied. This pattern is consistent with the Mapuche’s postgame interviews in the ultimatum game. Mapuche proposers rarely claimed that their offers were influenced by fairness, but rather [by a] fear of rejection. Even proposers who made hyper-fair offers claimed that they feared rare spiteful responders, who would be willing to reject even 50/50 offers.²¹⁵

The second empirical study further examined this correlation between fairness concerns and a more integrated economy.²¹⁶ One concern in any market economy is contributions to public goods. Selfish citizens will not contribute; they will free-ride on the efforts of others, leading to a suboptimal result.²¹⁷ They listen to public radio without contributing to the fundraisers. So if most people were greedy, NPR would either be non-existent, largely federally funded, or commercialized.²¹⁸ Likewise, greedy people will overharvest the trees in any shared commons; the predicted result is blight. To avert the tragedy of the commons, the government privatizes the land or taxes the commons to fund the costs for detecting and punishing overharvesting.

But in studying forty-nine forest user groups in Ethiopia, researchers found that with enough conditional cooperators in the group, the tragedy of the commons can be averted. Here, norms of cooperation, willingness to trust, and looking beyond self-interest, or the willingness to incur costly enforcement of norms, led to better economic outcomes. To assess whether

²¹⁵ Gintis et al., *supra* note 120, at 159.

²¹⁶ Devesh Rustagi et al., *Conditional Cooperation and Costly Monitoring Explain Success in Forest Commons Management*, 330 *SCIENCE* 961, 961 (2010).

²¹⁷ See generally Ostrom, *supra* note 129, at 417 (noting how Garrett Hardin’s “portrayal of the users of a common-pool resource[—]a pasture open to all[—]being trapped in an inexorable tragedy of overuse and destruction has been widely accepted since it was consistent with the prediction of no cooperation in a Prisoner’s dilemma or other social dilemma games”).

²¹⁸ The largest percentage of my NPR station’s revenue, in its 2011 fiscal year, was from listener support: “39 percent from gifts and 18 percent from underwriting.” *WUOT-FM Radio A Public Broadcast Station Operated by the University of Tennessee, Knoxville Financial Report*, WUOT-FM RADIO 6 (Dec. 8, 2011), http://www.wuot.org/h/Financials_2011.pdf.

the group members were self-interested, conditional cooperators, or altruists, the researchers had each group member play the Public Goods game—once, anonymously, and with high stakes, meaning the equivalent of one-day’s wage.²¹⁹ They found overall fewer altruists—fifteen of 679 participants—and self-interested free riders—seventy-eight participants—in the groups. Most were either conditional cooperators—231 participants—or weak conditional cooperators—79 participants.

This second study found that the forest groups with a larger share of conditional cooperators had better outcomes than groups with more free-riders. Forest user groups with a higher percentage of conditional cooperators had more potential crop trees per hectare.²²⁰ A ten percent increase in the share of free-riders led to an average drop in the forest management outcome by almost seven potential crop trees per hectare.

So why did the groups with more conditional cooperators outperform those with more free-riders? First, the conditional cooperators were more likely to abide by the group’s local rules and not cheat by harvesting and selling extra firewood. Second, conditional cooperators, like neighborhood watch groups, were more likely to invest time monitoring their forest: a 1% increase in the share of conditional cooperators increased the group’s time spent monitoring by 0.28%.²²¹ Conditional cooperators were “more willing to contribute to the second-order public good” in enforcing the rules at a personal cost.²²²

This makes sense. The strength of neighborhood community organizations involves neighbors who agree to abide to local norms (maintaining their lawns) and who spend the time to monitor infractions (telling others not to litter, clean up after their dog, etc.).

In the third behavioral experiment, the researchers examined the connection between market integration/world religions and norms of fairness, trust, and cooperation.²²³ They tested 2,149 people in fifteen populations with varying degrees of market integration²²⁴ and in practicing a world reli-

²¹⁹ Rustagi et al., *supra* note 216, at 962.

²²⁰ *Id.* at 963 (finding that all other things being equal, a 10% increase in the share of conditional cooperators in a group increased the outcome by five potential crop trees per hectare on average).

²²¹ *Id.* at 964.

²²² *Id.*; see also Ostrom, *supra* note 129, at 424-25 (noting how “in many field settings, resource users have devised a variety of formal or informal ways of sanctioning one another if rules are broken, even though this behavior is not consistent with the theory of norm-free, complete rationality” and in a controlled experimental setting “subjects who decided to adopt their own sanctioning system achieved the highest returns achieved in any of the common-pool resource laboratory experiments”).

²²³ Henrich et al., *Markets, Religion*, *supra* note 114, at 1480-84.

²²⁴ *Id.* at 1482 (study measured market integration by calculating the percentage of a household’s total calories that were purchased from the market as opposed to home-grown, home-hunted, or home-fished).

gion.²²⁵ To measure the individuals' propensities to fairness and willingness to punish unfairness, three experiments—Dictator Game, Ultimatum Game, and Third-Party Punishment Game—were used. The stakes were one-day's local wages. The study found a positive correlation between fairness and degree of market integration: A twenty percentage point increase in market integration was associated with an increase in percentage offered in the three games—roughly 2% to 3.4%.²²⁶ Likewise, participating in a world religion was associated with an increase in the percentage offered—between 6% and 10%.²²⁷ As the authors conclude, “These findings indicate that people living in small communities lacking market integration or world religions—absences that likely characterized all societies until the Holocene—display relatively little concern with fairness or punishing unfairness in transactions involving strangers or anonymous others.”²²⁸

Many people in these experiments were trusting. However, their willingness to trust and cooperate was conditional, depending on the actual or expected cooperation of others. The Ethiopian farmers, as in other experiments,²²⁹ refused to contribute if the other farmer was greedy and would free-ride, which is consistent with neo-classical economic theory, or the farmer would free-ride if the farmer *believed* that the other farmer would free-ride.²³⁰ While punishment mechanisms, even if costly to the punisher, can often deter free-riding, the punishment mechanism can be ineffective when ethnically and religiously segregated groups interact.²³¹

As this section discusses, there is little empirical support that jurors will use evidence of greedy intent to penalize socially beneficial behavior. Moreover, greed is neither descriptive nor normative. Greedy citizens are not necessary for a vibrant market economy. If anything, concerns of fairness, as the empirical work shows, are more strongly correlated with market integration and superior outcomes. Pure unremitting self-interest can undermine, rather than enhance, a market economy.²³² Therefore, if pro-social behavior, not greed per se, supports a market economy, and if citizens routinely rely on intent in determining whether behavior is pro- or anti-social,

²²⁵ *Id.* at 1481 (study measured the practice of a world religion by the percentage of individuals reporting adherence to Islam or Christianity).

²²⁶ *Id.* at 1482.

²²⁷ *Id.* (“Taken together, these data indicate that going from a fully subsistence-based society (MI = 0) with a local religion to a fully market-incorporated society (MI = 100%) with a world religion predicts an increase in percentage offered of roughly 23, 20, and 11 in the DG, UG, and TPG, respectively. This spans most of the range of variation across our populations: DG means range from 26 to 47%, UG from 25 to 51%, and TPG from 20 to 43%.”).

²²⁸ *Id.* at 1483-84.

²²⁹ STOUT, *supra* note 1, at 106-8.

²³⁰ Rustagi et al., *supra* note 216, at 964.

²³¹ Marcus Alexander & Fotini Christia, *Context Modularity of Human Altruism*, 334 SCI. 1392, 1392 (2011).

²³² Bowles, *supra* note 148, at 1605.

then one cannot defend the blanket exclusion of intent evidence on the basis that jurors will always, or almost always, penalize intentional greedy behavior to society's detriment.

5. Is Competition Zero-Sum Warfare?

One can concede that many people are concerned about fairness, can distinguish between good and bad intent, and punish intentional greedy behavior in the marketplace. But intent is irrelevant if people will mistake hatred for anticompetitive effects. Easterbrook asserts that "hatred is a spur to competition, which serves consumers' interests."²³³ He and Posner assume that competition is mostly zero-sum, whereby the deeper the injury to one's rivals, the greater the potential benefit.²³⁴ If competition is zero-sum warfare, then the propaganda of warfare is hatred of the enemy. Consequently, hatred naturally arises in zero-sum competition and is not very probative. "If courts [and jurors] use the vigorous, nasty pursuit of sales as evidence of a forbidden 'intent,' they run the risk of penalizing the motive forces of competition."²³⁵

First, a market economy is built on mutual exchange, *not* hatred or zero-sum warfare. Nor can self-interest or hatred explain some of the collaboration today, like open-source software and Wikipedia, where many people freely cooperate without expectation of financial compensation.²³⁶

Second, if firms uniformly despised their competitors and were bent on destroying them, they would never collaborate. The reality, as Posner recognized, is that many businesses have a mixed motive of collaboration and competition:

[F]irms often have both a competitive and a supply relationship with one another. A manufacturer of aluminum might both sell aluminum to fabricators and do its own fabrication in competition with its customers. Airlines compete but also feed passengers to each other. Railroads compete but also join in offering through routes and joint rates. Oil companies compete in some markets and are joint venturers in others.²³⁷

One cannot assume businesses are solitary gladiators: "Increasingly, industry structure is better characterized as competing webs or ecosystems

²³³ Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1255 (7th Cir. 1995).

²³⁴ Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986).

²³⁵ A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989).

²³⁶ Christopher Meyer & Julia Kirby, *Runaway Capitalism*, HARV. BUS. REV., Jan.-Feb. 2012, at 72-73; Eric von Hippel, *Defend Your Research: People Don't Need a Profit Motive to Innovate*, HARV. BUS. REV., Nov. 2011, at 36; Benkler, *supra* note 119, at 77, 78-79; Paul Adler et al., *Building a Collaborative Enterprise*, HARV. BUS. REV., July-Aug. 2011, at 96.

²³⁷ Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594 (7th Cir. 1984).

of codependent companies than as a handful of competitors producing similar goods and services and working on a stable, distant, and transactional basis with their suppliers and customers.”²³⁸

Retail supermarkets’ private label products, for example, compete with the manufacturers’ branded goods.²³⁹ But supermarkets are not bent on crushing the branded goods manufacturers.²⁴⁰ Instead, supermarkets cooperate with them in promoting their branded goods, such as end-cap displays, amount of shelf-space, sales, etc.²⁴¹ Manufacturers compete every day and collaborate with suppliers, distributors, and retailers.²⁴² Indeed, the difficult antitrust cases often involve firms that compete and collaborate, such as dominant firms who terminate their collaborative arrangements with competitors, or resale price maintenance cases where the manufacturer competes and collaborates with the retailer.

Consumers also benefit from the many joint ventures where competitors cooperate in pooling resources and labor to develop new products or technologies. Antitrust jurisprudence over the past thirty years has acknowledged the pro-competitive benefits of cooperation among direct competitors. A simplistic depiction of competition as warfare can chill these pro-competitive joint ventures.²⁴³ The FTC and DOJ, for example, recognize that (1) “[i]n order to compete in modern markets, competitors sometimes need to collaborate,” (2) “[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering produc-

²³⁸ Martin Reeves & Mike Deimler, *Adaptability: The New Competitive Advantage*, HARV. BUS. REV., July-Aug. 2011, at 139.

²³⁹ See, e.g., KROGER CO., *The Kroger Co. 2010 Fact Book* (July 2011), http://www.thekrogerco.com/finance/documents/2010_KrogerFactBook.pdf.

²⁴⁰ Richard Volpe, *The Relationship Between National Brand and Private Label Food Products: Prices, Promotions, Recessions, and Recoveries*, U.S. Dep’t of Agriculture, ERR-129, at 10 (Dec. 2011), available at http://www.ers.usda.gov/media/187072/err129_1_.pdf (discussing conventional supermarkets’ pricing promotions for private label and national brand products).

²⁴¹ *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 786 (6th Cir. 2002) (discussing concept of category management, which an expert testified “is based on trust”).

²⁴² Robert L. Steiner, *Market Power in Consumer Goods Industries*, in PRIVATE LABELS, BRANDS, AND COMPETITION POLICY: THE CHANGING LANDSCAPE OF RETAIL COMPETITION 73, 73 (Ariel Ezra-chi & Ulf Bernitz eds., 2009); Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 64, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF>; Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, HARV. BUS. REV., Jan. 2008, at 29-30; see also *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000).

²⁴³ *Compare Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (Easterbrook, J.) (arguing that “to require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law”) with *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985) (Easterbrook, J.) (“The war of all against all is not a good model for any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment.”).

tion and other costs,” and (3) “[s]uch collaborations often are not only benign but procompetitive.”²⁴⁴ Consequently, the intent of competitors can be especially relevant in their cooperative joint ventures.

Even when firms do not collaborate, competition is not necessarily zero-sum. Michael Porter and others have identified how competitors mutually gain from localized competition, such as improving the quality of their labor pool and strengthening their network of suppliers.²⁴⁵ Such localized competition may spur variety in products, as competitors strive to differentiate from their rivals’ products, as well as in production techniques and strategies, which will lead to further innovation. Under a dynamic, evolutionary process, such competition might have informational benefits as firms learn from their rivals’ mistakes and mimic and improve upon their rivals’ successes.²⁴⁶ One empirical study found a positive correlation between industry variety and performance.²⁴⁷ In considering why the entire industry benefits when firms pursue a variety of competitive strategies, the study’s authors posit that with less variety, there will be less opportunity for the firms to learn of the changing conditions and demands and appropriate responses thereto.²⁴⁸

Technological innovation can often be positive-sum—servicing a need currently unmet—rather than zero-sum—taking revenues away from entrenched competitors. Indeed firms may seek to avoid price competition by differentiating their product for distinct audiences. Increased competition can lead firms to develop new products to satisfy unmet needs and experiment with new processes, technologies, or designs, which will lead to greater variety and interest in that category.

Even for instances of zero-sum competition, it does not necessarily follow that “[t]he deeper the injury to rivals, the greater the potential benefit.”²⁴⁹ In athletic contests, like competition generally, cooperation is necessary in defining and enforcing the rules of the game.²⁵⁰ Even on the playing

²⁴⁴ FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 1 (2000), <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

²⁴⁵ See, e.g., MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 662-69 (1990); Michael E. Porter, *Competition and Antitrust: A Productivity Approach*, in UNIQUE VALUE: COMPETITION BASED ON INNOVATION CREATING UNIQUE VALUE 161-65 (Charles D. Weller et al. eds. 2004); Grant Miles et al., *Industry Variety and Performance*, 14 STRATEGIC MGMT. J. 163, 164 (1993) (collecting studies).

²⁴⁶ EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS 15-15, 146 (5th ed. 2003) (discussing how information exchange, trialability, and observability are crucial in the innovation-development process); Horton, *supra* note 207, at 486-89, 498-99.

²⁴⁷ Miles et al., *supra* note 245, at 166-72.

²⁴⁸ *Id.* at 174.

²⁴⁹ Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986).

²⁵⁰ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (college football “would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed”).

field, citizens nonetheless expect the winner to prevail within norms of fairness, and intent plays a role. In Major League Baseball, for example, the play-by-play is often determined objectively. The umpire generally considers whether the pitch was in the strike zone, not whether the pitcher intended a strike or ball. Nonetheless, intent comes into play, such as whether there is an interference of play,²⁵¹ an illegal pitch (also known as a “Quick Return” in the Major League Baseball Rulebook),²⁵² the pitcher is thrown out for hitting a batter,²⁵³ and unsportsmanlike conduct.²⁵⁴

The one market that perhaps approximates Easterbrook’s and Posner’s theory of zero-sum competition is what remains of the Chicago derivatives trading pits. Here, one trader often profits at another’s expense. Greed motivates behavior. Some traders in one documentary genuinely hated each another.²⁵⁵ There were “fistfights in the plaza outside the Chicago Board Options Exchange and one incident ended with a trader biting another’s nose.”²⁵⁶ But even in this greed-fueled warfare, the traders are bound by rules, where subjective intent is relevant. For example, the CBOT Rulebook prohibits traders

B. 1. to engage in fraud or bad faith; 2. to engage in conduct or proceedings inconsistent with just and equitable principles of trade;

C. to engage in dishonest conduct;

....

F. to buy or sell any Exchange futures or options contract with the intent to default on such purchase or sale;

²⁵¹ Official Baseball Rules: 2011 Edition, MLB Rule 3.15 (2011), http://mlb.mlb.com/mlb/official_info/official_rules/foreword.jsp (“In case of unintentional interference with play by any person herein authorized to be on the playing field (except members of the team at bat who are participating in the game, or a base coach, any of whom interfere with a fielder attempting to field a batted or thrown ball; or an umpire) the ball is alive and in play. If the interference is intentional, the ball shall be dead at the moment of the interference and the umpire shall impose such penalties as in his opinion will nullify the act of interference.”); Rule 7.09(k) (“If, in the judgment of the umpire, the runner deliberately and intentionally kicks such a batted ball on which the infielder has missed a play, then the runner shall be called out for interference.”).

²⁵² MLB Rule 2.0 (“A QUICK RETURN pitch is one made with obvious intent to catch a batter off balance. It is an illegal pitch.”).

²⁵³ MLB Rule 8.02(d) (Intentionally Pitch at the Batter).

²⁵⁴ MLB Rule 6.05(m) (“A preceding runner shall, in the umpire’s judgment, intentionally interfere with a fielder who is attempting to catch a thrown ball or to throw a ball in an attempt to complete any play: Rule 6.05(m) Comment: The objective of this rule is to penalize the offensive team for deliberate, unwarranted, unsportsmanlike action by the runner in leaving the baseline for the obvious purpose of crashing the pivot man on a double play, rather than trying to reach the base. Obviously this is an umpire’s judgment play.”).

²⁵⁵ FLOORED (Trader Film 2009).

²⁵⁶ James Allen Smith, *Wall Street Journal Crashes FLOORED Premiere*, FLOORED BLOG (Jan. 17, 2010), <http://flooredthemovie.com/community/?p=400>.

....

H. to engage in, or attempt to engage in, the manipulation of prices of Exchange futures or options contracts; to corner or squeeze, or attempt to corner or squeeze, the underlying cash market; or to purchase or sell, or offer to purchase or sell Exchange futures or options contracts, or any underlying commodities or securities, for the purpose of upsetting the equilibrium of the market or creating a condition in which prices do not or will not reflect fair market values;

....

Q. to commit an act which is detrimental to the interest or welfare of the Exchange or to engage in any conduct which tends to impair the dignity or good name of the Exchange;

....

T. to engage in dishonorable or uncommercial conduct.²⁵⁷

Hatred, like greed, neither spurs competition nor serves consumers' interests. Competition is, after all, what we want from it. Competition does not exist abstractly in the form of zero-sum warfare. His Holiness the Dalai Lama observed the importance of being aware "of what type of competition we need, which is a sort of friendly competition that would not seek the destruction or the downfall of rivals or other people, but rather would act as a stimulating factor for growth and progress."²⁵⁸ Similarly, the Restatement (Second) of Torts states, for one business tort, "[a] motive to injure another or to vent one's ill will on him serves no socially useful purpose."²⁵⁹ Thus, a defendant's "visceral good feeling that we have taken you out of the market" is not socially desirable.²⁶⁰

Ultimately, the most telling admission that Posner and Easterbrook's assumptions are empirically unsound is their fear over jurors' misuse of intent evidence.²⁶¹ Under their worldview, greed and hatred motivate market participants. Jurors consist of adult citizens residing in that district. All are market participants. Many jurors work for firms that presumably compete for business.²⁶² Therefore, jurors, in their everyday business activity,

²⁵⁷ CME Group, *CBOT Rulebook, Chapter 4. Enforcement of Rules, Rule 432. General offenses*, <http://www.cmegroup.com/rulebook/CBOT/I/4/32.html>.

²⁵⁸ HIS HOLINESS THE XIV DALAI LAMA, *THE ART OF LIVING: A GUIDE TO CONTENTMENT, JOY AND FULFILLMENT* 24 (2005).

²⁵⁹ RESTATEMENT (SECOND) OF TORTS § 767 cmt. d.

²⁶⁰ *Silver v. Mendel*, 894 F.2d 598, 600, 605 (3d Cir. 1990) (quoting appellee's phrase in a letter addressed to appellant during the dispute out of which the case arose).

²⁶¹ *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 698 (7th Cir. 2006); *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595-96 (7th Cir. 1984).

²⁶² Juror pools for federal trials are randomly selected from qualified citizens residing in that judicial district. Thus, to the extent citizen demographics vary by judicial district, so too will juror demographics. One project involving fifty jury trials in the Seventh Circuit between 2005 and 2008 found that most jurors (89%) were between 25 and 64 years old and employed (86.8%). Of the employed

should presumably desire to ruin their competitors. If true, intent evidence would not mislead jurors. The nonplussed jurors would collectively yawn. The animus would reflect their everyday reality—executives naturally hate their competitors. Since intent evidence would not affect juror deliberation, lawyers and courts would not waste time on such evidence. If Posner's and Easterbrook's assumptions reflect everyday reality, intent evidence would be irrelevant, not by judicial fiat, but by market forces. Even if the statute required intent, the courts would likely take judicial notice of a defendant's subjective intent; their intent would "not [be] subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction."²⁶³ In reality, courts do not take judicial notice of a defendant's intent in antitrust cases.²⁶⁴

In the end, Posner's and Easterbrook's concern is paternalistic. They assume that jurors in the workforce are bent on destroying their competitors; upon entering the courthouse, they become irrational naïfs.²⁶⁵ So if Posner's and Easterbrook's assumptions are true, many judges and jurors are in denial. They cannot recognize the extent to which greed and hatred motivate them, that greed and hatred are good, and that only economic outcomes, not intent, matter.

Consequently, economic theory has evolved beyond these empirically suspect assumptions. This does not mean that intent evidence is always admissible. Posner's and Easterbrook's criticism about intent evidence is valid when the evidence's probative value in a particular antitrust case is substantially outweighed by its danger of being unfairly prejudicial, of confusing the issues, or of misleading the jury to condemn obviously socially beneficial conduct. As Part III discusses, courts can and do exclude intent evidence in these circumstances. But there simply is no strong empirical support for excluding all or most intent evidence in civil antitrust trials.

jurors, many were either professional/white collar (27.1%) or office workers (21.5%). SEVENTH CIRCUIT BAR ASSOCIATION, SEVENTH CIRCUIT AMERICAN JURY PROJECT FINAL REPORT 210-11 (2008), available at <http://www.7thcircuitbar.org/associations/1507/files/7th%20Circuit%20American%20Jury%20Project%20Final%20Report.pdf>. Nationwide many United States residents hold management, professional and related occupations (over 51 million of 139 million employed civilians in 2010) or sales and office occupations (over 33 million). U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012 393, 395 (2012), available at <http://www.census.gov/prod/2011pubs/12statab/labor.pdf>.

²⁶³ FED. R. EVID. 201(b)(1).

²⁶⁴ See, e.g., *In re Mushroom Direct Purchaser Antitrust Litig.*, 514 F. Supp. 2d 683, 701 n.11 (E.D. Pa. 2007) (refusing to take judicial notice that the restriction of less than one thousandth of one percent of U.S. farmland does not evince specific intent to monopolize).

²⁶⁵ POSNER, *supra* note 14.

III. USING INTENT EVIDENCE

The Supreme Court and many other courts, as Part I shows, continue to recognize that intent evidence is relevant in antitrust cases. Part II assesses the criticisms by two Chicago School jurists about the admissibility of intent evidence. This Part examines intent evidence's relevance in antitrust cases. Evidence, such as a defendant's other bad acts, can be relevant and admitted for some purposes—to prove the defendant's motive or intent—but not for others—e.g., the defendant's poor character and propensity to commit crime.²⁶⁶ So too can intent evidence be more probative for some purposes than others. In antitrust cases, intent evidence, Justice Brandeis wrote, “may help the court to interpret facts and to predict consequences.”²⁶⁷ This Part examines intent evidence's probative value in predicting consequences and interpreting facts.

A. *The Probative Value of Intent Evidence in Predicting Consequences*

The D.C. Circuit in *Microsoft* viewed intent evidence's probative value narrowly:

[I]n considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant *only to* the extent it helps us understand the likely effect of the monopolist's conduct.²⁶⁸

The assumption is that firms—with informational advantages—can better predict their conduct's competitive effects than courts or antitrust enforcers who are less familiar with the industry's competitive dynamics. Even Chicago School theorists like Posner recognize intent evidence's value in predicting effects in some antitrust cases.²⁶⁹ Thus, intent evidence is especially probative in antitrust cases where the courts and enforcers must predict the conduct's likely competitive effects.

One example is pre-merger review. There, the enforcers and courts must assess whether the proposed merger may substantially lessen competition or tend to create a monopoly.²⁷⁰ Although it “is not requisite to the

²⁶⁶ FED. R. EVID. 404(b).

²⁶⁷ *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

²⁶⁸ *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (emphasis added).

²⁶⁹ Although Posner surmised that “[a]ny doctrine that relies upon proof of intent is going to be applied erratically at best,” even he saw no alternative but to allow proof of intent for “disambiguating an ambiguous practice” of predatory pricing. POSNER, *supra* note 14, at 214, 216.

²⁷⁰ 15 U.S.C. § 18.

proof of a violation of § 7 to show that restraint or monopoly was intended,²⁷¹ the merging parties' intent can play an important role in predicting competitive effects.²⁷²

Intent evidence's probative value for predicting effects diminishes when no prediction is required. One example is price-fixing cartels. The Government must prove the accused's intent to enter the conspiracy; it need not prove the agreement's anticompetitive effects. The Court is unsympathetic to hapless but harmless price-fixers; they "have little moral standing to demand proof of power or effect when the most they can say for themselves is that they tried to harm the public but were mistaken in their ability to do so."²⁷³ Consequently, when the conduct itself is wrongful, intent evidence is relevant for the purpose of assessing the defendant's awareness of engaging in the conduct, not for predicting the conduct's competitive consequences.

Even in antitrust cases where predicting consequences is key, intent evidence's probative value diminishes when business executives' predictions suffer from biases and heuristics. Overconfident executives can overstate the firm's ability to recoup from a predatory pricing scheme or raise prices post-merger.²⁷⁴ Some managers suffer from the illusion of control, whereby they are overconfident of their ability to affect events, as well as competition neglect, where they discount the reaction of rivals, customers, and suppliers, or intervening events.²⁷⁵ Dartmouth business professor Sydney Finkelstein, for example, studied over fifty companies and conducted about 200 interviews. He found that spectacularly unsuccessful executives shared several characteristics that are "widely admired in the business world."²⁷⁶ The first trait is that executives "see themselves and their companies as dominating their environment."²⁷⁷ The executives "fail to realize they are at the mercy of changing circumstances" and instead "vastly overestimate the extent to which they actually control events and vastly unde-

²⁷¹ *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957); *Mississippi River Corp. v. FTC*, 454 F.2d 1083, 1089 (8th Cir. 1972) ("Honest intentions, business purposes and economic benefits are not a defense to violations of an antimerger law.").

²⁷² *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring) (the "Supreme Court has clearly said that 'evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger.'" (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 n.48 (1962)); MERGER GUIDELINES, *supra* note 17, at § 2.2.1).

²⁷³ *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432 n.15 (1990) (quoting 7 PHILLIP AREEDA, ANTITRUST LAW ¶ 1509, at 411 (1986)).

²⁷⁴ DANIEL KAHNEMAN, THINKING, FAST AND SLOW 256-64 (2011); Maurice E. Stucke, *Reconsidering Competition*, 81 MISS. L.J. 107, 154-63 (2011); Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1540, 1542, 1554-70 (2011).

²⁷⁵ KAHNEMAN, *supra* note 274, at 259-61.

²⁷⁶ Sydney Finkelstein, *The Seven Habits of Spectacularly Unsuccessful Executives*, IVEY BUS. J., Jan.-Feb. 2004, at 1.

²⁷⁷ *Id.*

reestimate the role of chance and circumstance in their success.”²⁷⁸ Thus, even when corporate executives subjectively intend to dominate the market, their intent may not predict accurately their behavior’s competitive consequences. Given their biases and heuristics, executives at times may be poorer predictors of their action’s likely competitive effects than a dispassionate observer.

Consequently, a defendant’s intent is probative in predicting the restraint’s likely competitive effects only when the firm can predict more accurately—i.e., the firm has relatively more information, greater ability to affect market forces, and is not skewed by overconfidence bias—than courts and enforcers. This is not always the case. Not surprisingly, besides requiring anticompetitive intent, courts require, in any attempted monopolization claim, proof of a dangerous probability that defendant would monopolize a particular market.²⁷⁹

B. *The Probative Value of Intent Evidence in Interpreting Facts*

An “‘objective’ standard[—]the vitality of market competition,” observed the economist Alfred Kahn, “is disturbingly elusive.”²⁸⁰ Posner and neo-classical economists will concede that the parties can introduce intent evidence for the purpose of predicting the challenge restraint’s economic consequences, to the extent the intended behavior is consistent with neo-classical economic theory. The neo-classical economist may even concede that many people are concerned about fairness. But they assume that these concerns over fairness do not impact their conception of economic welfare.

The behavioral experiments, however, show that intent evidence goes beyond predicting anticompetitive effects. Intent evidence helps jurors assess the conduct itself. As Kahn stated:

The function of antitrust legislation can be only to see to it that no one attempts to stifle or pervert the process of competition by collusion, by unreasonable financial agglomeration, or by exclusion. Illegality must inhere in the act, not in the result, and the test of intent is only a means of defining the act.²⁸¹

People, as the behavioral experiments show, are not solely concerned about outcomes. Our natural inclination is to factor the actor’s intent in assessing the action’s reasonableness. Taking a purely outcome oriented

²⁷⁸ *Id.*

²⁷⁹ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

²⁸⁰ Kahn, *supra* note 8, at 49; *see also* *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 575-76 (1973) (Rehnquist, J., dissenting) (criticizing the notion that “an identifiable difference between ‘objective’ and ‘subjective’ evidence” exists in antitrust cases as “largely illusory”).

²⁸¹ Kahn, *supra* note 8, at 50.

model “is not in line with many experimental findings[,]” as the behavior’s fairness depends in part on the intent.²⁸² If I offered you \$5 in the Ultimatum Game, is that objectively reasonable? Your perception of my offer’s fairness depends in part on my intent—whether I sought to keep \$5 or \$5000 for myself.

In addition, as the behavioral experiments show, concerns for promoting efficiency do not always trump equity concerns. Participants will sacrifice efficiency gains to protect weaker members and punish aggressive intra-community behavior. Not only do people sacrifice economic gains to their supposed welfare under that conception, they predictably do so for fairness concerns. In other words, if one assumed that promoting societal welfare rested on the parties’ maximizing their self-interest, then citizens should be encouraged to accept the nominal offer; the actor’s intent should be irrelevant in the behavioral lab, the marketplace, and the courtroom. But this would deny the greater import of the behavioral evidence—people’s concern over fairness and trust, and intent role therein, is integral to any market economy. Thus, intent evidence has a far-reaching consequence—as an important factor in evaluating fairness, which in turn supports a market economy.

One assumption is that intent evidence favors the antitrust plaintiff. But intent evidence can benefit defendants. Courts already inquire whether pro-competitive reasons, such as improving the product, providing consumers better service, etc., motivated the defendants. Intent evidence can also explain why defendants sought to punish unfair behavior.²⁸³

Many people in the behavioral economics literature perceive free-riding as unfair. Free-riding can prevent the parties from reaching the mutually optimal outcome. Free-riding can pose similar problems in retail industries as well.²⁸⁴ Here, intent can be important. As the Court noted, “The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional sa-

²⁸² Armin Falk & Urs Fischbacher, *Modeling Strong Reciprocity*, in *MORAL SENTIMENTS*, *supra* note 119, at 207.

²⁸³ *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295-96 (11th Cir. 2004) (noting that preventing free-riding was a valid, non-pretextual business justification).

²⁸⁴ *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890-91 (2007). The Court summarized the free-rider problem: “Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. Consumers might learn, for example, about the benefits of a manufacturer’s product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer.” *Id.* (citations omitted).

lesmen or demonstrating the technical features of the product, and will want to see that ‘free-riders’ do not interfere.”²⁸⁵

One example is golf clubs. PING is a leading manufacturer of golf clubs. Its competitive advantage is attributable, in part, to custom-fitting. PING seeks to properly fit “a golfer with PING equipment tailored to that golfer’s individual game, regardless of his or her skill level.”²⁸⁶ PING’s custom-fitting is both costly and time-consuming.²⁸⁷ The retailer must be trained to identify “which, of the more than one million custom manufacturing possibilities PING can deliver, is the right one for each individual golfer.”²⁸⁸ Suppose a customer spent an hour with one golf shop to determine the proper PING golf club. The customer leaves the shop and purchases that PING club at another shop at a cheaper price. The retailer can offer the discount because it does not invest the time and expense training employees on PING’s custom-fitting.

Until recently, PING lacked good legal options. Under *Colgate*, PING could simply refuse to sell its clubs to free-riders.²⁸⁹ But free-riders rarely announce themselves—retailers, who desire to sell PING clubs, would disavow any intention of free-riding. Therefore, the problem arises when retailers complain about another store’s free-riding and discounting below PING’s suggested retail price. One way to avoid this dilemma and prevent free-riding, as Ostrom noted, is communication.²⁹⁰ But here, PING feared that extensive communications with its retailers could subject it to antitrust liability for resale price maintenance, which at the time was per se illegal.²⁹¹ As PING told the Court, “[t]o minimize the risks created by *Colgate*, PING

²⁸⁵ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762-63 (1984).

²⁸⁶ Brief for PING, Inc. as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (No. 06-480), 2007 WL 173680, at *6 [hereinafter Brief for PING, Inc.].

²⁸⁷ *Id.* at n.2 (reporting that “[a]n iron and wedge fitting session requires 30 to 60 minutes to evaluate properly each golfer’s physical characteristics and swing in arriving at the golf club specifications unique to that golfer. The fitting involves: an interview process (to identify the golfer’s current and desired ball flight); static measurements (height and other physical measurements necessary to calculate a starting point for club length, lie angle, and grip size); a dynamic swing test (‘impact tape’ is applied to the sole of the club, and the marks left on the tape are used to calculate the proper loft and lie angles); ball flight observations (ball flight is observed to determine the final lie angle specifications—which will minimize the chance that the golfer hits shots that miss left or right of the intended target); and performance monitor (the PING ‘Performance Scoresheet’ is employed to identify any changes to the golfer’s shot making patterns). As a result of this technical and time-intensive effort, PING customers who have been custom fitted receives the precise clubs that will allow them to ‘play their best,’ and obtain all of the value built into PING golf clubs.”).

²⁸⁸ *Id.* at 6 n.2.

²⁸⁹ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

²⁹⁰ Ostrom, *supra* note 129, at 419, 424; Benkler, *supra* note 212, at 83.

²⁹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 903 (2007) (“Even with the stringent standards in *Monsanto* and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures.” (citing Brief for PING, Inc., *supra* note 287, at 9-18)).

drastically restricts employees' communications with the retailers to whom they sell and, worse, summarily terminates retailers for even the smallest policy violations, without considering whether the violation was intentional or why it occurred."²⁹² PING wanted to discuss with its retailers the alleged infraction to assess whether it was intentional but the antitrust risks were too great.²⁹³

Why did PING want to ascertain the alleged violator's intent? If PING assumed that all retailers were greedy and would free-ride whenever possible, then intent is irrelevant. PING simply would assume that the offending retailer sought to free-ride. Moreover, if retailers were greedy free-riders, then the antitrust legal standard would be irrelevant. Whatever PING's minimum or maximum retail price, greedy retailers would opportunistically seek to free-ride, such as by hiring less competent salespeople and offering complementary add-ons like golf bags or shoes. Whatever the antitrust legal standard, PING would unlikely trust or rely upon the retailers. PING, in a world of free-riders, would have to sell the clubs directly.

Thus, PING's business model makes sense only if most of its retailers were conditional cooperators and the few free-riders feared punishment. Retailers in reality were not predisposed to free-riding. As one terminated retailer complained, "We would never do anything intentionally and knowingly to hurt the PING brand. We just promote it, push it, and sell it."²⁹⁴ Since retailers were not predisposed to free-riding, whether the retailer intended to free-ride was very important in PING's competitive assessment. PING's inability to assess intent, given the legal restraints at the time, was a sore spot.²⁹⁵ It could not punish the intentional free-riding while excusing the unintentional acts.

If PING and its retailers believe intent is probative in assessing the competitive effects, then logically, as Posner found, factfinders would find the same intent evidence helpful in assessing the manufacturer's conduct under the federal antitrust laws.²⁹⁶ One efficient solution is to allow manufacturers, like the players in the public goods experiments, to communicate

²⁹² Brief for PING, Inc., *supra* note 286, at 10.

²⁹³ *Id.* at 15 ("PING does not warn its retailers when it becomes aware of a violation; it does not contact the retailer to investigate whether the violation was intentional.").

²⁹⁴ *Id.* at 17.

²⁹⁵ *Id.* at 16 n.11 ("A significant intangible cost that flows from PING's inability to issue warnings, or fully to discuss iFIT Pricing Policy issues with retailers, without incurring unacceptable legal risk includes the deep regret PING's executive management and sales force feel when these important relationships end in such a 'legalistic' and abrupt fashion.").

²⁹⁶ *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1440 (7th Cir. 1986) ("As long as the supplier's motive is not to keep his established dealers' prices up but only to maintain his system of lawful nonprice restrictions, he can terminate noncomplying dealers without fear of antitrust liability even if he learns about the violation from dealers whose principal or perhaps only concern is with protecting their prices.").

with retailers to assess whether the free-riding was intentional, and if so, to punish it.

C. *Some Caveats on the Use of Intent Evidence*

As my colleague observed, “Ambiguity attracts litigation.”²⁹⁷ Critics of intent evidence fear that the use of intent evidence increases ambiguity, which in turn increases litigation and the risk of false positives and negatives. Professor Lao extensively and persuasively discusses the benefits and risks of using intent evidence.²⁹⁸ The point illustrated here is that the courts have successfully used, and should continue employing, intent evidence.

Two levers can help reduce the dangers of intent evidence in causing unfair prejudice, confusing the issues, misleading the jury, causing undue delay, wasting time, or being needlessly cumulative.

The first lever is to lessen intent’s probative value as the utility from the challenged conduct increases in value.²⁹⁹ The more important the activity is in promoting competition and overall welfare, the less relevant the actor’s intent should be.³⁰⁰ We see this in predatory pricing cases. Price discounting generally benefits consumers.³⁰¹ So long as the product’s price exceeds its total costs, the firm’s predatory intent should have little, if any,

²⁹⁷ Joseph H. King, *The Torts Restatement’s Inchoate Definition of Intent for Battery, and Reflections on the Province of Restatements*, 38 PEPP. L. REV. 623, 643 (2011).

²⁹⁸ Lao, *Aspen Ski*, *supra* note 8, at 203-07; Lao, *Reclaiming a Role*, *supra* note 8, at 157, 199-212; *see also* Waller, *supra* note 8, at 334-35 (“Sophisticated corporations expend too many resources in their strategic planning and marketing decisions not to take seriously the results of that work. Looking at the results of strategic planning exercises, brand management, and marketing studies do not necessarily lead to either plaintiff or defendant verdicts. Such evidence should be a fertile source for either plaintiffs or defendants seeking to unravel the purpose and effect of mergers, joint ventures, distribution agreements, and other economically ambiguous conduct being conducted under some form of the rule of reason.”).

²⁹⁹ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. g (1995) (“In assessing the propriety of the actor’s conduct, a primary consideration is the social utility of the conduct as a means of competition.”); *see, e.g.*, *Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc.*, 789 F. Supp. 2d 1201, 1211 (C.D. Cal. 2011) (finding it “repugnant to the antitrust laws to let Arminak present evidence of five lawful categories of conduct to the jury to prove Calmar’s allegedly anticompetitive intent to acquire or maintain a monopoly in violation of § 2 of the Sherman Act”).

³⁰⁰ *See Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989) (“As long as Blue Cross’s course of conduct was itself legitimate, the fact that some of its executives hoped to see Ocean State disappear is irrelevant. Under these circumstances Blue Cross is no more guilty of an antitrust violation than a boxer who delivers a perfectly legal punch—hoping that it will kill his opponent—is guilty of attempted murder.”).

³⁰¹ *See Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 451 (2009) (“Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.”) (quoting *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 340 (1990)).

probative value under § 2.³⁰² Likewise, as Professor Herbert Hovenkamp states, “The right to innovate better products in good faith must be protected, even for dominant firms.”³⁰³ Thus, a socially beneficial innovation should be lawful under the Sherman Act, regardless of the defendant’s intent.

The second lever is to lessen intent’s probative value the more harmful the challenged conduct is to societal welfare. When the behavior is predictably anticompetitive, the courts typically infer improper intent from the conduct itself.³⁰⁴ As courts recognize, “no monopolist monopolizes unconscious of what he is doing.”³⁰⁵ As such, the more blatantly anticompetitive the conduct, the more likely the court infers the requisite anticompetitive intent, the more skeptical the court will be over the defendant’s professed good intentions, and the less need there is for discovery on the defendant’s good or bad intentions. Therefore, the inquiry can be said to stop with clear anticompetitive effects, as intent evidence’s incremental value here is slight. Accordingly, price-fixing should be condemned regardless of the defendant’s altruistic motives.³⁰⁶

These two levers, along with the safeguards under Federal Rule of Evidence 403, enable courts to assess the admissibility and purpose of intent evidence in antitrust cases.

If the outcome in antitrust cases remains unpredictable, if discovery and litigation remain protracted and costly, and if the risks of false positives and negatives remain too high, then the problem lies not with intent evidence. With or without intent evidence, the culprit is, as discussed earlier, the rule of reason.³⁰⁷ One encouraging statement by the Court is “the importance of clear rules in antitrust law.”³⁰⁸ If significantly reducing ambigui-

³⁰² See, e.g., *linkLine*, 555 U.S. at 451-52 (“Recognizing a price-squeeze claim where the defendant’s retail price remains above cost would invite the precise harm we sought to avoid in *Brooke Group*”); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1058 (6th Cir. 1984) (holding that, regardless of defendant’s predatory intent, “as a matter of law, Sherman Act liability cannot be premised on alleged predatory pricing without some evidence that a defendant has charged prices below its total cost for the product sold”).

³⁰³ HOVENKAMP, *supra* note 9, § 6.4c.

³⁰⁴ See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 603 (1985).

³⁰⁵ *Id.* at 602 (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945)).

³⁰⁶ See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (“Even though members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.”); *Power Conversion, Inc. v. Saft Am., Inc.*, 672 F. Supp. 224, 227 (D. Md. 1987) (“Price-fixing is *per se* illegal regardless of whether the objective is to raise or lower market prices, whether the agreement is successful or not, and whether the prices were reasonable or not.”).

³⁰⁷ Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

³⁰⁸ *Pac. Bell Tel. Co. v. linkLine Commc’ns Inc.*, 555 U.S. 438, 452 (2009).

ity is its aim, the Court should fashion presumptions of legality and illegality and specific defenses for common restraints.

CONCLUSION

Contrary to some jurists' arguments, premised on neo-classical economic theory, intent matters. People rely on intent in assessing the conduct's reasonableness. Moreover, people are more willing to incur costs to punish greedy free-riders who intentionally violate norms of fairness. In punishing intentionally greedy behavior, people can avoid the tragedy of the commons and promote the cooperation and trust necessary for a healthy market economy.

Admitting intent evidence will not chill pro-social, and thus, procompetitive behavior. If anything, it encourages firms to emphasize virtue rather than hatred. Given "the extensive empirical research," Ostrom has argued that "a core goal of public policy should be to facilitate the development of institutions that bring out the best in humans."³⁰⁹ Similarly, Kahn wrote, "True, many of the actions that are prohibited are defined in terms of intent rather than clear-cut overt acts. But a company can in most cases avoid imputations of unreasonable intent by conscientiously acting like a fair, vigorous competitor before cases are brought."³¹⁰

It makes little sense to design a legal system that assumes competition is a greedy and spiteful pursuit. It can be far more efficient to provide market participants the means to punish intentional free-riders, rather than to rely on costly governmental monitoring, rewards, and punishments.³¹¹ Paradoxically, promoting neo-classical economic theory's simplistic assumption of human behavior can impede, rather than promote, competition and ultimately foster greater, rather than less, governmental regulation.

Many courts have taken the correct approach in admitting intent evidence in civil antitrust trials. Intent evidence is relevant in predicting consequences and interpreting facts. Except where the conduct is highly desirable or egregious, intent evidence should be admitted, subject to the same balancing under Federal Rule of Evidence 403 as any other relevant evidence.

³⁰⁹ Ostrom, *supra* note 129, at 435-36.

³¹⁰ Kahn, *supra* note 8, at 42 n.47.

³¹¹ See Benkler, *supra* note 119, at 77-78.



STILL RARE LIKE A UNICORN?
THE CASE OF BEHAVIORAL PREDATORY PRICING

*Joshua D. Wright & Judd E. Stone II**

INTRODUCTION

The likelihood of anticompetitive price predation has been the subject of considerable debate. Little ink has been spared discussing whether John D. Rockefeller engaged in predatory pricing in the famous *Standard Oil* case.¹ Empirical examples are rare—so rare, in fact, that observing real-life anticompetitive price predation has become the holy grail of industrial organization economists. Economist Kenneth Elzinga famously inquired in an address to the American Bar Association whether predatory pricing is “rare like a unicorn.”² Judge Frank Easterbrook compared the proliferation of theoretical accounts of predatory pricing to the human mind creatively spawning “a thousand positions on what dragons looked like.”³ Indeed, predatory pricing has even proven mythically elusive in laboratory settings.⁴ Unicorns and dragons aside, there is certainly a consensus that price predation is very rarely observed.⁵

Theoretical explanations for the prevalence of price predation have continued to proliferate within the pages of academic journals. The newest entrant into the field is behavioral economics. Behavioral economics has made significant inroads in law and economics generally, and antitrust is no

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¹ James A. Dalton & Louis Esposito, *Predatory Price Cutting and Standard Oil: A Re-Examination of the Trial Record*, 22 RES. L. & ECON. 155, 156-58 (2007); Elizabeth Granitz & Benjamin Klein, *Monopolization By “Raising Rivals’ Costs”: The Standard Oil Case*, 39 J.L. & ECON. 1, 2 (1996); Benjamin Klein, *The “Hub-and-Spoke” Conspiracy that Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958); George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance against Competing Cartels*, 85 S. CAL. L. REV. 499, 499-500 (2012).

² Rosario Gomez et al., *Predatory Pricing: Rare Like a Unicorn?*, in 1 HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS 178, 178 (Charles R. Plott & Vernon L. Smith eds., 2008).

³ Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 264 (1981).

⁴ R. Mark Isaac & Vernon L. Smith, *In Search of Predatory Pricing*, 93 J. POL. ECON. 320, 320 (1985); Gomez, *supra* note 2, at 179-80.

⁵ Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, in 4 ANTITRUST LAW AND ECONOMICS 116, 116 (Keith N. Hylton ed., 2010).

exception. Proponents of incorporating behavioral economics insights into antitrust have identified a number of potential avenues for its migration. Price predation is among the most prominent areas of antitrust in which the behavioral approach claims to improve existing law on behalf of consumers. Behavioral antitrusters argue price theory, and its loyalty to the rationality assumption, has misled the antitrust community concerning the likelihood of anticompetitive price predation. These scholars propose to modify modern price predation law by broadening the circumstances in which courts accept price predation as a potentially rational business strategy, and thus to increase antitrust exposure for firms' pricing decisions.

In prior work we discussed some general analytical shortcomings with behavioral antitrust.⁶ Specifically, we offered an "irrelevance theorem" to show that the assumption that firms behave rationally should not be replaced with an assumption that firms make systematically irrational decisions because the latter does not offer any stable predictions with respect to antitrust policy.⁷ An assumption of any given behavioral bias, without more, fails to strengthen the case for antitrust intervention, despite behaviorist proponents' uniform conclusion to the contrary. We showed that fully incorporating irrational firm behavior offers little guidance to courts and agencies evaluating predation claims.⁸ In this article, we focus our analysis upon behavioral price predation, demonstrating that this theory, the newest addition to an embarrassment of theoretical explanations for anticompetitive price predation, suffers from theoretical and empirical infirmities too significant to bear the burden assigned to it by behaviorists. In short, behavioral predatory pricing does not describe a phenomenon relevant to modern antitrust law.

Part I of this article offers a primer on behavioral economics and its application to antitrust. Part II articulates the various behavioral price predation theories that attempt to explain why using insights from behavioral economics requires greater antitrust intervention in firm pricing decisions. Part III critiques those theories on theoretical and empirical grounds.

I. A PRIMER ON BEHAVIORAL ANTITRUST⁹

Understanding the theoretical origins of behavioral antitrust requires examining the animating assumptions of behavioral law and economics and of behavioral economics before it. Behavioral economics examines ways in

⁶ Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2012).

⁷ *Id.* at 1517.

⁸ Wright & Stone, *supra* note 6.

⁹ This discussion relies upon and extends our analysis in Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2012).

which economic actors deviate from predicted conduct under rational choice assumptions—in other words, how and why actors behave irrationally. Behavioral law and economics attempts to apply these insights through policy measures designed to systematically “debias” firms and individuals.¹⁰ These debiasing mechanisms differ theoretically from ordinary market interventions by putatively enabling the regulated parties to better realize *their own preferences* rather than regulators’ preferences. This distinction leads some to dub behavioral law and economics a sort of “libertarian paternalism.”¹¹ This approach has risen to prominence in both regulatory and academic circles, despite serious flaws in both theory and practice.¹²

Some antitrust observers find this approach particularly appealing.¹³ Modern antitrust law embraces rational choice theory at all levels, from its formulation of rules designed to harness economic models’ predictive power and minimize error costs to appreciating the limits of antitrust as a regulatory regime.¹⁴ This loyalty traces back to the U.S. Supreme Court’s adop-

¹⁰ See Christine Jolls, *Behavioral Law and Economics*, in *BEHAVIORAL ECONOMICS AND ITS APPLICATIONS* 115, 137-40 (Peter Diamond & Hannu Vartiainen eds., 2007); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 *J. LEGAL STUD.* 199, 212 (2006).

¹¹ See, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U. CHI. L. REV.* 1159 (2003) (explaining the concept of libertarian paternalism); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 *AM. ECON. REV.* 175 (2003) (introducing the term); see also Matthew A. Smith & Michael S. McPherson, *Nudging for Equality: Values in Libertarian Paternalism*, 61 *ADMIN. L. REV.* 323 (2009) (applying the concept); Dru Stevenson, *Libertarian Paternalism: The Cocaine Vaccine as a Test Case for the Sunstein/Thaler Model*, 3 *RUTGERS J.L. & URB. POL’Y* 4 (2005) (applying and critiquing the concept).

¹² See, e.g., Andrew Ferguson, *Nudge, Nudge, Wink Wink: Behavioral Economics—The Governing Theory of Obama’s Nanny State*, *WKLY. STANDARD*, Apr. 19, 2010, at 18, available at <http://www.weeklystandard.com/articles/nudge-nudge-wink-wink>; Michael Grunwald, *How Obama is Using the Science of Change*, *TIME*, Apr. 2, 2009, at 1 (discussing the Obama administration’s “behavioral dream team”), available at <http://www.time.com/time/magazine/article/0,9171,1889153,00.html>; Matt Chorley, “Nudge Unit” Calls for Changes to Business Banking, *THE INDEPENDENT* Feb. 12, 2012, <http://www.independent.co.uk/news/uk/politics/nudge-unit-calls-for-changes-to-business-banking-6792211.html>; *Organ Donated “Nudge” for Drivers in New DVLA Process*, *BBC NEWS* (July 30, 2011, 8:53 PM), <http://www.bbc.co.uk/news/health-14341553>. For a critique of the rise of behavioral law and economics, see Douglas H. Ginsburg & Joshua D. Wright, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 *NW. U. L. REV.* (forthcoming 2012).

¹³ See Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 *U. PA. L. REV.* 261, 274 (2010); Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 *IND. L.J.* 1527 (2011); Avishalom Tor, *Illustrating a Behaviorally Informed Approach to Antitrust Law: The Case of Predatory Pricing*, 18 *ANTITRUST* 52 (2003); Luca Arnaudo, *The Quest for Behavioral Antitrust: Beyond the Label Battle, Towards a Cognitive Approach* 6, 11 (Nov. 21, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962515.

¹⁴ See *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 282 (2007) (focusing upon the possibility of error costs and noting that “antitrust courts are likely to make unusually serious mistakes” in determining whether conduct is pro- or anticompetitive); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889-98 (2007) (adopting a rational choice approach to predicting the competitive effects of minimum resale price maintenance); Joshua D. Wright, *The Antitrust/Consumer Protection Paradox*, 121 *YALE L.J.* 2216, 2237-38 (2012).

tion of observations from industrial organization literature—collectively referred to as the “New Learning.” After this adoption, the Court set out on its modern course of applying rational choice economics to antitrust in a variety of contexts, including resale price maintenance, exclusive dealings contracts, merger review, and predatory pricing.¹⁵

Yet behaviorist advocates request that antitrust agencies and the Court to update their thinking. They admit the shortcomings of their various models, but nonetheless encourage the incorporation of behavioral economic principles into both the development and the application of antitrust rules.¹⁶ As we will demonstrate, however, this approach fails to provide an intellectually satisfying alternative to rational choice economic analysis on both theoretical and empirical grounds.

A. *Irrationality, Behavioral Economics, and Antitrust*

Price theorists have long analyzed irrational behavior and errors within markets using conventional economic tools, including analyzing the effects of uncertainty and risk, discount rates, transaction costs, and information costs.¹⁷ Behaviorists employ a markedly different approach. Behavioral economics seeks to supplement, if not supplant, neoclassical economic theory by proffering a more descriptive, compelling, and empirically accurate account of human behavior.¹⁸ This effort attempts to explain conduct seemingly at odds with the rational choice economic predictions.

The behavioral economic research agenda comprises in significant part a collection of observed deviations from the predictions of rational choice theory both in laboratories and in the field.¹⁹ For example, one commonly

¹⁵ See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (ruling in the context of predatory bidding); *Leegin*, 551 U.S. 877 (ruling in the context of resale price maintenance); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (ruling in the context of predatory pricing); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (ruling in the context of non-price vertical restraints).

¹⁶ See, e.g., J. Thomas Rosch, Comm’r, FTC, Remarks at the Conference on the Regulation of Consumer Financial Products: Managing Irrationality: Some Observations on Behavioral Economics and the Creation of the Consumer Financial Protection Agency 8 (Jan. 6, 2010), available at <http://ftc.gov/speeches/rosch/100106financial-products.pdf> (“I worry about whether behavioral economics will leave us without an ‘organizing principle’ . . .”).

¹⁷ Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950); Gary Becker, *Irrational Firm Behavior and Economic Theory*, 40 J. POL. ECON. 1 (1962); Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 3-16 (1953); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961).

¹⁸ Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (describing the purpose of behavioral law and economics as the analysis of the law “with a higher R-squared”).

¹⁹ Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1628 n.20 (2006) (“The dominant research program within beha-

discussed observed phenomenon appearing to deviate from the standard tenets of neoclassical economic theory is loss aversion, that is, assigning losses greater value than otherwise equally sized gains.²⁰ Psychologists Daniel Kahneman and Amos Tversky famously developed “prospect theory,” a theory of preferences built around empirically observed loss aversion.²¹ Prospect theory is often associated with the so-called endowment effect. This effect, as referenced in behaviorist literature, is better described as “endowment effect theory,” as it offers a particular theoretical account of an observed empirical phenomenon of gaps between willingness-to-accept and willingness-to-pay (WTA-WTP gaps). This theory explains WTA-WTP gaps in experiments; individuals treat increases in ownership as “gains” and decreases as “losses” and disproportionately weight the latter.²² The validity of this interpretation is hotly contested.²³

The primary focus of the behavioral economic research agenda has been to identify a number of “biases,” or systematic deviations from welfare maximizing decisions. These biases can be usefully assigned to two

vioral decision theory, the heuristics and biases program, consists of a collection of robust empirical findings bound together by high-level concepts rather than an integrative theory that can predict how particular features of the mind and environment are likely to interact in particular cases.”); see John D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Jolls et al., *supra* note 18.

²⁰ See, e.g., Jolls et al., *supra* note 18; Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991); Tor, *supra* note 13.

²¹ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

²² Despite significant empirical evidence that such a straightforward interpretation of observed WTA-WTP gaps in experiments is misleading, endowment effect theory has become wildly popular in the behavioral law and economics literature. See, e.g., Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010) (finding the endowment effect in the creation and sale of intellectual property); Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1735 (1998) (“The endowment effect is the most significant empirical observation from behavioral economics.”); Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935 (2008) (providing a new theory to help explain reasons for the existence of the endowment effect); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1229 (2003) (“The endowment effect is undoubtedly the most significant single finding from behavioral economics for legal analysis to date.”).

²³ See, e.g., Charles R. Plott & Kathryn Zeiler, *Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?*, 97 AM. ECON. REV. 1449 (2007) (finding the WTA-WTP gap can be explained by the influence of classical preference theories on experimental procedures); Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay-Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530 (2005) (improving upon experimental procedures and consequently rejecting interpretations of experiments finding the existence of the endowment effect).

broad categories—contextualization, or observational, errors and self-control, or willpower, errors.

Contextualization errors reflect an individual's irrational misperception of his environment. These errors reveal shortcomings inherent in the pervasive use of heuristics, reflecting the deeper notion that context ultimately influences how an individual perceives a different situation. In other words, holding an individual's desires and options constant, an individual's decisions change along with the changes in his or her environment, partially leading to so-named preference reversals.²⁴ Contextualization errors include a variety of framing effects, including endowment effect theory predicated upon the WTA-WTP gaps.²⁵

Self-control errors are application errors that can be observed in predictable and asymmetric deviations from an individual's stated preferences. They are derived from an over- or under-valuation of present and future welfare gains and losses. These errors allegedly skew individuals' decisions regardless of informational quality. Hyperbolic discounting, optimism bias, and risk-aversion bias are three of the most commonly discussed behavioral biases. Hyperbolic discounting, perhaps the most pervasively cited self-control error, posits that individuals have time-inconsistent preferences, irrationally prizing present benefits over future ones.²⁶ Optimism bias speculates that individuals accurately assess potential risks in the abstract but discount these risks significantly when applying them to their own situations—that is, they tend to “think that bad events are far less likely to happen to them than to others.”²⁷ Risk-aversion bias reflects the corollary proposition—individuals will be generally unwilling to undertake options with defined costs and undefined benefits, even if the option is justified under rational cost-benefit analysis.

Behaviorists have widely embraced the validity of these biases and enthusiastically argue that they should be incorporated into an “empirically updated” antitrust analysis.²⁸ Such exhortations fail to recognize that modern antitrust analysis already accounts for the possibility of systematic and predictable biases. Antitrust law currently addresses these latent biases through data-driven empirical analysis. For example, antitrust law must estimate demand curves to assess cross-elasticities of demand. This analy-

²⁴ Lewis A. Kornhauser, *The Domain of Preference*, 151 U. PA. L. REV. 717, 722 (2003) (“[S]ome research suggests that . . . expressed preference depends on the way in which the preference is elicited.”).

²⁵ Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245 (2005) (reviewing framing effects and contextualization errors).

²⁶ See Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, in *TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE* 13, 13-86 (George Loewenstein et al. eds., 2003).

²⁷ Jolls et al., *supra* note 18, at 1524.

²⁸ See, e.g., Rosch, *supra* note 16, at 12-13 (“From my vantage point, behavioral economics has already offered some important insights for antitrust enforcers.”); see also sources cited *supra* note 22.

sis necessarily allows regulators investigating consumer behavior to evaluate how consumers *actually* respond to changing market conditions. Accordingly, modifications to the current antitrust framework cannot be justified by an enhanced capacity for analyzing consumer behavior alone; behaviorists must propose a superior theory of *firm* conduct.

Behaviorists claim their preferred model does precisely that.²⁹ Yet this claim is far more controversial. Behavioral economics focuses on the psychology and inherent cognitive limitations of individuals; attempting to extrapolate findings regarding individuals and impute them to firms is either disregarding a robust literature on the theory of the firm or committing an elementary categorical error.³⁰ While firms are essentially a collection of self-selected individuals, it does not follow that firms must or will exhibit similar, or similarly predictable, biases. Firms emerge to replace the price system when transaction costs become overwhelming. Thus, firms face important economic forces and pressures, and benefit from feedback mechanisms that individuals do not confront.³¹ Indeed, even if we could assume firms would behave with analogous consequences, this upward aggregation implies that not only firms, but also regulators, administrators, and judicial reviewers will suffer the same infirmities. One could note that market forces, including the price mechanism, would not discipline these latter mistakes.

Despite the vigor with which behaviorists promote their theories and observations, at least two additional theoretical limitations caution against the incorporation of these theories into legal analysis and policy making. First, behaviorists have yet to articulate the precise conditions—both necessary and sufficient—under which biases inhere and take effect. Without such a theoretical framework, the behavioral approach simply cannot be sensibly applied. It must begin by imputing biases indiscriminately to some class of individuals or firms and not others—that is, without analyzing whether these individuals or firms suffer from a bias *in fact*—or else by selecting specific individuals or firms for “debiasing” at the regulator’s whims. Second, *ex post* analysis cannot determine the rationality of a given decision. This endeavor necessarily requires a regulator—that is, someone other than the individual under scrutiny—to determine after the fact wheth-

²⁹ Rosch, *supra* note 16, at 12-13 (“Behavioral economics has provided important research showing that corporations, like individuals, do not always behave rationally.”).

³⁰ Some economists have addressed this issue. See RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963); Alchian, *supra* note 17.

³¹ See generally Alchian, *supra* note 17; Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978); see also Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 140 (2006) (“In experiments, individuals have few tools with which to improve their reasoning, and their only real method of responding to incentives is to think harder.”).

er the individual's perception of the *ex ante* situation justifies his decision. This requirement is particularly problematic in the case of alleged hyperbolic discounting, where a regulator is necessarily determining whether a discount rate exceeds what he considers justifiable in the absence of any objective metric for this determination. While these limitations are critical, they are far from behavioral antitrust's only shortcomings. As we develop below, it is presently impossible to apply behavioral law and economics to antitrust law. Without a comprehensive framework for discerning which individuals or firms will suffer from which biases, to what extent, and when, the implications of a behavioral approach are simply incoherent.

B. *The Irrelevance Theorem*

Behaviorists seek to extrapolate from a very narrow, circumscribed set of observations to a paradigm-shifting approach to antitrust. Moreover, they seek to do this absent any cohesive hypothesis tying their observations to concrete, clearly identifiable, and predictable implications for antitrust analysis. Relying upon a partially developed model of firm irrationality, behaviorists argue vociferously for greater antitrust intervention.³² Their model's incompleteness, however, obscures the potential implications of behavioral observations and proffered biases, and distracts from a proper analysis of both the motivations underlying a given firm's conduct as well as that conduct's competitive effects.

A comprehensive behavioral antitrust model would provide a framework for predicting the biases each firm will exhibit in a given scenario, the magnitude of that bias, and the direction in which that bias would skew each firm's predicted behavior. Yet the behavioral antitrust model as crafted fails to offer many of these necessary inputs. Fatally, this model focuses narrowly upon the impact of irrational acts of only specific market participants—typically incumbent, often dominant, firms or cartel members—to the exclusion of others. Notably, the biases of potential entrants, current rivals, judges, and regulators are often omitted or cursorily assumed away. Without constructing a basis for doing so, behaviorists apply cognitive biases asymmetrically—either to a monopolist or to potential entrants, but not to both, and certainly not market-wide. This asymmetrical application yields—to the behaviorist, but not to us, as we will discuss below—the behaviorist's preferred policy consequences, invariably some novel market intervention, but offers no sound mechanism for arriving at those chosen

³² Reeves & Stucke, *supra* note 13, at 1581 (“[T]he agencies can draw on the behavioral insights they have gained outside of federal civil antitrust law to better inform their competition missions. To this end, the DOJ can use its expertise in prosecuting white-collar crimes generally, and price-fixing conspiracies in particular, to inquire why executives, with so much to lose, fix prices, and why cartels are more durable and their members more trustful than neoclassical economic theory predicts.”).

theoretical inputs. Meanwhile, reconciling this fundamental error distorts the behaviorist model beyond recognition. One is left with a theoretically weak conception of behavioral antitrust that often naively assumes a given bias applies to a monopolist alone.

This naïveté leads behaviorists to the enticing, but ultimately incorrect, conclusion that anticompetitive behavior is necessarily more common than rational choice models predict. However, employing this naïve assumption eviscerates any chance of reaching a conclusion regarding the competitive effects of a behavioral analysis with such clarity.

To distill the fundamental problems with drawing implications from the “Naïve Model,”³³ as well as to highlight the basic point underlying our irrelevance theorem, we provide a simple modification and extension of the Naïve Model. Assume an incumbent firm faces competition from a potential entrant³⁴ and both incumbents and potential entrants are classified as either rational or irrational along any given behavioral bias. From this framework, four possible competitive scenarios emerge: (1) rational incumbents and rational potential entrants, (2) rational incumbents and irrational potential entrants, (3) irrational incumbents and rational potential entrants, and (4) irrational incumbents and irrational potential entrants. Table 1 illustrates these four permutations. As we will demonstrate, none of these permutations clearly supports increased antitrust intervention, or even obviously implicates antitrust analysis whatsoever.

TABLE 1			
		Potential Entrants	
		Rational	Irrational
Incumbents	Rational	Quadrant I <ul style="list-style-type: none"> Existing analysis and law Chicago and Post-Chicago 	Quadrant II <ul style="list-style-type: none"> Incumbents attempt predation only if rational Entry could be too much or too little depending on bias No clear antitrust implications
	Irrational	Quadrant III (Naïve Model) <ul style="list-style-type: none"> Incumbents engage in too much or too little predation Entry responds if and only if predation is successful No clear antitrust implications 	Quadrant IV <p>Behavioral biases distributed equally to both incumbents and potential entrants</p> <p>No clear antitrust implications</p>

³³ The term “Naïve Model” was first used in Wright & Stone, *supra* note 6, at 1542.

³⁴ An existing rival or rivals may be considered a “potential entrant” without loss of generality.

Quadrant I represents contemporary antitrust analysis, which attributes rationality across market participants to both incumbents and entrants. The rationality assumption is a fundamental principle of modern antitrust doctrine and the very basis of competitive effects analysis. Theories of anti-competitive price predation, for instance, are premised upon incumbents rationally developing reputations for engaging in price wars and potential rivals entering only when entry is rational. Indeed, the essential economic force driving the analysis in Quadrant I is that the creation of monopoly power signals the availability of supracompetitive profits, thereby incentivizing rational entry, stimulating competition, and dissipating monopoly rents. Economists uniformly acknowledge that rational entry tends to prevent anticompetitive conduct from obtaining equilibrium. The recognition of this tendency is a fundamental insight of contemporary antitrust analysis: rational entry generally exhausts monopoly rents, thereby diminishing incentives to behave anticompetitively. Knowing that success and the commensurate supracompetitive profits will be short-lived, rational incumbents are less likely to attempt anticompetitive strategies. This logic, plus the understanding that false positives are more costly than false negatives, underpins the skeptical treatment of monopolization claims.³⁵

Quadrant II presents the competitive dynamic between a rational incumbent and an irrational entrant. Despite the entrant's potential biases, increased competitive concerns warranting enhanced antitrust scrutiny do not arise in this permutation. To the contrary, this permutation may very well result in a more competitive environment than rational choice theory predicts. Consider an entrant suffering from optimism bias. Neoclassical economic theory demonstrates that rational incumbents are rightly skeptical of engaging in predation, given the low likelihood of success; it predicts that incumbents will not be able to profitably increase prices, as rival firms and potential entrants will compete away any price above the competitive level.³⁶ This equilibrium obtains even in the face of overly optimistic entrants. Indeed, overly optimistic entrants render predatory strategies even less likely. Such entrants will overestimate their ability to combat predatory incumbents, yielding "too much" entry, i.e., entry even absent supra-competitive pricing, and accordingly, diminish the expected benefits of predatory behavior.

The likelihood of predation is similarly reduced when incumbents exhibit hyperbolic discounting. These firms are irrationally biased toward "present" profit, and thus will enter more often than rational choice models predict. As with overly optimistic entrants, incumbents will anticipate this "excess" entry, and respond by engaging in predation less frequently. Accordingly, in both these scenarios entry increases as compared to the neoc-

³⁵ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984).

³⁶ "Success" is defined as the incumbent's ability to recoup its investments into the predatory strategy. See Easterbrook, *supra* note 3, at 269; Kobayashi, *supra* note 5, at 116.

lassical economics' prediction and a more—not less—competitive market prevails. Curiously, most behaviorist literature thus far explores the assumption of too-optimistic, rather than too-risk-averse, firms. One could fancifully conjure the counterfactual—exploring the competitive implications of irrationally risk-averse entrants and rationally risk-accepting incumbents. But not only does the behaviorist literature tilt against this set of biases, it would suffer from the myriad theoretical omissions outlined above.

Quadrant III similarly entails an asymmetric application of irrationality and provides no clear antitrust implications. Because the assumption of rationality among entrants is held constant, anticompetitive conduct yielding monopoly rents will necessarily attract entry. Indeed, the antitrust policy prescription derived from this Quadrant is nearly indistinguishable from the Chicago School's prescriptions: given that anticompetitive conduct incentivizes entry, which necessarily mitigates—if not totally dissipates—negative welfare effects, antitrust liability should arise only as a “last resort,” that is, when substantial barriers to entry exist. Moreover, it is doubtful that Quadrant III's competitive scenario would ever be observed—presumably, experience in the market would alleviate, not exacerbate, incumbents' potential irrationalities.³⁷ We describe this Quadrant as the Naïve Model because many behavioral antitrust models are similarly fashioned—by distributing an aggressive bias to a monopolist but not to potential entrants and theorizing increased anticompetitive conduct. As most of these models disregard entrants' effects entirely, they necessarily employ the assumption that entrants should either be ignored or, if contemplated, considered fully rational. Each assumption yields mistaken policy implications. While analysis under the first assumption is necessarily incomplete, the implications of the second are not fully formulated.

Quadrant IV presents the most comprehensive construction of a behavioral antitrust model and is the most realistic approach to conceiving of firm irrationality. As noted above, behaviorists offer no explanation as to why particular biases would apply unilaterally to incumbents but not entrants, and thus, assuming irrationality across all firms is the most logical way to craft a behavioral antitrust model. However, this same assumption—indeed, the very inclusion of entrants in the calculus at all—obscures the antitrust implications of behavioral theory.

Accordingly, we offer a general irrelevance theorem for behavioral antitrust as developed in Quadrant IV: competition among incumbents and entrants exhibiting the same behavioral biases does not clearly implicate antitrust policy in any direction. Consider competition between an incumbent and a potential entrant who each suffer from optimism bias. Assuming the bias is uniformly distributed across all firms, the competitive analysis

³⁷ Moreover, it seems rather far-fetched that new market participants would be markedly more rational than incumbents, who necessarily have some benefits of experience.

here is not clearly distinguishable from the analysis conducted in Quadrant I. While an irrational incumbent will overestimate the likelihood of successful predation, entrants will similarly overestimate the likelihood of supracompetitive profits from entry. When proponents conceive of “behavioral antitrust,” however, they tend to recognize this first proposition—i.e., that incumbents are more likely to engage in predation—and proceed straight to prescribing significant antitrust policy changes without considering the second proposition. Indeed, some behaviorists conveniently assume *reinforcing* opposed biases: too-aggressive monopolists confronted by too-passive entrants. Once a bias is uniformly applied across all firms, however, both entry and predation are more—or less—likely, thus warranting no deviation from current antitrust practice. Indeed, the comprehensive competitive effects analysis here renders antitrust intervention even less desirable because increased entry creates a more—not less—competitive environment.

Importantly, this analysis is robust with regards to other behavioral biases and other forms of anticompetitive behavior. Whenever a behavioral bias predicts increased incumbent predation, a comprehensive competitive effects analysis similarly suggests increased entry, thereby tempering the potential for negative welfare effects. Accordingly, the policy prescription of this analysis appears to match that of Quadrant I. Similarly, any time a behavioral bias predicts less frequent anticompetitive incumbent conduct, the justification for antitrust intervention becomes less compelling. Contrary to behaviorists’ assertions, taking cognizance of potential behavioral biases does not clearly indicate that increased antitrust regulation is required. Our irrelevance theorem therefore poses a serious challenge to behavioral antitrust proponents.

II. BEHAVIORAL PREDATION MODELS

Advocates of behavioral antitrust argue that predatory behavior is more common than either the Chicago School or, more broadly, rational choice theory predicts.³⁸ Some advocates assert that predatory conduct is often highly “satisfactory,” despite its economic irrationality—managers may find fulfillment in exhibiting “pride, vengeance, arrogance or hubris,”

³⁸ Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1153 (2003) (“[S]cholars have produced ample evidence demonstrating that predation occurs more commonly than rational choice theory and the courts suggest.”); Tor, *supra* note 13, at 57 (“[T]he behavioral approach to antitrust law . . . reveal[s] that predatory pricing may be more likely than rational actor models predict”); *id.* at 55-56 (discussing how “managers” are prone to decision-making biases). Most, but not all, of these claims seem to focus upon the irrationality of the individuals making the firm’s decisions. Harry S. Gerla, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*, 39 SW. L.J. 755, 761-62 (1985) (arguing that individuals, not firms, make business decisions and are thus the relevant unit of analysis).

even when this behavior causes them to act contrary to wealth maximization.³⁹ Behaviorists broadly claim, in several permutations, that price predation occurs more frequently than rational choice theory suggests because of behavioral phenomena such as prospect theory, in conjunction with endowment effect theory, optimism bias, and hindsight and confirmation biases; these phenomena allegedly afflict both firms and judges. As a result, the behaviorists contend that the legal scrutiny applied to price predation should be heightened.⁴⁰ We describe these claims in some detail here, before critiquing them in Part III as failing to overcome our irrelevance theorem.

A. *Prospect Theory/Endowment Effect Theory*

A particularly well-developed strain in the behavioral approach to predation employs the conceptually potent combination of prospect theory and endowment effects. This variant seems to originate with Harry Gerla's 1985 article, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*.⁴¹ While Gerla does not explicitly employ this terminology, his discussion relies upon the notion that firms perceive losses as disproportio-

³⁹ Nicolas Petit & Norman Neyrinck, *Behavioral Economics and Abuse of Dominance: A Fresh Look at Article 102 TFEU CASE-LAW 7* (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641431.

⁴⁰ One article argues that *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the seminal case on the Court's predatory pricing jurisprudence, is itself inconsistent with rational choice theory. Reeves & Stucke, *supra* note 13, at 1551-52. Amanda P. Reeves and Maurice Stucke postulate that below-cost pricing by a rational firm conclusively reveals that firms believe in their reasonable probability of recoupment, inferring that under rational choice theory, an antitrust plaintiff should recover "simply by proving the defendant's prices were below marginal cost." *Id.* They fail to develop this point further. Several obvious failings deserve at least brief mention. First, a rational firm's subjective belief in its ability to raise prices does not, in and of itself, imply that a price increase is in fact possible: rationality does not imply infallibility. Conversely, below-cost pricing confined to a single good ignores the complicated scheme of cross-subsidies often inherent in manufacturers and retailers that offer multiple goods. Liability for price predation is warranted only when a dominant firm in fact drives out rivals and raises prices, thereby harming consumer welfare; confusing a firm's harmful intentions with actual harm to consumer welfare merely reprises an old antitrust refrain. Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 618 (2005) ("[A]lthough actors may have the wrong aspirations, or may fail to achieve their aspirations, these factors do not alter the effects of their actions. . . . It is not their intention but the consequences of their conduct that is the focus of antitrust litigation.") (emphasis added).

⁴¹ See Gerla, *supra* note 38, at 761-62; see also Albert A. Foer, *The Third Leg of the Antitrust Stool*, 21 J. PUB. POL'Y & MARKETING 227, 227-28 (2002) (discussing Gerla, *supra* note 38); Guthrie, *supra* note 38, at 1153-55 (2003) (crediting Gerla, *supra* note 38, for developing the prospect theory of predation); Tor, *supra* note 13, at 55 n.29 (citing Gerla, *supra* note 38).

nately affecting their well-being, and thus are more likely to engage in risky price predation strategies to avoid or mitigate these losses.⁴²

Gerla's approach uses market share as a proxy for ownership in determining the incumbents' likely responses without explicitly distinguishing between prospect theory, which posits that firms are risk averse, and endowment effect theory, which postulates that one's ownership of a given entity will determine whether one perceives an actual or potential change as a loss or gain. Gerla argues that dominant firms losing market share can either continue to lose market share and sustain serious losses or use their superior resources to engage in price predation, thereby potentially alleviating these losses.⁴³ Given this tradeoff, Gerla concludes that firms "view[ing] the situation as one of weighing potential losses . . . will tend to display risk affinity and will opt for employing predatory pricing, the alternative that offers the chance of avoiding loss altogether."⁴⁴

Later authors further developed Gerla's prospect/endowment effect theory account of behavioral predation. Avishalom Tor, for instance, crafts a behavioral predation "framework" premised upon these two insights.⁴⁵ He argues that incumbent monopolists who are systematically losing market share may consciously "engage in high-risk, negative net present value predation" to mitigate, and hopefully reverse, these losses.⁴⁶ Because firms perceive such losses as disproportionately detrimental to their actual volume, they will take greater risks to avoid them than would a rational profit maximizer.⁴⁷ Consistent with endowment effect theory, Tor proffers that growing firms are unlikely to engage in predatory behavior because such risk-seeking efforts are comparatively less warranted for potential gains relative to potential losses.⁴⁸ Accordingly, Tor notes the proscribed potential for even behavioral predation: "only when faced with a medium to high proba-

⁴² Gerla, *supra* note 38, at 760.

⁴³ *Id.* at 761. Gerla examines the probability of price predation in two additional scenarios: (1) a dominant firm has recently lost market share, but its share has stabilized; (2) a non-dominant firm seeks to increase its market share. He argues firms in the latter category are unlikely to engage in predation, as they will perceive increases in market as gains, and thus not worth the risk of predatory strategies. Firms that have recently lost market share, but whose share has stabilized, meanwhile, may or may not engage in predation, depending upon which market share the firm uses as its point of reference—the stabilized share or the pre-loss share.

⁴⁴ *Id.* at 761-62 ("[M]anagers are likely to view their situation as one involving potential losses rather than potential gains. In perceived loss situations people tend to be risk affinitive. The managers of the dominant firm, therefore, are likely to be psychologically predisposed toward taking the riskier option, which in this case offers the chance of avoiding loss completely. Thus, the managers may engage in predatory pricing even if such a course would not rationally maximize the firm's revenues."). Gerla goes on to note that "the inability to estimate and weight probabilities accurately" increases the appeal of predatory pricing strategies. *Id.*

⁴⁵ Tor, *supra* note 13, at 56-57.

⁴⁶ *Id.* at 55.

⁴⁷ *Id.*

⁴⁸ *Id.* at 56.

bility of painful loss (e.g., a substantial and continuing downward slide in market share) will managers be inclined to embark on high-risk predation campaigns.”⁴⁹ However, he does not develop the precise circumstances giving rise to such behavior, other than to distinguish between the extreme examples of a dominant firm systematically losing significant market share and stable incumbents.

B. *Optimism Bias*

Behaviorists’ predation theories are not confined to endowment effect theory; many postulate, for example, that optimism bias, often referred to as “optimistic overconfidence,” leads firms to overestimate the likelihood their predatory strategies will succeed.⁵⁰ Tor, for instance, proffers that optimism bias will not only entice firms to enter into predatory campaigns,⁵¹ but will cause these same firms to persist in unsuccessful predation strategies long after their evident failure.⁵² Christopher Leslie similarly claims that firms are frequently overconfident and ignore sunk costs, leading them to overestimate the success of risky strategies.⁵³ The obvious implication of Leslie’s analysis is that these biases render firms more likely to engage in price predation.⁵⁴

In a cursory nod to the importance of analyzing entrant behavior and biases, Tor argues that boundedly rational predators might benefit from the fact that their competitors are similarly boundedly rational, asserting that the availability bias and law of small numbers may cause rivals to “overestimate the risks of predation.”⁵⁵ However, he does not discuss why entrants, as opposed to incumbents, would not suffer the same optimism bias in assessing their capacity to combat predatory strategies.

⁴⁹ *Id.* at 55.

⁵⁰ Maurice E. Stucke, *Is Intent Relevant?* 8 J.L. ECON. & POL’Y (forthcoming 2012); Tor, *supra* note 13; Leslie, *supra* note 13; Petit & Neyrinck, *supra* note 39, at 5, 7.

⁵¹ Tor, *supra* note 13, at 55 (“Only after a significant period of continuous losses without success will the reputational and economic costs of the patently failing scheme be likely to overwhelm managers’ commitment to the predatory strategy and make a painful retreat more attractive.”).

⁵² *Id.*

⁵³ Leslie, *supra* note 13, at 275-77. Leslie also argues that firms sometimes act contrary to profit maximization, and that this seemingly irrational behavior is likely due in part to individual irrationality. *Id.* at 274.

⁵⁴ Leslie generally criticizes the rationality assumption and employs predatory price cases and economic theories as foil for much of his argument. *Id.*

⁵⁵ Tor, *supra* note 13, at 56 (“[T]he availability bias will tend to make highly publicized, colorful instances of predation stand out in the imagination and memory of market participants. This effect may sometimes be reinforced through the law of small numbers, which can lead potential entrants to overestimate the risks of predation based on a small sample of cases and without sufficiently taking into account the objective difficulties and costs facing the predator, as well as due to the pervasive tendency to overweight events of known, small probability.”).

C. *Judicial Biases*

Leslie argues that price predation poses greater competitive issues than contemporary antitrust law admits because judges exhibit biases that prevent them from recognizing predation when they see it. He proffers that judges analyzing firms' conduct suffer from confirmation and hindsight biases and thus underestimate the success of predatory strategies.⁵⁶ Leslie argues that judges, relying upon the *ex post* knowledge that the predatory strategy failed, mistakenly infer that the *ex ante* probability of success was so low the firm must not even have attempted it in the first place.⁵⁷

Leslie further argues that judges succumb to confirmation bias by focusing solely upon those facts that support their pre-existing beliefs. Accordingly to Leslie, these beliefs are unduly influenced by the Chicago School's predictions that predatory pricing is rare. He examines the available facts in both the *Matsushita* and the *Brooke Group* cases, finding that judges in each case erroneously relied upon only those facts that aligned with, and excluded those in tension with, the Chicago School's predictions. Indeed, Leslie aggressively asserts that judges plainly ignored any evidence that challenged their pre-existing beliefs.⁵⁸ Leslie thus crafts a behavioral framework under which judges systematically permit firms guilty of predatory pricing to evade liability.

III. CRITIQUES OF BEHAVIORIST MODELS

Each behaviorist model suffers from several common failings, which we loosely group into theoretical and empirical criticisms. Perhaps on the most fundamental level, neither the endowment effect theory model nor the optimism bias model survives our irrelevance theorem. Moreover, as several other scholars have explored, imputing either of these biases to regula-

⁵⁶ Leslie, *supra* note 13, at 308 ("Behavioral research suggests that the more that a firm values an outcome—e.g., monopoly power—the more likely it is that overconfidence will bias the decision-making process. In short, firms bent on monopolization or cartelization may make a decision to violate antitrust laws even though a federal judge later scrutinizing the same business environment would not find such behavior plausible or rational. The fact that the judge would make a particular decision in that situation does not answer the question of whether the defendant, brimming with overconfidence, did in fact violate antitrust laws.").

⁵⁷ *Id.* at 312 ("When the plaintiff's theory is based on a predatory scheme that ultimately fails, federal judges appear susceptible to concluding that the failure of the alleged scheme demonstrates that the scheme must never have existed."). Leslie describes *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1985), as a case of "Monday morning quarterbacking." *Id.* at 312-13.

⁵⁸ *Id.* at 323-24 ("[S]even years after *Matsushita*, the Court remained unaware of post-Chicago literature in economics and game theory that explains how predatory pricing can be a profit-maximizing business strategy. The Court was also apparently oblivious of past successes of predatory pricing as well as tacit coordination in concentrated industries.").

tors, whether agencies or judges, confounds any theoretically ascertainable consumer welfare gains through additional antitrust intervention due to predictably increased error costs. Empirical studies, cited selectively by behaviorist advocates, further undermine behaviorally informed predation theories. Field evidence suggests price predation is in fact as rare as rational choice theory predicts, and this conclusion withstands scrutiny across multiple studies and methods.

A. *Theoretical Criticisms*

Fundamental theoretical failings vitiate each behaviorist model. We begin with Gerla and Tor's frameworks premised upon prospect and endowment effect theories. This behaviorist model presumes a monopolist irrationally averse to market share losses such that it is willing to engage in "negative net present value predation under some circumstances" in order to preserve an eroding position.⁵⁹ Accordingly, Gerla and Tor counsel, the rational choice-driven requirement of a reasonable probability of recoupment drastically under-predicts actual attempts at price predation.⁶⁰ But by its own terms, this framework applies only to incumbent firms, not to entrants; entrants, merely facing the prospect of comparatively smaller gains, as opposed to a behaviorally skewed fear of losses, will not engage in commensurate high-risk counter-strategies.⁶¹ In other words, Gerla and Tor propose a scenario in Quadrant II of our model: an irrational incumbent facing rational entrants.⁶² To Tor's credit, he at least attempts to postulate a distinction between monopolists and entrants: monopolists have something to lose—a substantial portion of market share—while entrants ostensibly do not.⁶³ But this distinction flies in the face of the theoretical scenario Tor proposes as prompting the monopolist's behavioral bias in the first place: for loss aversion to kick in, Tor offers, a monopolist must face "the successful expansion of new entrants or small incumbents" that pressure the monopolist with a constantly declining market share or with constantly declining total profits.⁶⁴

⁵⁹ Tor, *supra* note 13, at 55.

⁶⁰ Gerla, *supra* note 38, at 761-62; Tor, *supra* note 13, at 57.

⁶¹ Tor, *supra* note 13, at 56. As discussed *supra*, text accompanying note 51, Tor briefly acknowledges the potential for entrants to be rational; however, he only discusses entrants afflicted with behavioral biases that would benefit the incumbent, and he fails to consider potential competitors exhibiting the same biases as incumbents.

⁶² Being precise, Tor actually commits our cited fallacy twice: first distinguishing between monopolists and entrants, but then further distinguishing between *types* of monopolists, thereby postulating some dominant firms will behave rationally and some irrationally aside from entrants, who, presumably, all behave free of Tor's chosen bias. *Id.* at 56.

⁶³ *Id.*

⁶⁴ *Id.* at 55.

Reconsidering Tor's theoretical framework with evenly distributed biases eliminates the model's prediction of anticompetitive predation. In Tor's scenario, at least one or more small incumbents or entrants have joined the market; the loss-averse monopolist irrationally predate to scare off new entrants.⁶⁵ But if one assumes that firms overweight losses relative to gains, and that this bias applies to all firms—there is no evidence to suggest it applies to some and not others—then Tor's conclusion that anticompetitive predation is more likely is suspect. Under this assumption, new entrants or existing fringe firms from whom market share would be drawn would also have a significant incentive to fend off predation. An *equally* irrational entrant would, by Tor's logic, either match a monopolist's below-cost prices in the hopes of resisting predation or simply wait for the monopolist to raise their prices anew in the hopes of recoupment and would then re-enter the market.⁶⁶

Tor's account of framing effects suggest smaller market participants will respond to the dissipation of a relatively small amount of sales *more* vigorously and not less. If, as Tor suggests, an irrational firm will fear a \$10 loss more when it moves from \$20 to \$10 in revenues than when its revenues fall from \$110 to \$100, it stands to reason that irrational entrants will resist predation with greater force to avoid a reduction from a 10% market share to a 5% market share (or a 0% share) than an irrational monopolist will predate to protect an 80% share from dropping to 75% (or 70%).⁶⁷ Again, a full consideration of behavioral biases applied to incumbents, rival firms, and new entrants implies that while attempted predation may be more common in the behavioral world, recoupment would not be any more likely in light of the more aggressive competition from entrants. Of course, merely increasing the frequency of failed attempts at price predation is a boon to consumers, not a reason to heighten the scrutiny applied to predation allegations.

Further errors befuddle Tor's model of predation based upon endowment effect theory. In this model, Tor simultaneously assumes irrational aggression from new entrants and irrationally soft competition from rivals. Specifically, Tor assumes "[r]eal entrants exhibit a higher rate of entry than rational entrants would,"⁶⁸ and actual or potential competitors may irrationally *avoid* entry predicated upon the "mere hypothetical knowledge that predatory pricing is not a rational investment strategy."⁶⁹ The primary

⁶⁵ *Id.*

⁶⁶ *Cf. id.*

⁶⁷ *Cf. Tor, supra* note 13, at 55 ("[R]eal world managers are far more inclined to hold to a course they have committed to despite dim prospects for success . . . and often exhibit a tendency to escalate commitments in the face of losses A small decline in market share the does not constitute a clear trend or a mere low-probability competitive threat typically will be insufficient to generate risk seeking market behavior").

⁶⁸ *Id.* at 56.

⁶⁹ *Id.*

problem with this model is not logical but empirical. There is simply no empirical justification for this particular set of assumptions in the behavioral or experimental literature. Putting aside that empirical objection to Tor's model, as well as the more general empirical observation (addressed later) that the empirical data is consistent with the hypothesis that predatory pricing is rare, there is a more fundamental theoretical objection grounded in economic logic. Tor suggests, without irony, that both irrational over-entry by new entrants and irrational under-expansion by actual or potential competitors unequivocally imply greater predation than rational choice models predict.⁷⁰ There is no reason why irrationally powerful incentives to enter would be insufficient to ward off irrationally powerful incentives to predate, whether that entry comes from new or existing firms.

Finally, Tor intimates the firm's irrational decision-making would arise from "real world managers" who might, in lieu of behaving rationally, act "far more inclined to hold a course . . . despite dim prospects for success," either due to "loss aversion due to a self-serving bias" or general overconfidence.⁷¹ Tor fails to distinguish these issues from standard principal-agent and incentive-conflict problems well-known and understood in the rational choice economics literature for decades. Tor fails to explain why, for example, the putatively irrational manager's superiors—or their superiors, or, at last, shareholders—would not discipline this conduct.⁷² Nor does one have to abandon rational choice theory to cope with the prospect of a faithless manager pursuing his own agenda at the expense of the firm. Indeed, the literature on agency problems, faithless agents, monitoring costs, and bonding mechanisms explores precisely this scenario in excruciating detail.⁷³ At most, irrational managerial behavior could prove the irrationality of *that manager*; it grossly oversimplifies the complexity of competing theories of the firm to deem a *firm* systematically irrational on the assumed irrationality of one of its managers.

The "optimism bias" or "optimistic overconfidence" variant of the behaviorist predatory pricing model fares only slightly better. The optimism-bias-driven model presumes that incumbent monopolists, driven by executives who wildly overestimate the actual likelihood of success in a predatory pricing scheme, enter into below-cost pricing strategies.⁷⁴ These same

⁷⁰ *Id.*

⁷¹ *Id.* at 55.

⁷² See Wright & Stone, *supra* note 9, at 1523-24; sources cited *supra* note 31.

⁷³ See, e.g., Eugene Fama, Agency Problems and the Theory of the Firm, 88 J. POL. ECON. 288 (1980); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Benjamin Klein, *Contracting Costs and Residual Claims: The Separation of Ownership and Control*, 26 J.L. & ECON. 367 (1983); Oliver E. Williamson, *Organization Form, Residual Claimants, and Corporate Control*, 26 J.L. & ECON. 351 (1983).

⁷⁴ Tor, *supra* note 13, at 55; see also Leslie, *supra* note 13, at 308 (internal footnotes omitted) ("Behavioral research suggests that the more that a firm values an outcome—e.g., monopoly power—

managers, irrationally overconfident in the prudence of their initial plot, persist well after failure has become obvious.⁷⁵ The resulting period of below-cost pricing, even without a reasonable probability of recoupment, tends to discourage entry into the market.⁷⁶

This conception of behavioral predation naturally fails to distribute the monopolist's putative bias to potential entrants.⁷⁷ Yet it stands to reason under the behaviorists' theory that decision-makers in both incumbent and entrant firms perform similar functions and are similarly likely to suffer an optimism bias. An irrationally optimistic incumbent faced with irrationally optimistic potential entrants would most likely result in the entrants' irrational persistence in the market despite the below-cost pricing—reflecting overconfidence in their ability to weather the incumbent's temporary predation—or an inefficiently large amount of entry in response to the monopolist's increased prices as rivals rush back into the market, or both. The consequence to consumers in each circumstance is the same: decreased prices at similar quantities in the former scenario and increased quantities at the market price in the latter. Neither plausibly imperils consumer welfare.

Behaviorists' final predation model postulates that judges' confirmation and hindsight biases skew judicial decision-making against predation claims. Because judges categorically deem predatory pricing unlikely, they tend to focus upon evidence of its irrationality rather than the opposite.⁷⁸ In this model, behaviorists obliquely approach one of our threshold theoretical challenges to behavioral antitrust, that is, the complication of imputing biases exhibited at the individual level to the firm.⁷⁹ Once one transplants distinctly *individual* cognitive biases, largely drawn from psychology literature and studies of *individual* behavior, onto *firm* or group behavior, there is no obvious reason why regulators or agencies should not similarly be charged with myriad behavioral biases.⁸⁰

the more likely it is that overconfidence will bias the decisionmaking process. In short, firms bent on monopolization . . . may make a decision to violate antitrust laws even though a federal judge later scrutinizing the same business environment would not find such behavior plausible or rational. The fact that the judge would make the decision in that situation does not answer the question of whether the defendant, brimming with overconfidence, did in fact violate antitrust laws.”).

⁷⁵ Tor, *supra* note 13, at 55.

⁷⁶ Gerla, *supra* note 38, at 767, 769.

⁷⁷ Of course, one could renew the objections briefly discussed distinguishing between irrational executives and an irrational firm—and we do. But they apply with equal force here and need no further elaboration. See generally Wright & Stone, *supra* note 9, at 1523-24.

⁷⁸ See Leslie, *supra* note 13, at 315-17.

⁷⁹ See *supra* text accompanying notes 30-31; see also Wright & Stone, *supra* note 9, at 1523-25.

⁸⁰ It is in fact easier to explain how *judges*—a subset of antitrust regulators—fit the traditional behavioral paradigm than firms. Judges act as individuals, or, in appellate review, discrete panels; they enjoy near-complete autonomy and enjoy comparatively little repeated exposure as individuals to any specific market or challenged restraint. Article III of the Constitution insulates judges from feedback mechanisms beyond even that of far-removed agencies, which, as Cooper and Kovacic explain, qualita-

Charging enforcement agencies with behavioral biases yields troubling results, especially in light of behaviorists' interventionist policy preferences. Leslie posits confirmation and hindsight biases in judicial review due to his personal accreditation of evidence of monopolistic intent in various predatory pricing cases.⁸¹ The infirmities with this ad hoc attribution of biases to judicial decision-making can be illustrated by application to other antitrust claims. For instance, one could just as easily adopt a contrary approach to seminal cases finding antitrust liability on economically dubious grounds by attributing judicial solicitousness toward governmental theories against potential mergers as a sort of optimistic overconfidence in agencies' ability to assess actual competitive effects. This might at least account for Justice Stewart's maxim of pre-Guidelines merger law.⁸² But without a meaningful way of theorizing the predicate conditions under which a bias will inhere or the magnitude and distribution of biases in the general population—putting aside questions of application to groups, as raised above—behavioral biases lend themselves easily enough as cudgels for or against liability in any given case. Ad hoc invocations of behavioral biases thereby invite antitrust to reduce to the model selection problem, in which courts and agencies merely select among a myriad of economic models the one most consistent with their pre-existing biases.⁸³ This approach leaves antitrust law and policy rudderless and far less likely to operate to the benefit of consumers.

As Cooper and Kovacic point out, antitrust regulators act under different incentives and gather information from different signals than firms. If behavioral biases may be “learned away” through repeated experience, then it matters that antitrust regulators, both agencies and firms, are insulated from the price and output signals that follow market interactions.⁸⁴ Policy-makers' feedback signals are far more attenuated and, in the case of agencies, may have little to do with market outcomes.⁸⁵ Behaviorally-biased regulators further implicate the error-cost framework: if markets may correct false negatives where they cannot correct false positives, and if behaviorally biased regulators may be more prone than expected to welfare-destroying false positives,⁸⁶ antitrust liability should be assigned only in the clearest cases. As a result, the newly gained efficiency in imposing anti-

tively differ from firms, which respond to market forces. See James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REG. ECON. 41, 52 (2012).

⁸¹ Leslie, *supra* note 13, at 316.

⁸² See *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) (“The sole consistency that I can find is that in litigation under § 7 [of the Clayton Antitrust Act], the Government always wins.”).

⁸³ For a discussion of the model selection problem in antitrust, see Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241 (2012).

⁸⁴ Cooper & Kovacic, *supra* note 80, at 50.

⁸⁵ *Id.*

⁸⁶ *Id.*

trust liability will alleviate the possibility that behaviorally biased regulators will impose severe consumer welfare costs while pursuing greater outputs, that is, increased intervention, rather than better outcomes.

The foregoing analysis does not invariably condemn all future behaviorist theories with antitrust implications; we too embrace any theory promising a higher “ R^2 .”⁸⁷ But our objections demonstrate that despite their proliferation in the legal academy, behaviorist theories as applied to antitrust doctrine and scholarship fail to answer fundamental questions. Those questions include how observers can reliably predict the presence of one bias rather than another, why firms would suffer behavioral biases in the first place, and, subsequently, why group-aggregated biases would not transfer to regulators as well, requiring even further caution in antitrust scrutiny. Perhaps a fully coherent behaviorally-informed theory of predatory pricing will one day improve observers’ ability to predict and identify predation. However, that day has not yet arrived. Until then, reliable error–cost concerns counsel substantial caution in imputing antitrust liability predicated on a practice that has thus far proven mythically rare.

B. *Empirical Criticisms*

Behaviorist theories of predatory pricing further fail on several empirical grounds. Whether irrational or rational, the evidence suggests any and all forms of price predation are relatively rare. As Bruce Kobayashi notes, initial empirical studies concluded predatory pricing rarely occurred and even less frequently succeeded.⁸⁸ A series of studies from the late 1960s through the early 1970s examined foreign sugar concerns,⁸⁹ a successful predatory pricing case,⁹⁰ the gunpowder trust,⁹¹ and, finally, thirty-one alleged instances of predation.⁹² Each study found only scant evidence for predation, even absent antitrust laws forbidding predatory pricing.⁹³ And, as Kobayashi points out, while recent reviews conclude these studies underestimated the empirical frequency of below-cost pricing in the wild, they

⁸⁷ Cf. Jolls et al., *supra* note 18, at 1487 (positing behavioral law and economics, rather than rational choice economics, as the model with the greater explanatory power).

⁸⁸ Bruce H. Kobayashi, *The Law and Economics of Predatory Pricing*, in ANTITRUST LAW AND ECONOMICS 116, 150 (Keith N. Hylton ed., 2010).

⁸⁹ John S. McGee, *Government Intervention in the Spanish Sugar Industry*, 7 J.L. & ECON. 121 (1964).

⁹⁰ M.A. ADELMAN, *THE A & P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY* (Harvard University Press 1966).

⁹¹ Kenneth G. Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J.L. & ECON. 223 (1970).

⁹² Roland H. Koller II, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105, 105 (1971); see Kobayashi, *supra* note 5, at 125 (citing *id.*).

⁹³ Kobayashi, *supra* note 5, at 124–28.

fail to establish that the challenged pricing actually reduced consumer welfare.⁹⁴

Experimental studies further undercut behaviorist predatory pricing theories. R. Mark Isaac and Vernon Smith conducted experiments attempting to create predatory pricing as an equilibrium outcome in laboratory settings. Isaac and Smith adopted a generous definition of predatory pricing for these experiments, with a price “lower than would be optimal in a simple myopic (short-run) pricing strategy” sufficient to indicate predation.⁹⁵ Isaac and Smith imposed sunk cost entry and reentry barriers and introduced various informational variables that, in light of behavioral narratives regarding individual decision-making, appear salient, including obscuring demand conditions and the other party’s costs.⁹⁶ They further replicated their experiments with complete information.⁹⁷ Isaac and Smith found no evidence of predation, and replications of their experiments found little to no evidence to support predatory pricing.⁹⁸ In each circumstance, individuals acted as firms.⁹⁹ Individuals’ biases were necessarily imputed to firms. One would expect that if behavioral biases are distributed evenly in the population, Isaac and Smith’s and subsequent experimental groups would capture a random distribution of these behavioral biases as well. Yet none of their experiments support behaviorists’ theories of rampant price predation.¹⁰⁰

Regrettably, some behaviorists have selectively cited to certain game theoretic studies and occasional empirical findings implying predatory conduct in order to magnify its policy relevance. These incomplete references ignore a broad body of literature, including empirical work, demonstrating the comparative implausibility of behavioral predation. For example, Leslie’s comments characterize Isaac and Smith’s repeated experiments as “theorists assum[ing] that a dominant firm would not follow through on a predatory pricing threat”¹⁰¹ Leslie similarly ignores both Kobayashi’s

⁹⁴ *Id.* at 117.

⁹⁵ Isaac & Smith, *supra* note 4, at 330; *see also* Kobayashi, *supra* note 5, at 128 (discussing Isaac & Smith, *supra* note 4).

⁹⁶ Isaac & Smith, *supra* note 4, at 326; *see also* Kobayashi, *supra* note 5, at 128 (discussing Isaac & Smith, *supra* note 4).

⁹⁷ Isaac & Smith, *supra* note 4, at 321; *see also* Kobayashi, *supra* note 5, at 128 (discussing Isaac & Smith, *supra* note 4).

⁹⁸ Glenn Harrison modified Isaac and Smith, creating a multiple-market experiment, and found weak evidence of predation; however, the robustness of this finding is questionable, as only one of his trials examined multiple markets and actually exhibited predation. Glenn W. Harrison, *Predatory Pricing in a Multiple Market Experiment*, 9 J. ECON. BEHAV. & ORG. 405 (1988). Rosario Gomez and Jacob Goeree replicated Harrison and observed no behavior fulfilling the legal requirements of predation. Jacob K. Goeree & Rosario Gomez, *Predatory Pricing in the Laboratory* (U. Virginia Working Paper, 1995); Gomez et al., *supra* note 2, at 181.

⁹⁹ *See* Isaac & Smith, *supra* note 4.

¹⁰⁰ *Id.*

¹⁰¹ Leslie, *supra* note 13, at 297.

review of recent strategic studies suggesting predation is rare, as well as Zeiler and Plott's well-known study criticizing behaviorist narratives of endowment effect theory.¹⁰² As with our theoretical criticisms, we welcome behaviorist experimentation and verifiable results consistent with a fully developed theory of predatory pricing, but until empirical data undergirding such a theory arrives, selective redaction of critical scholarship cannot stand in its stead.

CONCLUSION

Behaviorists approach the daunting task of explaining ostensibly rampant predation despite experimental and empirical evidence to the contrary with theories insufficient to the task. They seek to revive price predation as a significant antitrust concern using economic models that are either woefully incomplete or do not comport with existing evidence from the behavioral literature. Further, despite any number of game-theoretic models generating price predation in equilibrium, it remains as elusive as ever in the wild. Empirical analyses, including laboratory experiments, suggest price predation is rare. To borrow Judge Easterbrook's famous aphorism, anecdotes of the dragon abound, but concrete evidence is scarce. Both endowment effect theory and optimism bias narratives fail to explain in the first instance how individual cognitive biases, whether theoretically present or observed in random experimental groups, aggregate to firms. Moreover, both fail to satisfy our irrelevance theorem by irregularly and arbitrarily attributing carefully selected biases to only monopolists or only entrants, presuming the respective counterpart behaves rationally without developing any explanation grounded in behavioral literature or economic logic for this asymmetry. This assumes too much and proves too little. We do not mean to insinuate that behavioral economics cannot someday update antitrust understanding of price predation, but behaviorists must address the substantial lacunae in their theories before generating welfare-enhancing policy prescriptions.

¹⁰² *Id.* at 297-300 (rebutting literature positing rational choice explanations of the rarity of price predation but failing to address literature specifically aimed at criticizing behaviorist theories).

GOOGLE
FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE
SEARCH RESULTS

*Eugene Volokh & Donald M. Falk**

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INTRODUCTION

Once, the leading sources to which people turned for useful information were newspapers, guidebooks, and encyclopedias. Today, these sources also include search engine results, which people use (along with other sources) to learn about news, local institutions, products, services, and many other matters. Then and now, the First Amendment has protected all these forms of speech from government attempts to regulate what they present or how they present it. And this First Amendment protection has applied even when the regulations were motivated by a concern about what some people see as “fairness.”

Google, Microsoft’s Bing, Yahoo! Search, and other search engines are speakers. First, they sometimes convey information that the search engine company has itself prepared or compiled (such as information about places appearing in Google Places). Second, they direct users to material created by others, by referencing the titles of Web pages that the search engines judge to be most responsive to the query, coupled with short excerpts from each page. Such reporting about others’ speech is itself constitutionally protected speech.

Third, and most valuably, search engines select and sort the results in a way that is aimed at giving users what the search engine companies see as the most helpful and useful information. (That is how each search engine company tries to keep users coming back to it rather than to its competitors.) This selection and sorting is a mix of science and art: It uses sophisticated computerized algorithms, but those algorithms themselves inherently incorporate the search engine company engineers’ judgments about what material users are most likely to find responsive to their queries.

In this respect, each search engine’s editorial judgment is much like many other familiar editorial judgments:

- newspapers’ daily judgments about which wire service stories to run, and whether they are to go “above the fold”;
- newspapers’ periodic judgments about which op-ed columnists, lifestyle columnists, business columnists, or consumer product columnists are worth carrying regularly, and where their columns are to be placed;
- guidebooks’ judgments about which local attractions, museums, stores, and restaurants to mention, and how prominently to mention them;
- the judgment of sites such as DrudgeReport.com about which stories to link to, and in what order to list them.

All these speakers must decide: Out of the thousands of possible items that could be included, which to include, and how to arrange those that are included? Such editorial judgments may differ in certain ways: For example, a newspaper also includes the materials that its editors have selected and arranged, while the speech of DrudgeReport.com or a search engine consists almost entirely of the selected and arranged links to others' material. But the judgments are all, at their core, editorial judgments about what users are likely to find interesting and valuable. And all these exercises of editorial judgment are fully protected by the First Amendment.

That is so even when a newspaper simply makes the judgment to cover some particular subject matter: For instance, when many newspapers published TV listings, they were free to choose to do so without regard to whether this choice undermined the market for *TV Guide*. Likewise, search engines are free to include and highlight their own listings of (for example) local review pages even though Yelp might prefer that the search engines instead rank Yelp's information higher. And this First Amendment protection is even more clearly present when a speaker, such as Google, makes not just the one include-or-not editorial judgment, but rather many judgments about how to design the algorithms that produce and rank search results that—in Google's opinion—are likely to be most useful to users.

Of course, search engines produce and deliver their speech through a different technology than that traditionally used for newspapers and books. The information has become much easier for readers to access, much more customized to the user's interests, and much easier for readers to act on. The speech is thus now even more valuable to customers than it was before. But the freedom to distribute, select, and arrange such speech remains the same.

We will discuss this in detail below, both as to the First Amendment generally (Part III) and as to the intersection of First Amendment law and antitrust law (Part IV). We focus in this submission on Google search results for which no payment has been made to Google, because they have been the subject of recent debates; we do not discuss, for instance, the ads that Google often displays at the top or on the right-hand side of the search results page.

I. ACCUSATIONS AND FACTS

The accusations by certain competitors against Google and the facts bearing on those accusations have been covered in Google's previous filings, and will not be repeated here. Briefly, the heart of the accusations is that Google somehow prioritizes its own thematic search results over results originating from specialized competitors. Whether this is so is a contested question, which turns, among other things, on disputes about what would constitute "neutral" judgments and what would be a departure from those judgments. Yet even if it is assumed that Google engages or plans to en-

gage in such prioritizing, that prioritizing would constitute the legitimate exercise of Google's First Amendment right to decide how to present information in its speech to its users.

II. THE FIRST AMENDMENT FULLY PROTECTS SEARCH ENGINE RESULTS

Two federal court decisions have held that search results, including the choices of what to include in those results, are fully protected by the First Amendment. *Search King, Inc. v. Google Technology, Inc.* concluded that Google's rankings of pages were "subjective result[s]" that constituted "constitutionally protected opinions" "entitled to full constitutional protection."¹ Likewise, *Langdon v. Google, Inc.*, refused to order Google and Microsoft to prominently list plaintiff's site in their search results, reasoning: "The First Amendment guarantees an individual the right to free speech, 'a term necessarily comprising the decision of both what to say and what not to say.' . . . [T]he injunctive relief sought by Plaintiff contravenes Defendants' First Amendment rights."² Just as newspapers cannot be forced to print either editorial content or advertising, the court held, so search engines cannot be forced to include links that they wish to exclude.³

And Supreme Court precedents compel the conclusion reached by these two courts, for seven related reasons. First, Internet speech is fully constitutionally protected. Second, choices about how to select and arrange the material in one's speech product are likewise fully protected. Third, this full protection remains when the choices are implemented with the help of computerized algorithms. Fourth, facts and opinions embodied in search results are fully protected whether they are on nonpolitical subjects or political ones. Fifth, interactive media are fully protected. Sixth, the aggregation of links to material authored by others is fully protected. Seventh, none of this constitutional protection is lost on the theory that search engine output is somehow "functional" and thus not sufficiently expressive. And, eighth, Google has never waived its rights to choose how to select and arrange its material.

¹ No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (internal citations and quotation marks omitted).

² 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (citing *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988); *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); and other cases).

³ *Id.* at 630.

A. *The First Amendment Fully Protects Internet Speech*

To begin with, the First Amendment protects communications delivered over the Internet as much as it protects traditional print communications.⁴ The Supreme Court's First Amendment precedents "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [the Internet]."⁵

B. *The First Amendment Fully Protects Editorial Choices About What to Include or Exclude in One's Speech Product*

Just as the First Amendment fully protects Internet speech, it also fully protects Internet speakers' editorial judgments about selection and arrangement of content. As the Supreme Court held in *Miami Herald Publishing Co. v. Tornillo*,⁶ the freedom to speak necessarily includes the right to choose what to include in one's speech and what to exclude. And the Court later reinforced that principle: "'Since all speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"⁷

A speaker is thus entitled to choose to present only the speech that "in [its] eyes comports with what merits" inclusion.⁸ And this right to choose what to include and what to exclude logically covers the right of the speaker to choose what to include on its front page, or in any particular place on that page. The government may not tell the Huffington Post or the Drudge Report how to rank the news stories or opinion articles to which they link. Likewise, it may not do so for other speakers, such as search engines.

And this is true even when the government argues that a speaker's choices are unfair to others. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."⁹ The "point" of the rule that speakers may choose what to include and what to exclude "is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."¹⁰

⁴ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁵ *Id.* at 870.

⁶ 418 U.S. 241, 258 (1974).

⁷ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (plurality opinion) (emphasis in original) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986)).

⁸ *Id.* at 574.

⁹ *Miami Herald*, 418 U.S. at 256.

¹⁰ *Hurley*, 515 U.S. at 574.

The Court has also made clear that this right to choose what to include and what to exclude in one's speech is not "restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers."¹¹ "The concerns that caused [the Court] to invalidate the compelled access rule in [*Miami Herald*] apply to appellant [a utility company sending material to its customers] as well as to the institutional press."¹² And this in turn is just a special case of the broader principle that First Amendment rights extend equally to the institutional press and to other speakers.¹³ Google, Microsoft's Bing, Yahoo! Search, and other search engine companies are rightly seen as media enterprises, much as the New York Times Company or CNN are media enterprises. And in any event, the First Amendment fully protects speech by all speakers, whether they are media enterprises or not.

C. *That Search Engine Results Are Created with the Help of Computerized Algorithms Does Not Rob Them of First Amendment Protection*

Search engine selection decisions are indeed the result not just of individual editorial choices, but also of the computerized algorithms that search engine employees have created to implement these choices. That is necessary given the sheer volume of information that search engines must process, and given the variety of queries that users can input. Such automation is necessary for users to get free, convenient, quick, and comprehensive access to speech—both the speech of the search engines expressing their decisions about how to rank and organize content, and the speech of the sites referenced by the search engines' speech.

Such automation does not reduce the First Amendment protection afforded to search engine results, for three related reasons. First, the computer algorithms that produce search engine output are written by humans. Humans are the ones who decide how the algorithm should predict the likely usefulness of a Web page to the user. These human editorial judgments

¹¹ *Hurley*, 515 U.S. at 574; *id.* at 575–76 (applying *Miami Herald* to protect the rights of a parade organizer).

¹² *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion); *id.* at 21–26 (Marshall, J., concurring in the judgment) (not noting any disagreement with the majority on this matter).

¹³ *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 905 (2010) ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.") (quotation marks and internal citations omitted); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 782 n.18 (1978) (rejecting the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by [non-institutional-press businesses]"); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (stating that the freedom of the press "embraces pamphlets and leaflets" as well as "newspapers and periodicals," and indeed "comprehends every sort of publication which affords a vehicle of information and opinion").

are responsible for producing the speech displayed by a search engine. For instance, Google's ground-breaking use of the volume of links from other sites as a criterion for ranking search results was itself the result of Google engineers' editorial judgment that inbound links provided a sound and quantifiable measure of a site's value. Search engine results are thus the speech of the corporation, much as the speech created or selected by corporate newspaper employees is the speech of the newspaper corporation.

Second, the First Amendment value of speech also stems from the value of the speech to listeners or readers.¹⁴ As we mentioned, the automation process only increases the value of the speech to readers beyond what purely manual decision-making can provide. Finally, the objections to Google's placement of its thematic search results arise precisely because Google employees are said to have made a conscious choice to include those results in a particular place.

D. *The First Amendment Fully Protects Facts and Opinions on Nonpolitical Subjects*

Much of the speech distributed by search engines responds to searches on political, religious, or scientific topics. And if the government asserts the power to constrain Google's ordering of search results, that power would logically extend to search results for political queries (e.g., "the best book about Mitt Romney" or "is global warming happening") as much as for other queries. The First Amendment clearly forbids such use of government authority.¹⁵

But even query results that relate to less elevated matters remain fully constitutionally protected, because the First Amendment protects even speech that is not closely linked to political or religious debates. As the Court pointed out just two years ago,

*Most of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons."*¹⁶

And the First Amendment also protects the collection and communication of facts as much as it protects opinions, including facts that are not

¹⁴ See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *Lamont v. Postmaster General*, 381 U.S. 301, 307–08 (1965) (Brennan, J., concurring).

¹⁵ See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that the government acting as regulator may not prefer some ideas over others).

¹⁶ *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (emphasis and ellipsis in original) (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971) (internal quotation marks omitted)).

ideologically laden—such as names of crime victims in three-sentence crime reports, names of accused juvenile offenders, lists of bestselling books, lists of tenants who had been evicted by local landlords, information in a mushroom encyclopedia, recipes in a cookbook, and computer program source code.¹⁷ As the Supreme Court has held, “information is speech,”¹⁸ and “[the] general rule, that the speaker has the right to tailor the speech [by choosing what to say and what to leave unsaid], applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”¹⁹ Any theory that search results lack full First Amendment protection because they are “mere facts” thus lacks support.

Of course, search engine results are in reality not simply facts: They are collections of facts that are organized and sorted using the judgment embodied in the engines’ algorithms, and those judgments and algorithms represent the search engine companies’ opinions about what should be presented to users.²⁰ But even to the extent that search engine results could be treated as primarily consisting of facts rather than opinions, they remain fully constitutionally protected.

E. *The First Amendment Fully Protects Interactive Media*

Search engine output is in many ways more interactive than traditional print—users get different results depending on the particular queries they enter, as well as on the user’s location, the user’s search history, and other factors. But the First Amendment protects interactive media as well as non-interactive ones, and new media as well as the centuries-old ones.²¹ Indeed, the fact that interactive search engine outputs are more personalized than a

¹⁷ See, respectively, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977); *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986); *U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228, 230 (Ct. App. 1995); *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001) (dictum); *Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000).

¹⁸ *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011). In *Sorrell* there was an argument that the speech was subject to the somewhat lower protection offered commercial advertising, because the speech itself was used as part of an advertising transaction. This is not so for Google’s speech discussed here, and it was not so in the other cases mentioned in this paragraph. But *Sorrell*’s broader point remains applicable: Whether or not speech is commercial advertising, the protection given to factual speech is the same as that given to ideas.

¹⁹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

²⁰ See, e.g., *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (concluding that Google’s rankings of pages were “constitutionally protected opinions”).

²¹ See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (holding that even violent video games are constitutionally protected, despite their interactivity).

traditional book or newspaper simply makes them especially valuable to readers.

F. *The First Amendment Fully Protects Aggregation of Materials Authored by Others*

Search engines are also fully constitutionally protected in showing short excerpts from selected other sites, rather than creating content themselves. The First Amendment protects the decisions to include or exclude others' content, based on the speakers' exercise of their judgment, as much as it protects the authoring of the content in the first place. As the Supreme Court made clear in deciding that a parade organizer is protected by the First Amendment—even though the parade simply consists of others' floats—

First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication. . . . [T]he presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, *Miami Herald Pub. Co. v. Tornillo*, as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper, see *New York Times v. Sullivan*.²²

And that was so even when the parade was highly unselective, allowing nearly all applicants to march.²³ Search engines are vastly more selective, with the first page of the output containing only a tiny fraction—though, in the search engine companies' views, the most useful fraction—of all the potentially relevant Web pages. Search engines' selectivity is much more comparable to the selectivity of newspaper op-ed pages, which choose to feature only a small fraction of potential columns. Thus, even though the search engine does not generate the content that is linked to by its results, the judgments and opinions about how to rank and present those results are fully protected by the First Amendment.

So what is true for parades and newspaper op-ed pages is at least as true for search engine output. When search engines select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed first and others last, they are engaging in fully protected First Amendment expression—“[t]he presentation of an edited compilation of speech generated by other persons.”²⁴

²² *Hurley*, 515 U.S. at 570.

²³ *Id.* at 569–70.

²⁴ *Id.* at 570.

G. *The Rules Governing Speech That Is Acted on Mechanically Are Inapplicable Here*

Some contents of a Web page may be acted on mechanically, with no user judgment, and may therefore be more subject to regulation in some circumstances. Thus, for instance, if a Web page contains a virus, courts and legislatures may be able to impose liability on the producer of the page.²⁵ The same would be true if the page knowingly displays a link that, when clicked on, triggers such a virus. Analogous examples with paper publications are rare, but one can imagine some: If some of the chemicals used in a fashion magazine's "scratch and sniff" perfume insert prove poisonous to some readers, that might lead to liability.

This conclusion might also support the results in the aeronautical charts cases, in which people were allowed to recover damages against manufacturers who provided factually erroneous aeronautical charts.²⁶ As we noted above, even purely factual information—such as that given in an Encyclopedia of Mushrooms—is constitutionally protected. But as a federal appellate court explained in distinguishing aeronautical charts from the mushroom encyclopedia, "[a]eronautical charts are highly technical tools" akin to compasses, which are "like a physical 'product'" rather than like speech.²⁷

People use aeronautical charts not by considering whether to follow the charts' advice, contemplating using a different chart, or deciding which of the charts' many recommendations should be accepted. Chart users just apply the information given in the charts. Charts are authoritative, especially in an environment where quick decisions are necessary and lives are at stake.

But search engines' speech about goods and services, which people read and evaluate at leisure and often with skepticism, is not "a physical 'product'" akin to a compass. Rather, like the mushroom encyclopedia, the information output by a search engine "is pure . . . expression,"²⁸ and restrictions on the format and distribution of such information implicate the First Amendment²⁹

²⁵ We do not say that such liability is currently the law, or that it would be a good legal rule to have; we only say that such liability likely would not violate the First Amendment.

²⁶ See, e.g., *Brocklesby v. United States*, 767 F.2d 1288, 1294–95 (9th Cir. 1985).

²⁷ *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991).

²⁸ *Id.*

²⁹ *Id.* at 1037.

H. *Google Has Never Surrendered the Right—Which All Speakers Possess—To Choose What Information It Presents and How It Presents It*

Finally, some of Google’s critics assert that any speech by Google that prefers Google’s thematic search results is misleading. Customers, the argument goes, have allegedly come to expect that Google will choose search results based solely on supposedly “neutral” computer algorithms, with no preference for Google’s thematic search results. But the critics cannot point to any such guarantees to customers, because Google makes no such guarantees. Google has never given up its right as a speaker to select what information it presents and how it presents it.

And the First Amendment does not let the government hold a speaker liable on the theory that the speaker’s alleged biases deny readers the balanced presentation that they supposedly expect. That the *New York Times* has spoken of publishing “all the news that’s fit to print” cannot justify holding the newspaper liable for slighting some stories that the government or a third party may feel are even more important than what the *Times* chose to print.

The precedents bear this out. That the *Times* bestseller list is said to be “based on computer-processed sales figures from about 2,000 bookstores in every region of the United States” cannot justify a lawsuit objecting to the *Times*’ supposedly misleading exclusion of one book, on the theory that the *Times* represented the list as an “objective, unbiased and accurate compilation of actual sales.”³⁰ And an information technology advisor’s describing its “analysis [as] being ‘fact-based and knowledge-centric,’ ‘built on objectivity,’ and founded on a methodology it says ensures the ‘ultimate objectivity’” cannot justify a lawsuit objecting to a particular ranking as being supposedly contrary to the publisher’s assurance of objectivity and therefore misleading.³¹ Even such express assertions of an objective foundation, the *ZL Technologies* court held, “are insufficient to transform the tenor of the rankings . . . from opinion to fact,”³² and thus to diminish the speaker’s right to exercise its judgment in crafting such rankings. This is so even when the rankings are allegedly biased by the speaker’s economic incentives.³³

It is clearer still that the government may not demand that a search engine live up to some hypothetical and undefined expectations of abstract objectivity. Reasonable users understand that determining which of the billions of Internet pages are the most useful responses to any particular query necessarily involves a great deal of subjective judgment, and that

³⁰ *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1046 n.2 (1986).

³¹ *ZL Techs., Inc. v. Gartner, Inc.*, 709 F. Supp. 2d 789, 797–98 (N.D. Cal. 2010).

³² *Id.* at 798.

³³ *Id.* at 801 n.4.

search engine companies might well conclude that material produced by themselves will be especially useful and thus merits being prominently displayed. And reasonable users would not expect that Google would lock itself into a set of ranking and display criteria used at any particular time—indeed, given the rapid innovation that has characterized the Internet generally and search engines specifically, change in algorithm design should and would be expected.

If users do find Google's results to be unreliably skewed, Google will be punished by the marketplace, as frustrated users shift to other easily available search engines.³⁴ Users' appreciation of the usefulness of Google's search results is what brought so many users to Google in the first place. If users start doubting the usefulness of Google's results, the users will switch to another search engine. But the First Amendment denies government the power to police the "fairness" of search engine speech, just like the First Amendment denies government the power to police the fairness of newspaper speech.³⁵

³⁴ Google's rivals are naturally promoting what they say is the superior quality of their search technology, both as to its selection decisions and as to the arrangement of results on the page—that is to say, their own supposedly superior editorial judgment—in order to persuade users to switch. See, e.g., Tim Addington, *Bing Will Take Market Share from Google*, B & T (Australia), Nov. 15, 2011, <http://www.bandt.com.au/news/latest-news/bing-will-take-market-share-from-google-> (quoting "Stefan Weiz, senior director of Bing search," as saying, "I think we are going to take share away in certain areas because we are going to have a better experience and they are going to maintain share in certain areas because they have a good experience"); Dr. Jan Pedersen, Chief Scientist for Core Search at Bing, *Bing Search Quality Insights: Whole Page Relevance*, Mar. 5, 2012, http://www.bing.com/community/site_blogs/b/search/archive/2012/03/05/bing-search-quality-insights-whole-page-relevance.aspx (promoting the result selection and arrangement technology of Microsoft's Bing as supposedly being better for users); UKTeam, *Bing Announces Significant Improvements to Instant Answer and News Searches*, Apr. 26, 2011, http://www.bing.com/community/site_blogs/b/uk/archive/2011/04/26/bing-announces-significant-improvements-to-instant-answer-and-news-searches.aspx (discussing changes in Microsoft's Bing search, and closing with "[t]he search improvements are a result of customer feedback and research, and closely follow news that Bing has gained a greater market share in the UK. With more and more room to grow we look forward to further developments in the future and will continue to keep you all updated. We hope you enjoy the new features!"); Dave Copeland, *Is Microsoft Driving at Google with Bing Maps Improvements & Patent?*, Jan. 5, 2012, READWRITEWEB, http://www.readwriteweb.com/archives/is_microsoft_driving_at_google_with_bing_maps_impr.php ("Microsoft announced enhancements to its Bing Maps, including a change to the algorithm that allows the service to process directions requests twice as fast and help drivers avoid traffic. Those changes, along with a newly-awarded patent for a feature that allows Bing Maps to route pedestrians away from unsafe neighborhoods, suggest Microsoft is driving to surpass Google Maps, which has dominated the space since surpassing MapQuest in site traffic and queries in 2008.").

³⁵ For a particularly effective—and amusing—illustration of the analogy between calls for regulating search and what would be clearly unconstitutional calls for regulating news, see Danny Sullivan, *The New York Times Algorithm & Why It Needs Government Regulation*, SEARCH ENGINE LAND (July 15, 2010, 2:07AM), <http://searchengineland.com/regulating-the-new-york-times-46521>.

III. THE FIRST AMENDMENT PROTECTS SEARCH ENGINE RESULTS AGAINST ANTITRUST LAW

Businesses that engage in speech, like other businesses, are covered by antitrust law when it comes to restrictions on their non-speech business practices, such as the licensing of content.³⁶ But antitrust law itself, like other laws, is limited by the First Amendment, and may not be used to control what speakers say or how they say it.

A clear example of this comes in the *Noerr/Pennington* line of cases. Antitrust law generally prohibits organizations from unreasonably restraining competition. But when organizations try to restrain trade by speaking to legislators and to the public, and urging the listeners to enact anticompetitive regulations, such speech is immunized from liability. A contrary conclusion, the Court has held, would “invade” the protection offered by the First Amendment.³⁷ Indeed, the Supreme Court took the view that it should interpret the antitrust laws to avoid any interpretation that would even “raise important constitutional questions.”³⁸

Likewise, antitrust law cannot be used to require a speaker to include certain material in its speech product. *Associated Press v. United States*, the 1945 Supreme Court case that held that the press may generally be covered by antitrust law, stressed that the lower court’s decree “does not compel AP or its members to permit publication of anything which their ‘reason’ tells them should not be published.”³⁹ And the Court has since made clear, in *Miami Herald Publishing Co. v. Tornillo*,⁴⁰ that the First Amendment bars orders that a newspaper “print that which it would not otherwise print,” even when those orders apply antitrust law:

[B]eginning with *Associated Press, supra*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which “‘reason’ tells them should not be published” is unconstitutional.

To be sure, it is constitutionally permissible to stop a newspaper from “forcing advertisers to boycott a competing” media outlet, when the newspaper refuses advertisements from advertisers who deal with the competi-

³⁶ *Associated Press v. United States*, 326 U.S. 1 (1945).

³⁷ *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *see also* *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

³⁸ *Noerr*, 365 U.S. at 138; *see also* *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 424 (1990) (describing the *Noerr* Court’s interpretation of the Sherman Act “in the light of the First Amendment[.]”).

³⁹ 326 U.S. at 20 n.18.

⁴⁰ 418 U.S. 241, 256 (1974).

tor.⁴¹ But the newspaper in *Lorain Journal Co.* was not excluding advertisements because of their content, in the exercise of some editorial judgment that its own editorial content was better than the proposed advertisements. Rather, it was excluding advertisements solely because the advertisers—whatever the content of their ads—were also advertising on a competing radio station. The *Lorain Journal Co.* rule thus does not authorize restrictions on a speaker's editorial judgment about what content is more valuable to its readers.⁴²

Search engines' decisions about where to display certain search results do not involve any such illegal agreements, or attempts to force advertisers to boycott the search engines' competitors. Instead, search engines' selection and arrangement decisions reflect editorial judgments about what to say and how to say it, which are protected by the First Amendment. As the Tenth Circuit made clear in *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor Servs.*, cases such as *Lorain Journal*, *Superior Court Trial Lawyers Ass'n*, and *National Society of Professional Engineers* "do not suggest that merely engaging in protected speech may constitute an antitrust violation."⁴³ "[T]he First Amendment does not allow antitrust claims to be predicated solely on protected speech."⁴⁴ Likewise, the Ninth Circuit has concluded that even a newspaper that was plausibly alleged to have a "substantial monopoly" could not be ordered to run a movie advertisement that it wanted to exclude, because "[a]ppellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper."⁴⁵ And the Tennessee Supreme Court similarly stated that, "[n]ewspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication."⁴⁶

This principle that even generally applicable economic regulations may not be used to require a speaker to include certain material in its speech product is not confined to antitrust law; it is equally visible, for example, in the labor law cases. Labor law, like antitrust law, is aimed at

⁴¹ *Lorain Journal Co. v. United States*, 342 U.S. 143, 152, 155 (1951).

⁴² See *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (stressing that a boycott violated antitrust law not because of the defendants' speech or lobbying, but because of the "concerted refusal" to engage in commercial transactions); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 697 (1978) (stressing that an injunction against a professional association's adoption of a ban on competitive bidding was constitutional because the ban was implemented in reaction to a Sherman Act violation that consisted of an "agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer").

⁴³ *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Investor Servs.*, 175 F.3d 848, 860 (10th Cir. 1999).

⁴⁴ *Id.*

⁴⁵ *Assocs. & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971).

⁴⁶ *Newspaper Printing Corp. v. Galbreath*, 580 S.W.2d 777, 779 (Tenn. 1979).

protecting against misuse of economic power. And labor law, like antitrust law, may usually be lawfully applied to most business decisions by newspapers and other speakers. Yet the Court has stressed “the full freedom and liberty of” a speaker “to publish the news as it desires it published or enforce policies of its own choosing with respect to the editing and rewriting of news for publication.”⁴⁷

Likewise, federal appellate courts have reaffirmed that “the First Amendment erects a barrier against government interference with a newspaper’s exercise of editorial control over its content.”⁴⁸ The NLRB, for instance, is not allowed to force newspapers to yield editorial control to union members,⁴⁹ keep publishing an employee’s column,⁵⁰ or keep an employee as part of the publisher’s editorial writing staff.⁵¹ “The Supreme Court has implied consistently that newspapers have absolute discretion to determine the contents of their newspapers.”⁵² “Implementation of a remedy that requires governmental coercion gives rise to a confrontation with the First Amendment.”⁵³ The First Amendment bars the government from controlling what speakers say and how they say it, even when the government’s motivation is to correct a perceived unfair use of economic power.

And, as discussed above, these principles apply equally to all speakers, whether they create newspapers or other speech. Indeed, the *Miami Herald v. Tornillo* principle has been applied even to parades, including ones that have far more viewers than other parades are likely to have. Even when “the size and success of [a] parade makes it an enviable vehicle for the dissemination of [a speaker’s] views,” that sort of influence on the parade’s part cannot justify ordering the parade to include floats that the organizers want to exclude.⁵⁴

Moreover, the one case in which the Court did uphold a law that required speakers to include certain kinds of speech, *Turner Broadcasting System, Inc. v. FCC*,⁵⁵ relied on the fact that the speakers in that case—who were cable system operators—were physically able to “prevent . . . subscribers from obtaining access to programming [the operator] chooses to exclude.”⁵⁶ The Court stressed that its decision to uphold the

⁴⁷ *Associated Press v. NLRB*, 301 U.S. 103, 133 (1937).

⁴⁸ *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959 (9th Cir. 2010).

⁴⁹ *Id.*

⁵⁰ *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1558 (D.C. Cir. 1984).

⁵¹ *Wichita Eagle & Beacon Pub. Co., Inc. v. NLRB*, 480 F.2d 52, 56 (10th Cir. 1973) (holding that the NLRB’s ruling blocking the transfer of an employee from the editorial writing department “infringe[s] upon the newspaper’s freedom to determine the content of its editorial voice in an atmosphere of free discussion and exchange of ideas”).

⁵² *Passaic Daily News*, 736 F.2d at 1557.

⁵³ *Id.* at 1558.

⁵⁴ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 577–78 (1995).

⁵⁵ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

⁵⁶ *Id.* at 656.

must-carry law did not stem simply from a judgment that a cable company had market power. The Court made clear that its analysis would not apply to newspapers, “no matter how secure [their] local monopoly,” because such a newspaper “does not possess the power to obstruct readers’ access to other competing publications.”⁵⁷ Instead of focusing on market share, the Court focused on the physical power of the cable operator to block speakers: “A cable operator, unlike speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch.”⁵⁸

Search engine operators, no matter what their alleged market shares may be, lack any such physical power because of how the Internet works. In 1994, each home usually had access only to one cable provider. But each home has access, with just a click of the mouse, to Google, Microsoft’s Bing, Yahoo! Search, and other general-purpose search engines, as well as to almost limitless other means of finding content on the Internet, including specialized search engines, social networks, and mobile apps.

As the later *Hurley* case explained, *Turner* also rests on the fact that cable system operators were seen at the time as merely “a conduit” for others’ speech that viewers did not perceive as edited or compiled into a coherent item by the cable operator.⁵⁹ But the *Turner* approach does not apply where the speaker is compiling and editing a speech product of its own—such as a single page that contains text selected and presented in a way that “in the [speaker’s] eyes comports with what merits” inclusion.⁶⁰

As *Hurley* held, the *Turner* “conduit” metaphor is “not apt” where the inclusion of some item of speech “would likely be perceived as having resulted from the [speaker’s] customary determination . . . that [the] message [of any component of the speech] was worthy of presentation.”⁶¹ That is precisely the perception that users are likely to have when viewing search engine results: Users assume that each link was judged by the search engine as “worthy of presentation,” because the very point of using a search engine is to narrow down the billions of Web pages into those that the engine views as worth presenting.

In such a situation, whether it involves a parade, a newspaper, or a page of results displayed by a search engine, the First Amendment fully protects the speaker’s “autonomy to control [its] own speech.”⁶² For search engine output, as for the contents of a parade or of a newspaper, “[t]he choice of material . . . and the decisions made as to limitations on the size

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Hurley*, 515 U.S. at 575; *Turner*, 512 U.S. at 629 (“[T]he cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers.”).

⁶⁰ *Hurley*, 515 U.S. at 574.

⁶¹ *Id.* at 575.

⁶² *Id.*

and content . . . —whether fair or unfair—constitute the exercise of editorial control and judgment” upon which the State can not intrude.⁶³

CONCLUSION

Google, Microsoft’s Bing, and Yahoo! Search exercise editorial judgment about what constitutes useful information and convey that information—which is to say, they speak—to their users. In this respect, they are analogous to newspapers and book publishers that convey a wide range of information from news stories and selected columns by outside contributors to stock listings, movie listings, bestseller lists, and restaurant guides. And all of these speakers are shielded by the First Amendment, which blocks the government from dictating what is presented by the speakers or the manner in which it is presented.

⁶³ *Id.* (quoting *Tornillo*, and explaining why *Turner* is inapplicable).



‘LAISSEZ FAIRE L’ANGLAIS’: WHY FRANCE SHOULD ABANDON
THE TOUBON LAW AND EMBRACE LINGUISTIC FREEDOM

*Katie Barnes**

INTRODUCTION: ENGLISH –THE MODERN “*LINGUA FRANCA*”¹

*La mondialisation actuelle . . . est à la fois une idéologie – le libéralisme –, une monnaie – le dollar –, un outil – le capitalisme –, un système politique – la démocratie –, une langue – l’anglais.*²

Since World War II, the United States has become an “economic, commercial, and military juggernaut,” which has helped facilitate the widespread use of English.³ The U.S. has replaced France as the international leader in culture and science, and language relating to American technological and scientific developments has evolved in English.⁴ Indeed, French science graduates often lack the ability to make quality expressions in their

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¹ Latin for “French language.” Loretta Nelms-Reyes, *Deal-Making on French Terms: How France’s Legislative Crusade to Purge American Terminology from French Affects Business Transactions*, 26 CAL. W. INT’L L.J. 273, 274 (1996). The term denotes a means of international communication. See RONALD WARDHAUGH, *AN INTRODUCTION TO SOCIOLINGUISTICS* 58 (Blackwell Publishers, 4th ed. 2002).

² “Today’s globalization is, at the same time, one ideology – liberalism –, one currency – the dollar –, one instrument – capitalism –, one political system – democracy –, one language – English.” Sylvie Brunel, *Qu’est-ce que la mondialisation?*, SCIENCES HUMAINES (Fr.), Mar. 2007, available at http://www.scienceshumaines.com/qu-est-ce-que-la-mondialisation-_fr_15307.html.

³ Nelms-Reyes, *supra* note 1, at 275; see also Christine Vanston, *In Search of the Mot Juste: The Toubon Law and the European Union*, 22 B.C. INT’L & COMP. L. REV. 175, 175 (1999) (noting that the “shrinking globe” that is globalization has become a *fin de siècle* (end of the century) phenomenon).

⁴ Vanston, *supra* note 3, at 178. See also DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, MINISTERE DE LA CULTURE ET DE LA COMMUNICATION, MULTILINGUISME COMPETITIVITE ECONOMIQUE ET COHESION SOCIALE 6 (Sept. 26, 2008), http://www.dglf.culture.gouv.fr/publications/Livret_competivite-27022009.pdf (quoting Guilhène Maratier-Declety, Director of International Relations at the Paris Chamber of Commerce and Industry, that “English is considered today as the international language of business used throughout the world, the alpha and omega ensuring economic competitiveness.”); Michele Belluzzi, *Cultural Protection as a Rationale for Legislation: The French Language Law of 1994 and the European Trend Toward Integration in the Face of Increasing U.S. Influence*, 14 DICK. J. INT’L L. 127, 130 (1995).

own language.⁵ Because of this, English has replaced French as the “preferred international tongue” and is “corrupting” French’s so-called purity.⁶ Given that globalization is inextricably tied to the spread of American influence, many fear that its acceptance “entails the quasi-assumption of an American way of life, in which profits take precedence” and traditions are abandoned for efficiency.⁷

There are two main explanations for why English has achieved such a broad use. First, English has by far the largest vocabulary of any Indo-European language.⁸ In short this is because English, a language with Germanic roots, is comprised of two entire languages—Latin and Norman French—and large parts of several others.⁹ Its vocabulary is three to four times larger than any other Western language, containing more than 600,000 words, not counting the roughly 500,000 entirely new terms that have arisen due to scientific, medical, and technological innovations.¹⁰ Accordingly, English lets one “find *the* precise word or phrase to express the exact idea, concept or fact with just the right nuance”¹¹ in a way that other languages cannot because meaning is more closely tied to context.¹² Second, compared to other Western languages, English is simpler and more direct because it uses the active voice more, reflexive verbs less, and fewer verb tenses.¹³ In addition to its structure, English is gender neutral,¹⁴ which may aid in its vast appeal. These reasons may largely explain why English

⁵ “English is not a foreign language anymore. It’s a language you have to speak, like you have to speak information technology.” D.D. Guttenplan, “France Reinvesting in Universities, Education Minister Says,” INT’L HERALD TRIB., May 23, 2011, at 15, available at <http://www.nytimes.com/2011/05/23/education/23iht-educlde.html> (interviewing Valérie Pécresse, Minister of Higher Education and Research).

⁶ Nelms-Reyes, *supra* note 1, at 275. Before the rise of English, French had been the language of diplomacy since the early 1700s. See Aymeric Janier, *Le français a toutes les ressources nécessaires pour se réinventer*, LE MONDE, Mar. 17, 2011, available at http://www.lemonde.fr/international/article/2011/03/17/le-francais-a-toutes-les-ressources-necessaires-pour-se-reinventer_1491440_3210.html (interviewing Xavier North, Director General for the French Language and Languages of France).

⁷ Vanston, *supra* note 3, at 175. Indeed, “French’s decline in certain areas/neighborhoods/districts is an obvious symptom of social decline.” DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, MINISTERE DE LA CULTURE ET DE LA COMMUNICATION, LE FRANCIAS, UNE LANGUE POUR L’ENTREPRISE 78 (Dec. 3-4, 2007), http://www.dglf.culture.gouv.fr/publications/Le_francais_langue_entreprise.pdf (quoting Jacques Toubon defending France’s language policy).

⁸ ROBERT M. KNIGHT, A JOURNALISTIC APPROACH TO GOOD WRITING: THE CRAFT OF CLARITY 12 (Wiley-Blackwell 2d ed. 2003). About a third of the world’s population speak an Indo-European language. *Id.*

⁹ *Id.* at 11-12.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 13.

¹² *Id.* at 14.

¹³ KNIGHT, *supra* note 8, at 12.

¹⁴ *Id.*

is the most widely spoken language in the European Union (EU),¹⁵ and why many fear the dawn of a dystopia forced upon the world by North America.¹⁶

A common language facilitates trade¹⁷ by increasing the efficiency of market transactions.¹⁸ Nevertheless, globalization can threaten culture¹⁹ and thus has spawned attempts at protection.²⁰ For example, France spends \$3 billion in U.S. dollars annually and employs 12,000 cultural bureaucrats in an effort to preserve its culture and argue that free trade agreements should

¹⁵ This is especially true since the 2004 incorporation of eastern states into the EU. Overall, these countries do not speak French or German, the other two official languages of the European Commission. See SPEAKING FOR EUROPE: LANGUAGES IN THE EUROPEAN UNION, EUROPEAN COMMISSION 5, 13 (2008), available at http://ec.europa.eu/education/languages/pdf/doc3275_en.pdf. Indeed, the original logo chosen by the European Union to celebrate the 50th Anniversary of the Treaty of Rome reads “Together since 1957” in English; the logo has since been adapted in twenty-three languages. *Anniversary Logo*, EUROPA, http://europa.eu/50/anniversary_logo/index_en.htm (last visited Nov. 9, 2011).

¹⁶ Mario Vargas Llosa, *The Culture of Liberty*, FOREIGN POLICY, Jan. 1, 2001, at 1, available at <http://home.sandiego.edu/~baber/globalethics/cultureofliberty.pdf> (noting that Europeans are not the only ones who have this fear—many Latin Americans fear the onslaught of North American culture as well). While the U.S. is not the only country in North America, presumably it is the U.S.’s influence that worries other countries the most.

¹⁷ Stacy Amity Feld, *Language and the Globalization of the Economic Market: The Regulation of Language as a Barrier to Free Trade*, 31 VAND. J. TRANSNAT’L L. 153, 199 (1998) (advocating a common language policy in the EU to further economic integration and facilitate an increase in market activity. After analyzing the Toubon Law, Feld argues for a “supranational common language in the economic market.”).

¹⁸ *Id.*

¹⁹ Proponents of cultural protectionism make a legitimate argument when they point out that the effects of trade are not always beneficial or quantitative, as trade affects societal ethos and worldview. TYLER COWEN, CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD’S CULTURES 13, 48-49 (2002) (defining “ethos” generally as “the special feel or flavor of a culture . . . the background network of worldviews, styles, and inspirations found in a society, or a framework for cultural interpretation . . . an implicit language” and in economic terms as “the interdependence of individual attitudes, or . . . a ‘network effect’ across attitudes The attitude held by one person is, in part, a function of the attitudes held by others in the same community.” Most importantly, ethos is “unpriced . . . collectively produced by the actions and attitudes of many human beings . . . much like the concept of ‘paradigm’ in the philosophy of science.”). See also *id.* at 48 (quoting French historian and philosopher of art Hippolyte Adolphe Taine’s definition of ethos as “the general state of mind and surrounding circumstances.”). Even if “external commercial influences” make people better off, they can destroy ethos. *Id.* at 51. One possible reason why France continues to trade with the U.S. despite fears about American culture is that French people may not internalize the cost of ethos-disruption. See *id.* at 54.

²⁰ See DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION, LA LANGUE FRANÇAISE DANS LE MONDE 2 (2006), <http://www.dglf.culture.gouv.fr/publications/francais-monde.pdf> (noting that globalization and new technology have altered French’s international status, requiring an evolving approach to promoting the language and maintaining its status as a means of international communication). English Canada has several cultural protection laws that do not deal with language. Countries that have experimented with language legislation include Canada (Quebec), Belgium, and the former Yugoslavia. Interestingly, many Québécois fear French culture. COWEN, *supra* note 19, at 142.

exempt culture.²¹ One means of protecting culture is language regulation,²² of which France's Toubon Law (the Law) is a famous example.²³

Part II of this comment provides a background of France's legal system and language law prior to the Law's enactment. Part III analyzes the Law and cites key provisions. Part IV argues that the Law promotes economic inefficiency, fails to achieve its goal of preserving the French language, and violates individual liberty. This comment concludes that France should adopt a *laissez-faire* attitude toward language, abandon the Law, and embrace the role English has attained in international discourse.

I. BACKGROUND: FRANCE'S LEGAL SYSTEM AND LANGUAGE LAW PRE-TOUBON

A. *Overview of the French Legal System*

The French legal system differs from the American legal system in many respects. France is a civil law jurisdiction.²⁴ It has a single national government and one set of uniform laws.²⁵ Legislative statutes or codes are its only source of law and judicial decisions are not binding precedent.²⁶ The French Constitution is equivalent to a legislative statute, and its court system lacks quintessential American substantive and procedural trial rules.²⁷ Discovery, motions, and testimonial evidence are notably absent, and jury trials are only available in limited circumstances.²⁸

²¹ COWEN, *supra* note 19, at 2 (citing William Drozdiak, *The City of Light, Sans Bright Ideas*, WASH. POST, Oct. 28, 1993, at D1, D6).

²² Feld, *supra* note 17, at 158.

²³ Loi 94-665 du 4 août 1994 relative à l'emploi de la langue française [Law 94-665 of August 4, 1994 relative to the use of the French language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 5, 1994, p. 11392, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005616341&dateTexte=vig>. For the official English version, see <http://www.dgjf.culture.gouv.fr/droit/loi-gb.htm>.

²⁴ Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 58, 58 (1994). In a civil law system, codified law is the primary source of law, whereas judicially-determined law is the primary source of law in common law systems. For more information on the civil law system, see generally JAMES G. APPLE & ROBERT P. DEYLING, FEDERAL JUDICIAL CENTER: A PRIMER ON THE CIVIL-LAW SYSTEM (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).

²⁵ Kublicki, *supra* note 24, at 59.

²⁶ *Id.* at 58. Decisions of high courts are only binding vertically, against lower courts, on a case-by-case basis, and not horizontally as historical precedent. *Id.* at 84-85. Courts can use past decisions as guidance as to whether to apply a particular code to a given set of facts; as such, French jurisprudence is a "system of 'statutory application precedent.'" *Id.* at 85.

²⁷ *Id.* at 59.

²⁸ *Id.* at 59, 61-62.

Despite the centralized nature of its government, France maintains a divided court system.²⁹ It has judicial courts, which exercise both civil and criminal jurisdiction, and administrative courts, which exercise jurisdiction over claims against the state.³⁰ Both the judicial and administrative systems have a trial, appellate, and high court.³¹ In the judicial system, there are courts of original jurisdiction (*tribunaux d'instance* and *tribunaux de grande instance*), courts of appeal (*cours d'appel*), and a high court (*Cour de Cassation*).³² The difference between the *tribunaux d'instance*, which exercise “low” original jurisdiction, and the *tribunaux de grande instance*, exercising “high” original jurisdiction, is analogous to the difference between American municipal and superior courts.³³ The amount in controversy determines jurisdiction.³⁴

The judicial courts also contain a criminal chamber.³⁵ The police tribunal is the criminal chamber of the *tribunal d'instance* and the correctional tribunal is the criminal chamber of the *tribunal de grande instance*.³⁶ The severity of the crime determines jurisdiction.³⁷ The police tribunal covers crimes with a penalty of two months incarceration, and the correctional tribunal covers crimes that carry penalties of up to five years imprisonment.³⁸ Neither court affords defendants a trial by jury.³⁹ A third category of crimes, those “subject to ‘afflictive or infamous’ punishment,” goes directly to the *Cours d'Assises*, where defendants receive a jury trial.⁴⁰

Specialized courts of original jurisdiction also exist.⁴¹ There are courts that exclusively cover civil subjects such as commerce, labor, and social security disputes, or criminal subjects like juveniles, the armed forces, and the merchant marines.⁴²

All decisions from courts of original jurisdiction are appealable to the *cours d'appel*, except decisions from the *Cour d'Assises*, which are appeal-

²⁹ Kublicki, *supra* note 24, at 60.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 61.

³⁵ Kublicki, *supra* note 24, at 61.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* In the summer of 2011, however, Parliament voted to allow popular juries, comprised of two citizens, to take part in trial and appellate proceedings in the correctional tribunal. It is a sort of *projet de loi*, with juries taking part in some appellate court proceedings until January 1, 2014, when Parliament will definitively legislate. *Jurés populaires: le Parlement adopte définitivement le projet de loi*, LEPOINT.FR, July 6, 2011, http://www.lepoint.fr/societe/jures-populaires-le-parlement-adopte-definitivement-le-projet-de-loi-06-07-2011-1349961_23.php.

⁴⁰ Kublicki, *supra* note 24, at 61-62.

⁴¹ *Id.* at 62.

⁴² *Id.* at 62-63.

able directly to the highest judicial court, the *Cour de Cassation*.⁴³ All appeals are a matter of right and are reviewed de novo.⁴⁴ The right to appeal, and de novo review of all lower court decisions, facilitate a just result as trial by jury is usually unavailable at the lower levels.⁴⁵ The *Cour de Cassation* is not analogous to the United States Supreme Court.⁴⁶ It does not review administrative or constitutional cases, which go to the administrative high court—*Conseil d'Etat*—and the Constitutional Council—*Conseil Constitutionnel*, respectively.⁴⁷

Cases in which the state is a party enter the administrative court system.⁴⁸ Like the judicial system, there are courts of original jurisdiction (*tribunaux administratifs*), appellate jurisdiction (*cours administratives d'appel*), and a high court (*Conseil d'Etat*).⁴⁹ The administrative court system performs both adjudicative and administrative functions.⁵⁰ It hears cases alleging injury from the state or state employees (analogous to federal or state tort claims acts in America), can determine the legality of state action, and can annul administrative acts.⁵¹ However, these courts are precluded from reviewing either acts established through the legislative process or acts involving state relations with foreign sovereigns or international organizations.⁵² Specialized administrative courts also exist.⁵³

Unlike the United States Supreme Court, which is supreme over federal and state courts, the *Conseil Constitutionnel* wields much less power than its American counterpart.⁵⁴ The French Constitution's status as a mere legal document that lacks binding judicial precedent means that the *Conseil* can-

⁴³ *Id.* at 63.

⁴⁴ *Id.*

⁴⁵ *Id.* at 64.

⁴⁶ Kublicki, *supra* note 24, at 65.

⁴⁷ *Id.*

⁴⁸ *Id.* at 67.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 67-68.

⁵² Kublicki, *supra* note 24, at 68.

⁵³ *Id.* at 73.

⁵⁴ *Id.* at 77-78. It should be noted that the United States Supreme Court's primacy is not without limitation. The Court has what is essentially *carte blanche* review over federal issues, but lacks jurisdiction over state issues unless there is "clear error." See *Murdock v. City of Memphis*, 87 U.S. 590, 632-33 (1875). An issue is presumed federal if it is mixed or combines federal and state in a way that the two cannot be separated; in this event, the Court has jurisdiction over the whole case. *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). For a more in-depth explanation of how the *Conseil Constitutionnel* differs from the United States Supreme Court, see Jean-Louis Debré, President, Constitutional Council, Address at the Kalorama Lectures Series: The Constitutional Council and the Defense of Rights and Freedoms (June 7, 2010), available at <http://ambafrance-us.org/spip.php?article1682> (last visited Aug. 14, 2011).

not create substantive and procedural rights.⁵⁵ However, it can rule on: (1) the constitutionality of laws, statutes, and treaties; (2) the validity of elections; (3) the President's ability to perform official duties; and (4) the validity of the President's exercise of emergency powers.⁵⁶ Also unlike its American counterpart, each of its nine members is limited to a nonrenewable nine-year term with staggered appointments.⁵⁷ Hence, the *Conseil* is arguably less influenced by changes in political ideology based on the President's political leaning than the United States Supreme Court.⁵⁸

The *Conseil* reviews the constitutionality of all laws passed by Parliament before they become law.⁵⁹ The President or Parliament can also request it review statutes and international treaties.⁶⁰ All its rulings are final, and laws found unconstitutional are deemed void.⁶¹ These are the only forms of constitutional review,⁶² with the exception that private citizens may challenge a law's constitutionality in limited circumstances.⁶³ The *Conseil* does not review executive and administrative regulations (the latter go to administrative courts) or laws adopted by national referendum.⁶⁴

Unlike the United States Constitution, the French Constitution is not the "supreme law of the land."⁶⁵ Nor does its text specifically guarantee

⁵⁵ Kublicki, *supra* note 24, at 77, 80 (noting that only the legislature can create substantive and procedural rights via statute).

⁵⁶ *Id.* at 77.

⁵⁷ *Id.* at 77-78.

⁵⁸ *Id.* at 78.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Kublicki, *supra* note 24, at 79.

⁶² *Id.*

⁶³ Before the 2008 revision of the Constitution, private citizens were precluded from challenging a law's constitutionality. See Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République (1), art. 29, [Constitutional Law 2008-74 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic (1), art. 29], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2008, p. 11890, available at http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=06388990C38517F5937BDB4153673822.tpdj_o11v_2?cidTexte=JORFTEXT000019237256&dateTexte=&oldAction=rechJO&categorieLien=id. For more information, see LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITE, CONSEIL CONSTITUTIONNEL (2010), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/QPC/plaquette_qpc.pdf; LOI CONSTITUTIONNELLE DE MODERNISATION DES INSTITUTIONS, MINISTERE DE LA JUSTICE ET DES LIBERTES, 23 juillet 2008, <http://www.textes.justice.gouv.fr/lois-et-ordonnances-10180/loi-constitutionnelle-de-modernisation-des-institutions-15626.html> (last visited Aug. 9, 2011). For an explanation in English, see PRIORITY PRELIMINARY RULINGS ON THE ISSUE OF CONSTITUTIONALITY, CONSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/priority-preliminary-rulings-on-the-issue-of-constitutionality.48002.html>.

⁶⁴ Kublick, *supra* note 24, at 78.

⁶⁵ *Id.* at 79.

certain individual rights.⁶⁶ Its text only defines the powers of the respective branches of government—the executive, legislative, and judiciary.⁶⁷ Therefore, for a law to be unconstitutional, it must violate the separation of powers.⁶⁸ This does not mean, however, that individual rights are left unprotected. The Constitution’s preamble incorporates the Declaration of the Rights of Man of 1789 (Declaration).⁶⁹ Although the Declaration contains guiding principles rather than substantive law, it is actionable under law (much like American courts’ authority to find laws contrary to public policy).⁷⁰ Therefore, even though the French Constitution lacks an equivalent to the American Bill of Rights,⁷¹ the *Conseil* can nevertheless nullify a law that violates “general principles and fundamental rights” found in the Declaration.⁷² This power to nullify, together with the lack of *stare decisis*, actually “affords the French system greater flexibility in the establishment of individual rights,” according to one view.⁷³

B. *Language Law Prior to World War II*

French authorities’ resort to language regulation is not a recent phenomenon. In 1539, the *ordonnance Villers-Cotterêts* was enacted and mandated that all legal acts be in French to prevent ambiguity; it was motivated in part to establish the king’s power.⁷⁴ In 1635, Cardinal de Richelieu founded the Académie Française (Académie).⁷⁵ Its goal was to reinforce the use of French by standardizing it and destroying other dialects.⁷⁶ The

⁶⁶ See generally 1958 CONST. The English version is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf. See also Kublicki, *supra* note 24, at 79.

⁶⁷ See generally 1958 CONST. See also Kublicki, *supra* note 24, at 80.

⁶⁸ Kublicki, *supra* note 24, at 80, 82. It should be noted, however, that one could sue under various “secondary” social rights that the Constitution incorporates through the overarching principle of equality. The *Conseil Constitutionnel* has determined that the principles of equality of citizens and non-discrimination are fundamental rights guaranteed by the Constitution. For more on the *Conseil Constitutionnel*’s jurisprudence, see Debré, *supra* note 54.

⁶⁹ See 1958 CONST. pmb., available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf. See also Declaration of Human and Civic Rights of 26 August 1789, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf [hereinafter “Declaration”].

⁷⁰ Kublicki, *supra* note 24, at 81-82.

⁷¹ See generally 1958 CONST.

⁷² Declaration, *supra* note 69; see also Kublicki at 82.

⁷³ Kublicki, *supra* note 24, at 82.

⁷⁴ Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 298-99 (1996).

⁷⁵ Nelms-Reyes, *supra* note 1, at 279. For history predating this, see Belluzzi, *supra* note 4, at 131; see also Wexler, *supra* note 74, at 300 (citing article 24 of the charter).

⁷⁶ Belluzzi, *supra* note 4, at 130, 131-32. See also Wexler, *supra* note 74, at 299.

French Revolution in 1789 brought with it the “Jacobin philosophy of ‘one people, one nation, one language’”⁷⁷ One of the revolutionaries’ main goals was to eliminate regional dialects and make French the national language.⁷⁸ To this end, the Jacobins abolished the Académie (which was later reestablished in 1795) and replaced it with their own language laws.⁷⁹ They viewed the Académie as inherently aristocratic—a means through which the aristocracy maintained a linguistic barrier to control the masses.⁸⁰ Consequently, the Revolutionary Convention promulgated the law of 2 *thermidor an II* (July 20, 1794),⁸¹ which provided that “no public act may, in any part of the territory of the Republic, be written other than in the French language.”⁸² This law remains in force today⁸³ and has been reinforced by the *Cour de Cassation*, which has held that *Villers-Cotterêts* and the Revolutionary texts require public acts be in French.⁸⁴

C. Modern Language Law

1. Post-World War II Decrees and Terminology Commissions

Public outcry over French’s incorporation of many English words began in the 1950s.⁸⁵ In 1966, President Charles de Gaulle initiated the modern language regulatory movement by creating a language commission called the High Committee for the Defense and Expansion of the French Language (the High Committee) via presidential decree.⁸⁶ The High Com-

⁷⁷ Wexler, *supra* note 74, at 304.

⁷⁸ *Id.* at 302.

⁷⁹ *Id.*

⁸⁰ *Id.* at 302-03 n.64 (citing Le Rapport Barère, Rapport du Comité de Salut Public sur les Idiomes, Archives Parlementaires, 1ère série, T. LXXXIII, séance du 8 pluviôse an II, n° 18, at 713-17 (Paris, Éd. C.N.R.S., 1961) (stating that “[d]espotism maintained the multiplicity of languages: a monarchy must resemble the Tower of Babel.”), reprinted in MICHEL DE CERTEAU ET AL., UNE POLITIQUE DE LA LANGUE, LA REVOLUTION FRANÇAISE ET LES PATOIS: L’ENQUETE DE GREGOIRE 291, 296-97 (Gallimard rééd. 2002) (1975)).

⁸¹ The revolutionaries abolished the Gregorian calendar in 1793, creating and renaming new months with thirty days each. Wexler, *supra* note 74, at 302-03.

⁸² *Id.* at 303 n.67 (citing article 1, reprinted in RENEE BALIBAR & DOMINIQUE LAPORTE, LE FRANÇAIS NATIONAL: POLITIQUE ET PRATIQUES DE LA LANGUE NATIONALE SOUS LA REVOLUTION FRANÇAISE 96-97 (Hachette 1974)). Article 2 also forbids the registration of private acts not written in French, and articles 3 and 4 provide for criminal sanctions for violating the law. *Id.* at 303.

⁸³ It was suspended but later reenacted as *arrêté* of 24 *prairial an XI*. *Id.* at 304.

⁸⁴ *Id.* at 304 n.44 (citing Judgment of Aug. 4, 1859, Cass. req., 1859 Recueil Périodique et Critique I 453 as an example).

⁸⁵ Nelms-Reyes, *supra* note 1, at 276.

⁸⁶ Wexler, *supra* note 74, at 307 n.83 (citing Loi 66-203 du 31 mars 1966 portant création d’un Haut Comité de la langue française [Law 66-203 of March 31, 1966 for the Creation of a High Commit-

mittee had little influence until subsequent decrees broadened its powers.⁸⁷ A 1984 decree rescinded de Gaulle's 1966 decree and created the General Commissariat and Consultative Committee for the French Language.⁸⁸ Its purpose was to study French's usage and submit proposals to the Prime Minister to promote the language.⁸⁹ The 1984 decree was rescinded five years later by another that created the General Delegation for the French Language and the Superior Council of the French Language "to define language policy in defense of French."⁹⁰

Terminology commissions were also created in conjunction with these decrees to find non-French terms in use and propose replacements.⁹¹ A 1972 decree expanded the original advisory role of these commissions, allowing them to ban the use of foreign terms.⁹² These commissions worked in conjunction with the Académie to alter, replace, or create a French equivalent of foreign terms.⁹³

tee of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 7, 1966, p. 2795).

⁸⁷ *Id.* (citing Loi 73-194 du 24 février 1973 modifiant le décret n° 66-203 du 31 mars 1966 portant création d'un Haut Comité pour la défense et l'expansion de la langue française [Law 73-194 of February 24, 1973 modifying decree 66-203 for the Defense and Expansion of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 28, 1973, p. 2204; Loi 80-414 du 11 juin 1980 modifiant le décret n° 66-203 du 31 mars 1966 portant création d'un Haut Comité de la langue française [Law 80-414 of June 11, 1980 modifying decree 66-203 for the Creation of a High Committee of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 13, 1980, p. 1451; Loi 84-91 du 9 février 1984 instituant un commissariat général et un comité consultatif de la langue française [Law 84-91 of February 9, 1984 instituting a General Commissariat and a Consultative Committee of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 10, 1984, p. 544. *See also* Nelms-Reyes, *supra* note 1, at 278 n.23 (citing Loi 89-403 du 22 juin 1989 instituant un Conseil supérieur de la langue française et une délégation générale à la langue française [Law 89-403 of June 22, 1989 instituting a Superior Council of the French Language and General Delegation of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 22, 1989, p. 7729).

⁸⁸ Wexler, *supra* note 74, at 307 n.83 (citing Law 84-91 of February 9, 1984).

⁸⁹ *Id.* (citing Law 84-91 of February 9, 1984).

⁹⁰ Nelms-Reyes, *supra* note 1, at 278 n.23 (citing Law 89-403 of June 22, 1989).

⁹¹ *Id.* at 279 n.31. Originally, the commissions were to look for foreign words used only in sectors covered by the Ministry of Industrial and Scientific Development and the Ministry of Finance, but eventually expanded to cover other ministries as well. *Id.* at 279.

⁹² Décret 72-19 du 7 janvier 1972 relatif à l'enrichissement de la langue française [Law 72-19 of January 7, 1972 for the Enhancement of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 9, 1972, p. 388, *available at* http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=19720109&numTexte=&pageDebut=00388&pageFin=

⁹³ Nelms-Reyes, *supra* note 1, at 279-80.

2. Bas-Lauriol

In 1975, Parliament codified France's modern language law with Bas-Lauriol.⁹⁴ Bas-Lauriol mandated the use of French in all commercial exchanges except for trademarks, well-known specialties, and words without a French equivalent.⁹⁵ The law also established additional terminology commissions as well as a language association with the power to prosecute the use of restricted foreign terms.⁹⁶ Although introduced as a consumer protection law mandating the use of French in commercial contexts, Bas-Lauriol was really an attempt to preserve the language through protectionism.⁹⁷ Its extension in 1982 to cover import documentation raised concern that it was a trade barrier in violation of the Treaty of Rome.⁹⁸ However, the French government countered that because the law's real purpose was to protect the French language, it was therefore valid under a public policy exception to the Treaty of Rome.⁹⁹

In the following year after the passage of Bas-Lauriol in 1975, the High Committee created the General Association of French Users,¹⁰⁰ which had the power to prosecute state and private entities for not using French.¹⁰¹ The High Committee also created eighteen subcommissions corresponding to different ministries including foreign affairs, agriculture and fishing, culture and communication, and defense.¹⁰² These subcommissions moni-

⁹⁴ Loi 75-1349 du 31 décembre 1975 relative à l'emploi de la langue française [Law 75-1349 of December 31, 1975 relative to the Use of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 4, 1976, p. 189, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000521788>.

⁹⁵ See *id.* art. 2 (abrogé au 5 août 1994). See also Nelms-Reyes, *supra* note 1, at 281. An example of a specialty where the use of English is acceptable is "French manicure," which is the actual name for the treatment in France.

⁹⁶ Nelms-Reyes, *supra* note 1, at 283-85.

⁹⁷ *Id.* at 273; see also Feld, *supra* note 17, at 162-63 (citing Law 75-1349 of December 31, 1975, *supra* note 94, art. 1).

⁹⁸ See Treaty Establishing the European Economic Community art. 30, Mar. 25, 1957, 298 U.N.T.S. 11, available at <http://www.hri.org/MFA/foreign/treaties/Rome57/3title1.txt> (stating that "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.").

⁹⁹ *Id.* art. 36 (allowing prohibitions on trade that are not a means of arbitrary discrimination or disguised restriction). Along similar lines, Jacques Toubon would later uphold the validity of language policy as a "cultural exception" by explaining that if language were allowed to "unravel," the basis for cultural policy would disappear, rendering the latter ineffective. See DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 7, at 77.

¹⁰⁰ L'Association Générale des Usagers de la Langue Française (AGULF). Nelms-Reyes, *supra* note 1, at 283-84.

¹⁰¹ *Id.* at 284.

¹⁰² Wexler, *supra* note 74, at 307 n.84 (citing Loi 83-243 du 25 mars 1983 relative à l'enrichissement de la langue française [Law 83-243 of March 25, 1983 for the Enhancement of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF

tored the ministries' use of French and created French equivalents to foreign terms; the foreign terms were then prohibited.¹⁰³

Overall, however, Bas-Lauriol was largely ineffective at protecting the French language.¹⁰⁴ It was largely ignored because it did not allow for penal sanctions, only small fines.¹⁰⁵ Furthermore, while it prohibited foreign words in state documents, this limited its effect on publications and not "where it really mattered: how French was spoken by everyday people."¹⁰⁶

II. THE TOUBON LAW: FIGHTING FRENCH'S "YANQUISATION"¹⁰⁷

Since Bas-Lauriol, the U.S.'s dominance in global markets grew even more, resulting in the European market's incorporation of more English terms, which further resulted in greater use of the despised "*franglais*."¹⁰⁸ One commentator noted in 1996 that there are currently more English words in Paris than there were German words during the Nazi occupation.¹⁰⁹ Consequently, many French attributed France's economic problems of the 1980s and 1990s to the introduction of English terms.¹¹⁰ In this vein, then-Minister of Culture Jacques Toubon urged for modernization of the French language, stating: "We cannot imagine that linguistic terrain in finance, the economy and global enterprise be abandoned at the hands of Anglo-Saxon

FRANCE], Mar. 29, 1983, p. 955, *abrogated by* Loi 86-439 du 11 mars 1986 relative à l'enrichissement de la langue française [Law 86-439 of March 11, 1986 for the Enhancement of the French Language], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 16, 1986, p. 4255). See also DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION, L'ENRICHISSEMENT DE LA LANGUE FRANÇAISE 6, 11 (2009), http://www.dglf.culture.gouv.fr/publications/References09_Enrichissement_LF.pdf.

¹⁰³ Nelms-Reyes, *supra* note 1, at 284-85.

¹⁰⁴ *Id.* at 288.

¹⁰⁵ *Id.* at 288-89.

¹⁰⁶ *Id.* at 285. For additional difficulties in application of the law, see Wexler, *supra* note 74, at 310.

¹⁰⁷ Wexler, *supra* note 74, at 307. This paper focuses on articles 2-7 and 14-15. Other articles that are relevant but beyond the scope of this paper include: 8-10 (supplementing the labor code and providing that employee agreements, company rules, labor agreements, and union contracts be in French, with French explanations of any foreign terms), 16 (dealing with enforcement), and 17 (providing criminal penalties for non-compliance). For more on sanctions, see Feld, *supra* note 17, at 168; Vanston, *supra* note 3, at 176, 180 (explaining that the penalties range from minor fines to incarceration); Elizabeth Manera Edelstein, *La Loi Toubon: Liberte, Egalite, Fraternite, But Only on France's Terms*, 17 EMORY INT'L L. REV. 1127, 1139 (2003) (explaining that violations are generally a fourth-class misdemeanor); Wexler, *supra* note 74, at 325 (explaining that the law allows for private prosecutions).

¹⁰⁸ Feld, *supra* note 17, at 165-66.

¹⁰⁹ Jean-Pierre Péroncel-Hugoz, *La francophonie dans la Constitution ?*, LE MONDE, May 8, 1992, at 8 (quoting philosopher Michel Serres), available at 1992 WLNR 3110736.

¹¹⁰ Vanston, *supra* note 3, at 178-79 (calling the introduction of English terms a scapegoat).

expression.”¹¹¹ According to one view, however, France’s attribution of its problems to “*anglicisms*” present in the French language was simplistic and naïve.¹¹²

The Toubon Law (the Law) repealed Bas-Lauriol.¹¹³ Its enactment followed the election of a more conservative Parliament, which, before passing the Law in 1994, passed a constitutional amendment in 1992 declaring French the national language.¹¹⁴ The Law’s stated goal is to protect culture, reflecting the fact that many French believe their language represents their culture.¹¹⁵ The Law is therefore openly protectionist¹¹⁶ and a direct reaction to the presence of *anglicisms*.¹¹⁷

The Law requires all advertising, trademarks, product documentation, and contracts to be in French.¹¹⁸ Like Bas-Lauriol, it mandates that foreign text have a French translation and also only allows foreign terms where

¹¹¹ DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 7, at 79-80.

¹¹² Vanston, *supra* note 3, at 178-79.

¹¹³ See Law 94-665 of August 4, 1994, *supra* note 23, art. 24.

¹¹⁴ 1958 CONST. art. 2 (stating that “[t]he language of the Republic shall be French.”); Loi constitutionnelle 92-554 du 25 juin 1992 des Communautés européennes et de l’Union européenne, art. 1 [Constitutional Law 92-554 of June 25, 1992, The European Communities and the European Union, art. 1], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 26, 1992, p. 8406 available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000723466&dateTexte=&categorieLien=id>. See also Nelms-Reyes, *supra* note 1, at 289.

¹¹⁵ Article 1 reads:

Established by the Constitution as the language of the French Republic, the French language is a key element in the personality and the heritage of France. French shall be the language of instruction, work, trade and exchanges and of the public services. It shall be the chosen bond between the States comprising the community of French-speaking countries.

Law 94-665 of August 4, 1994, *supra* note 23. See also DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 20, at 2 (referring to francophones worldwide when stating French “belongs to those who speak it.”). However, Jacques Toubon also supported the Law as a consumer protection measure. See Belluzzi, *supra* note 4, at 143 (citing Toubon as stating that the Law’s purpose is “so that employees can understand their work contracts and so that product instructions and safety warnings are written in the language of the consumer and the worker.”).

¹¹⁶ Feld, *supra* note 17, at 165.

¹¹⁷ See Law 94-665 of August 4, 1994, *supra* note 23, art. 21 (stating, for example, that the law applies without prejudice to regional languages and is not opposed to their usage); see also Feld, *supra* note 17, at 156, 161; DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, MINISTERE DE LA CULTURE ET DE LA COMMUNICATION, RAPPORT AU PARLEMENT SUR L’EMPLOI DE LA LANGUE FRANCAISE 37 (2010), http://www.dglf.culture.gouv.fr/rapport/2010/Rapport_Parlemen_10.pdf (noting that the Law’s requirement that a French translation accompany advertising messages in a foreign language “applies particularly to domaines where using English is fashionable.”). Accordingly, Toubon justified language policy given the “context of perpetual tension between global communication and pursuit of identity.” DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 7, at 76.

¹¹⁸ See generally Law 94-665 of August 4, 1994, *supra* note 23.

there is either no existing French equivalent or the term is a well-known or foreign specialty.¹¹⁹ Listed below are some of the Law's key provisions.¹²⁰

Article 2 states in relevant part: "The use of French shall be mandatory for the designation, offer, presentation, instructions for use, and description of the scope and conditions of a warranty of goods, products and services, as well as bills and receipts. The same provisions apply to any written, spoken, radio and television advertisement."¹²¹ It provides an exception, however, for "the names of typical products and specialties [sic] of foreign origin known by the general public."¹²² Article 3 extends the requirement to "[a]ny inscription or announcement posted or made on a public highway, in a place open to the public or in a public transport system and designed to inform the public."¹²³ Moreover, when any of the above are presented in a foreign language, they must be accompanied by a French translation that is "as legible, audible and intelligible" as the original presentation.¹²⁴

In addition, article 5 mandates that all

contracts signed by a public corporate body or a private person on a public service assignment must be drafted in French. Such contracts may neither contain *expressions nor terms in a foreign language where a French term or expression with the same meaning exists* and is approved under the conditions provided for by the rules relative to the enhancement of the French language.¹²⁵

¹¹⁹ *Id.*

¹²⁰ The following provisions reflect the changes made by the decision of the Constitutional Council dated July 29, 1994, and changes made to the second paragraph of Article 5 by Law No. 96-597 of July 2, 1996, on the Modernization of Financial Activities. The Constitutional Council limited the scope of the Law when it restricted the Law's application to public entities and private entities engaging in public activities; it found that the regulation of private citizens' use of language violated Article 11 of the Declaration of the Rights of Man (guaranteeing liberty of expression). Conseil constitutionnel [CC] [Constitutional Court] decision No. 94-345DC, July 29, 1994, Rec. 106 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1994/94-345-dc/decision-n-94-345-dc-du-29-juillet-1994.10568.html> [hereinafter "CC decision"]. The English version is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a94345dc.pdf. Jacques Toubon criticized the Council for rendering the Law considerably less puissant and ruling in favor of a liberty, the abridgement of which was never implicated. DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 7, at 78. Toubon cites the fact that the Law aims to legislate usage rather than content as support for its legitimacy. *Id.* at 77. For more information, see Feld, *supra* note 17, at 168-69; see also Wexler, *supra* note 74, at 328-30.

¹²¹ Law 94-665 of August 4, 1994, *supra* note 23, art. 2.

¹²² *Id.*

¹²³ *Id.* art. 3.

¹²⁴ *Id.* art. 4.

¹²⁵ However, "[t]hese provisions do not apply to contracts entered into by a public corporate body managing activities of an industrial and commercial nature, the Banque de France or the Caisse de dépôts et consignations when such contracts are to be wholly performed outside the national territory." *Id.* art. 5 (emphasis added).

This provision applies even when one or more of the contracting parties are foreign.¹²⁶ The translation requirement extends to “[a]ny participant in an event, seminar or convention organised [sic] in France by natural persons or corporate bodies of French nationality.”¹²⁷ A French summary can suffice for “[p]ublications, reviews and papers distributed in France and drafted in a foreign language . . . when [they] are issued by a public corporate body, a private person on a public service assignment or a private person subsidised [sic] by public funds.”¹²⁸ Furthermore, article 14 forbids

public corporate bodies [from using] a trademark, trade name or service brand made up of a foreign expression or term when an equivalent French term or expression with the same meaning exists and is approved under the conditions defined by the provisions of the rules relative to the enhancement of the French language.¹²⁹

All recipients of public funding must comply.¹³⁰

A 1996 presidential decree supplemented the Law and created the General Commission of Terminology and Neology.¹³¹ This commission adopts terms and definitions, the usage of which becomes obligatory per articles 5 and 14 of the Law.¹³² In sum, the Law mandates that French public and private entities engaged in public business conform the following aspects of public discourse to the government’s standards of “French”: “(1) consumer information; (2) employment; (3) education; (4) demonstrations, colloquiums, and congregations; (5) audiovisual media; and, (6) civil ser-

¹²⁶ *Id.*

¹²⁷ A summary in French may suffice “[w]here an event, seminar or convention involves the distribution of preparatory documents or work documents to participants, or the publication of proceedings or minutes of work sessions, [and] the texts or papers [are] presented in [a] foreign language.” This regulation does not apply where the event is organized for foreigners or designed to promote foreign trade. Law 94-665 of August 4, 1994, *supra* note 23, art. 6.

¹²⁸ *Id.* art. 7.

¹²⁹ This applies to “private corporate bodies on a public service assignment during the performance of this assignment” but not retrospectively to brands used before. *Id.* art. 14.

¹³⁰ *Id.* art. 15 (noting that non-compliance can result in loss of funding).

¹³¹ DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 102, at 3.

¹³² *Id.* Such terms include “CD-Rom” (replaced with *céderom*), “happy hour” (replaced with *la bonne heure*), “World Wide Web (WWW)” (replaced with *toile d’araignée mondiale (TAM)*), “FAQ file” or “frequently asked questions” (replaced with *foire aux questions (FAQ)*), and “personal digital assistant (PDA)” (replaced with *assistant électronique de poche (ADP)*). DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION, CENT TERMES FRANÇAIS DU VOCABULAIRE TECHNIQUE 4, 5, 6, 12, 21 (2004), <http://www.dglf.culture.gouv.fr/publications/vocabulaires/100termes.pdf>. Curiously, the Commission chose to abbreviate this last term with the inverse of the English abbreviation instead of “AEP” as the term would seem to intuitively provide for. *See id.* at 4.

vice.”¹³³ It indirectly imposes choice of language restrictions on private citizens, as criminal courts can decide what is “correct” French.¹³⁴

III. THE TOUBON LAW: INEFFICIENT, INEFFECTIVE, AND VIOLATIVE OF INDIVIDUAL LIBERTY

A. *Toubon’s Economic Effect: “ne laissez pas faire”*

*[L]a loi peut définir les circonstances sociales, économiques, culturelles, scientifiques, politiques dans lesquelles nous devons utiliser le français.*¹³⁵

Consistently, France has readily embraced state intervention to solve problems. One explanation for this, especially as it relates to language, is that the creation of the Académie in the seventeenth century coincided with the height of French civilization.¹³⁶ Another explanation is that many French philosophers promulgated the belief that reason can control human affairs.¹³⁷ Together, these may explain why France has turned to regulation to preserve its language and culture, likely assuming that since it “had been able to *generate* some system of rules . . . [it] must also be able to *design* an even better and more gratifying system.”¹³⁸

¹³³ Edelstein, *supra* note 107, at 1136. For jurisdictional info, how “public sector” is defined, and how the Law differs and is more extensive than Bas-Lauriol, see Nelms-Reyes, *supra* note 1, at 290-94.

¹³⁴ Wexler, *supra* note 74, at 320. There have been several notable cases dealing with violations of the Law, but which are beyond the scope of this paper. Nevertheless, these include *ADC v. La Société The Disney Store* (French branch of Disney sued for having English-only labels), *ALF v. Georgia Tech* (Georgia Tech prosecuted for having an English-only website for its French campus), *AALF et ADC v. La Société Chronopost et La Poste* (La Poste sued for offering a service called “Skypak”), and The Body Shop case (prosecuted for having English-only labels on its products). For more information, see Nelms-Reyes, *supra* note 1, at 306-10; Vanston, *supra* note 3, at 184-86; Feld, *supra* note 17, at 170-71.

¹³⁵ “The law can define the social, economic, cultural, scientific, and political circumstances in which we must use French.” DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 7, at 77 (quoting Jacques Toubon).

¹³⁶ Wexler, *supra* note 74, at 301. See also Edwy Plenel, *Langue vivante, puissance défunte défensif, le projet de loi sur l’emploi du français exprime la nostalgie d’une gloire perdue*, LE MONDE (Fr.), May 4, 1994, at 1, available at 1994 WLNR 3351604.

¹³⁷ René Descartes emphasized use of reason in wanting to discard tradition, Jean-Jacques Rousseau invented the notion of the “general will,” and Auguste Comte offered a view of “positivism,” by which he meant “demonstrated ethics” (demonstrated by reason), as an alternative to supernaturally “revealed ethics” (an idea later picked up by Jeremy Bentham). FRIEDRICH A. HAYEK, THE FATAL CONCEIT 48-49, 52 (William Bartley ed., The University of Chicago Press 1991) (1988). According to Hayek, such views gave rise to the “delusion of ‘social engineering’”—the tendency among intellectuals to embrace the ideas of rational coordination and control. *Id.* at 51, 54.

¹³⁸ *Id.* at 7.

The Law is protectionist because it effectuates a “government monopoly” on language.¹³⁹ The Law applies to employment agreements made in French territory, even if the parties to the agreement perform it elsewhere.¹⁴⁰ It is an attempt at controlling human behavior¹⁴¹ and constitutes a barrier to trade.¹⁴² This conclusion stems from the fact that with increased globalization comes increased economic interdependence among nations and, therefore, a greater exchange of people, culture, and products.¹⁴³

The Law is also rife with unintended consequences. An example is enforcement costs that occupy resources (e.g., labor, capital, etc.) that could have been used elsewhere. For instance, translation requirements increase the cost of doing business in France¹⁴⁴ because they increase transaction costs,¹⁴⁵ which likely decrease investment and trade opportunities.¹⁴⁶ Few French businesses actually have a multilingual policy, stressing instead that their employees master English.¹⁴⁷ Examining behavior regarding business over the Internet confirms the Law’s inefficiencies—only 5% of websites originating in France are solely in French.¹⁴⁸ In fact, many French companies prefer English-language websites because of increased profit opportunities.¹⁴⁹ Interestingly, the French government originally wanted the Law to compel conference participants to provide French summaries of non-French communications.¹⁵⁰ However, the government eventually abandoned this idea to prevent France in general, and Paris in particular, from becoming a less attractive site for international conferences.¹⁵¹

Translation requirements, and the requisite costs such as the labor that goes into oversight and enforcement, risk worsening the French economy.¹⁵² If continued, these requirements will stifle Internet and other technological

¹³⁹ Vanston, *supra* note 3, at 176; *see also* HAYEK, *supra* note 137, at 103 (noting that government restrictions on money are “monopolies” that prevent competitive experimentation).

¹⁴⁰ Vanston, *supra* note 3, at 180.

¹⁴¹ *See* Feld, *supra* note 17, at 155.

¹⁴² *Id.* at 157.

¹⁴³ *Id.* at 158.

¹⁴⁴ Nelms-Reyes, *supra* note 1, at 310.

¹⁴⁵ Belluzzi, *supra* note 4, at 144-45.

¹⁴⁶ Nelms-Reyes, *supra* note 1, at 310; *see also* Belluzzi, *supra* note 4, at 144-45 (stating that the Japanese are used to conducting business in English).

¹⁴⁷ DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 4, at 6 (citing Guilhène Maratier-Declety, Director of International Relations at the Paris Chamber of Commerce and Industry).

¹⁴⁸ Vanston, *supra* note 3, at 190; *see also* DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 4, at 31, 33.

¹⁴⁹ Vanston, *supra* note 3, at 191. For a list of French companies that have declared a combined use of French and English, *see* DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 4, at 31.

¹⁵⁰ Wexler, *supra* note 74, at 323.

¹⁵¹ Wexler, *supra* note 74, at 324.

¹⁵² Vanston, *supra* note 3, at 191.

development, reinforcing the EU's "current technological regression."¹⁵³ The potential for economic setbacks becomes clearer when considering what would happen if each country adopted similar protectionist measures.¹⁵⁴ Such a situation would greatly disrupt the international economic market.¹⁵⁵ The Law highlights France's Draconian approach to problem-solving and is a clear rejection of the principle of *laissez-faire*, which originated in France.¹⁵⁶

The Law promotes inefficiency because it is a centrally imposed law that seeks to control human action.¹⁵⁷ This argument is based on the assumption that language is economic activity. People adopt behavior that makes them better off (i.e., "profit" read loosely).¹⁵⁸ There must be a reason why non-English speakers, and French people specifically, want to incorporate at least some English words into their vocabulary. The likely explanation comes from the benefit they derive from this "exchange." In economic terms, the marginal benefits exceed the marginal costs. Essentially, these individuals choose to speak English because it offers a "better return."¹⁵⁹

Language regulation likely has the same effect as price controls—blocking progress by diminishing the benefit individuals receive from exchange.¹⁶⁰ This is because laws that mandate language use are an attempt at raising the "price" of the language above its natural market level.¹⁶¹ In a free system, each individual "makes his own demand and casts a fresh vote . . . every day."¹⁶² However, in a system of price controls, bureaucrats make "for the consumers, not what the consumers themselves wanted, but

¹⁵³ *Id.*

¹⁵⁴ Feld, *supra* note 17, at 159-60.

¹⁵⁵ *Id.*

¹⁵⁶ Vanston, *supra* note 3, at 191-92. The term *laissez-faire* originated in the 17th century from the phrase "*laissez nous faire*," a reaction by French merchants against finance minister Jean-Baptiste Colbert's mercantilist policy. HENRY CHARLES CAREY, *ESSAY ON THE RATE OF WAGES* 9 (Carey, Lea & Blanchard 1835).

¹⁵⁷ See generally Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945), available at <http://www.econlib.org/library/Essays/hykKw1.html> (arguing that attempts by a central planner to control economic activity lead to economic inefficiency, as a central planner cannot possess all economic knowledge relevant to decision-making). Efficiency is never the only consideration, and what is "efficient" is not necessarily "right." The goal of economics, however, is not to explain what is "right," but rather to explain the usefulness of certain practices. See HAYEK, *supra* note 137, at 85.

¹⁵⁸ See HENRY HAZLITT, *ECONOMICS IN ONE LESSON* 104 (Three Rivers Press 1979).

¹⁵⁹ *Id.* at 107.

¹⁶⁰ The Dark Ages, the biggest cultural decline in Western history, occurred while trade frontiers shrank; the Renaissance, on the other hand, was "a process of reglobalization." COWEN, *supra* note 19, at 6-7. See also *id.* at 12 (describing Cowen's "gains from trade" model: "[i]ndividuals who engage in cross-cultural exchange expect those transactions to make them better off . . . to increase their menu of choice.").

¹⁶¹ HAZLITT, *supra* note 158, at 110.

¹⁶² *Id.* at 109.

what the bureaucrats decided was good for [the consumers].”¹⁶³ Price controls, even if implemented only to stabilize the price of a commodity, usually lead to greater instability.¹⁶⁴ Such a restriction of economic behavior results in lower living standards and fewer liberties.¹⁶⁵

As renowned economist and Nobel Prize winner Friedrich Hayek described the free market’s price system, market information relevant to individuals’ economic decisions is not located in one place; rather, it is dispersed among all individual economic actors.¹⁶⁶ The best use of this dispersed knowledge is inseparable from the question of whether “economic planning” will be achieved by a central authority or divided up among all individual market participants, which is the essence of competition.¹⁶⁷ The free market, Hayek argues, is the only efficient, and therefore plausible, option because “the knowledge of the particular circumstances of time and place” essential to economic decision-making exists only at the individual level.¹⁶⁸ The price system communicates this relevant knowledge faster and more accurately to all economic actors than a central planner ever could.¹⁶⁹

Language is precisely the kind of knowledge to which Hayek refers: “the kind which by its nature cannot enter into statistics and therefore cannot be conveyed to any central authority in statistical form.”¹⁷⁰ Economics explains not physical phenomena, but people.¹⁷¹ Because language really exists at the individual level, insofar as how individuals speak and write it, central planning can never achieve an efficient result.¹⁷² Hayek explains:

If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them.¹⁷³

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 115-16. It should be noted that language is not a “commodity” in its usual sense, as it is not an output of production based on scarce resources. *See id.* at 114. Nevertheless, the analogy is still relevant.

¹⁶⁵ *Id.* at 116.

¹⁶⁶ Hayek, *supra* note 157, at 519.

¹⁶⁷ *Id.* at 520. Competition generates efficiency by forcing man to “unwittingly respond to novel situations,” a process of “trial and error.” HAYEK, *supra* note 135, at 19-20.

¹⁶⁸ Hayek, *supra* note 157, at 521-22.

¹⁶⁹ *Id.* at 525-26.

¹⁷⁰ *Id.* at 524; *id.* at 528 (“The problem which we meet here is by no means peculiar to economics but arises in connection with nearly all truly social phenomena, with language and with most of our cultural inheritance, and constitutes really the central theoretical problem of all social science.”).

¹⁷¹ HAYEK, *supra* note 137, at 98.

¹⁷² *See* Hayek, *supra* note 157, at 524.

¹⁷³ *Id.*

While centralization cannot solve the “economic problem,” decentralization does.¹⁷⁴ It may be that English gives its users the opportunity to “gain an advantage from better knowledge of facilities of communication.”¹⁷⁵ Whether or not such an assertion is true, and despite market imperfections, “excessive insulation from competitive pressures can virtually guarantee an unfavorable result.”¹⁷⁶

B. *Toubon: Another Maginot Line?*¹⁷⁷

Most meaningful attacks on globalization focus on culture rather than economics.¹⁷⁸ This is because people belonging to a linguistic group often exhibit the same beliefs and attitudes, otherwise known as a “collective understanding.”¹⁷⁹ Language, however, is dynamic.¹⁸⁰ Like the law and the market, language is a “grown structure.”¹⁸¹ Laws therefore cannot effectively keep languages from evolving.¹⁸² Indeed, “no dictionary of a living tongue ever can be perfect, since, while it is hastening to publication, some words are budding and some [have] fallen away.”¹⁸³ Language legislation is thus a futile attempt at countering inevitable linguistic change.¹⁸⁴ Even the

¹⁷⁴ *Id.* Decentralization “leads to more information being taken into account.” HAYEK, *supra* note 137, at 77.

¹⁷⁵ Hayek, *supra* note 157, at 522.

¹⁷⁶ COWEN, *supra* note 19, at 101.

¹⁷⁷ Vanston, *supra* note 3, at 181 (stating that members of the Socialist Party called the Toubon Law the “Maginot line of the language”).

¹⁷⁸ Llosa, *supra* note 16, at 1. “And if the standardization driven by English in the world is questioned today by numerous communities, it is only in the name of the necessity of protecting countries’ cultural and linguistic diversity, and was never envisioned under an economic angle.” DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 4, at 6 (quoting Guilhène Maratier-Declety, Director of International Relations at the Paris Chamber of Commerce and Industry).

¹⁷⁹ Belluzzi, *supra* note 4, at 129. For Toubon, “language . . . defines a form of identity and conveys our connection to nature and humanity.” DELEGATION GENERALE À LA LANGUE FRANÇAISE ET AUX LANGUES DE FRANCE, *supra* note 7, at 76. For Xavier North, “language is not only a tool of communication, but is also a way to express a collective connection with the world.” Janier, *supra* note 6.

¹⁸⁰ Feld, *supra* note 17, at 159 (noting that “language borrowing and absorption” is a “natural phenomenon”). Likewise, Hayek applies an “evolutionary account” approach to the study of cultural institutions and notes that evolutionary thinking originated in fields like law, money, markets, and language. HAYEK, *supra* note 137, at 10. The field of biology applied evolutionary theory to disprove the “superstition” that order must be superseded by a personal orderer; in so doing, Hayek notes, biology actually borrowed the concept of evolution from cultural studies. *Id.* at 24 (internal quotation marks omitted).

¹⁸¹ HAYEK, *supra* note 137, at 51.

¹⁸² Evolution means that no one can rationally control or predict change. *Id.* at 25.

¹⁸³ Samuel Johnson, *Preface* to SAMUEL JOHNSON & DAVID CRYSTAL, A DICTIONARY OF THE ENGLISH LANGUAGE 40-41 (Penguin 2006) (1755).

¹⁸⁴ Feld, *supra* note 17, at 159.

Académie said as much when it stated that its dictionary has remained a living work.¹⁸⁵

Interestingly, and perhaps ironically, both French and English have borrowed considerably from each other.¹⁸⁶ Like English, French has greatly evolved over time, having originated from Latin (and before Roman conquest, the Gauls spoke Celtic).¹⁸⁷ Later, Germanic conquest introduced Germanic elements into the language while Latin's influence continued to solidify.¹⁸⁸ Two languages eventually arose in France: *la langue d'oc* in the south and *la langue d'oïl* in the north, the Parisian dialect of which was imposed by centralized rule and became what French is today.¹⁸⁹ In the sixteenth century, French borrowed heavily from Italian, especially with respect to artistic terms.¹⁹⁰ Therefore, while French borrows almost exclusively from English today, it is very likely that a large portion of the borrowed terms will be outdated in ten, twenty, or fifty years.¹⁹¹

Although economist Tyler Cowen does not specifically address language in his book *Creative Destruction*,¹⁹² his argument clearly applies to language. Western civilization is a "multicultural product."¹⁹³ There has never been a cultural "level playing field."¹⁹⁴ Cowen applies Joseph Schumpeter's metaphor that capitalist production is like "creative destruction," where some economic sectors expand while uneconomical sectors shrink, to culture.¹⁹⁵ Applying this metaphor to language suggests that Eng-

¹⁸⁵ "If, three hundred years after being presented to the king, the *Dictionnaire de l'Academie* [sic] has remained a living work, it is because it symbolizes the rather exceptional link that unites a nation to its language, many nations to their common tongue." Wexler, *supra* note 74, at 300 (citing *Avant-propos* to MIREILLE PASTOUREAU ET AL., *LE DICTIONNAIRE DE L'ACADEMIE FRANÇAISE: 1694-1994 SA NAISSANCE ET SON ACTUALITE* (Institut de France 1994)), available at http://www.bibliotheque-institutdefrance.fr/archives/precedentes/Galleries_photo/DictionnaireAF/CHAP1.pdf. The entire publication is available at http://www.bibliotheque-institutdefrance.fr/archives/precedentes/Galleries_photo/DictionnaireAF/DictionnaireAF.html.

¹⁸⁶ *Id.* at 294-95; see also L. Susan Carter, *Oyez, Oyez, "O Yes"*, 83 MICH. BAR J. 38 (2004) (listing French words that have been incorporated into English).

¹⁸⁷ Wexler, *supra* note 74, at 296.

¹⁸⁸ *Id.* at 297-98.

¹⁸⁹ *Id.*

¹⁹⁰ Janier, *supra* note 6 (interviewing Xavier North, Director General for the French Language and Languages of France).

¹⁹¹ *Id.* (interviewing Xavier North, Director General of the French Language and Languages of France).

¹⁹² COWEN, *supra* note 19, at 4-5 (focusing more on the arts when referring to "culture").

¹⁹³ *Id.* at 6 (stating that "[t]o varying degrees, Western cultures draw their philosophical heritage from the Greeks, their religions from the Middle East, their scientific base from the Chinese and Islamic worlds, and their core populations and languages from Europe."). See also *id.* at 10 (noting that globalization's critics are themselves "diverse products of a worldwide intellectual culture, strongly rooted in Western and classic Greek methods of analysis and argumentation").

¹⁹⁴ *Id.* at 7.

¹⁹⁵ *Id.* at 11.

lish is more “economical” than French—it has a comparative advantage in today’s economy.

The evolution of language mimics that of diversity: many languages today are dying out, but the ones that remain are becoming richer; the differences between the remaining languages are decreasing, while each is more diverse within.¹⁹⁶ Like the common practice by which a culture accepts a foreign item or practice and adopts it as “native,”¹⁹⁷ languages naturally draw upon words from other languages. In predicting which external influences will be accepted and which, being viewed as harmful, will be rejected, time probably plays a key role (with longer exposure increasing the probability of acceptance).¹⁹⁸

The evolution of language is natural, and an attempt at controlling it will be unsuccessful at best and repressive at worst.¹⁹⁹ Indeed, “[w]hether or not a ‘marketplace of culture’ exists, new technologies . . . make the flow of cultural products virtually impossible to control.”²⁰⁰ What is more, the *Conseil Constitutionnel*’s decision to limit the Law to the public sphere undermines the Law’s goal, as it prevents the Law from reaching private individuals, with whom language really exists.²⁰¹ “Human language is primarily speech. It has always been and it remains so.”²⁰²

Shared fears of “Americanization of the planet [are] more ideological paranoia than reality.”²⁰³ English has not developed at the expense of other languages.²⁰⁴ Rather, increased globalization has actually helped spread knowledge of other languages and cultures, especially because professional success depends now more than ever on familiarity with different languages and cultures.²⁰⁵ The best way to defend language and culture is not “vaccinating them against the menace of English,” but promoting them.²⁰⁶

Moreover, state-sanctioned efforts to preserve culture may actually effectuate its decline by preventing the evolution necessary for survival.²⁰⁷ When Latin replaced Greek, for instance, Greek culture did not wither; ra-

¹⁹⁶ *Id.* at 65-66.

¹⁹⁷ COWEN, *supra* note 19, at 139.

¹⁹⁸ *Id.* See also *id.* at 140 (noting that Beethoven is seen as part of European and Western heritage, while Hollywood is not).

¹⁹⁹ Belluzzi, *supra* note 4, at 134, 148. See also Janier, *supra* note 6 (interviewing Xavier North as saying that French is in a constant state of evolution).

²⁰⁰ Judith Beth Prowda, *U.S. Dominance in the “Marketplace of Culture” and the French “Cultural Exception”*, 29 N.Y.U. J. INT’L L. & POL. 193, 210 (1997).

²⁰¹ Nelms-Reyes, *supra* note 1, at 310.

²⁰² KNIGHT, *supra* note 8, at 11 (quoting Robert MacNeil). In French, the word “langue” means both “tongue” and “language”/“speech.”

²⁰³ Llosa, *supra* note 16, at 4.

²⁰⁴ *Id.* at 5.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

ther, it pervaded Roman culture, which preserved the works of Homer, Plato, and Aristotle.²⁰⁸ A more modern example is the small local cultures in Europe (such as Catalonia, Galicia, and Basque country), which were once repressed by the state, but have flourished as the state weakened due to increased globalization.²⁰⁹ The order of modern civilization resulted spontaneously and not from human design.²¹⁰ It is state interference with these spontaneous orders that has caused most of their defects.²¹¹

C. *Toubon: Violator des Droits de l'homme*²¹²

“[T]here is only one universal language for the tyrant: that of force”²¹³

The *Conseil Constitutionnel*'s decision did not go far enough in protecting the rights of private individuals. Its decision does not protect choice of language, but rather only the choice of words within a language, ultimately reflecting “different views of freedom and of life in civil society.”²¹⁴ Under the Law, commissions, which are backed by the threat of criminal sanctions, determine legal and illegal vocabularies.²¹⁵ The Law is therefore an attempt at policing language,²¹⁶ a top-down approach.²¹⁷ Moreover, it

²⁰⁸ *Id.*

²⁰⁹ Llosa, *supra* note 16, at 5-6.

²¹⁰ HAYEK, *supra* note 137, at 6. Modern civilization originated in the Mediterranean, where free trade flourished without central direction. *Id.* at 29. Rome's increasing centralization led to a collapse of order. *Id.* at 32. This tendency is not limited to the West; China made the most technological advancements at times when governmental control was weakened. *Id.* at 32-33. Western civilization's resuscitation near the end of the Middle Ages was due to the rise of capitalism, itself due to an increase in political anarchy. *Id.* at 33 (noting that capitalism expanded in towns of the Italian Renaissance, South Germany, the Low Countries, and England, all of which were “lightly governed” at the time). See also *id.* at 14 (crediting Adam Smith as the first to recognize order absent human design, the market governed by the “invisible hand”).

²¹¹ HAYEK, *supra* note 137, at 84. Historical accounts exaggerate the role played by governments because they show what governments did and tend not to show what spontaneous coordination accomplished. *Id.* at 44 (noting that the historical record seems to indicate that government action tends to damage spontaneous improvement).

²¹² See CC decision, *supra* note 120.

²¹³ Wexler, *supra* note 74, at 302 (quoting Barère, a French revolutionary, who was arguing in favor of imposing French on minorities; French revolutionaries believed the aristocracy kept the masses from learning correct French to preserve their own power).

²¹⁴ *Id.* at 369.

²¹⁵ *Id.* at 295.

²¹⁶ But see Belluzzi, *supra* note 4, at 143 (citing Jacques Toubon as saying this is not the law's intent because language is living).

²¹⁷ Wexler, *supra* note 74, at 368 (differentiating from America's tradition of courts incorporating cultural ideas, establishing them as common law—a more bottom-up approach).

violates rights of those who do not speak the language.²¹⁸ One commentator suggests that the Law violates France's human rights tradition by "implicitly excluding foreigners and immigrants from all aspects of French public life."²¹⁹ Indeed, "[p]luralism, tolerance and broadmindedness are hallmarks of a "democratic society" [D]emocracy does not simply mean that the views of a majority must always prevail" ²²⁰ More implicitly, however, the Law violates the rights of French people who want to use certain English words and adopt a more "American" way of life.

Cultural evolution results in diversity.²²¹ Cowen differentiates between diversity within societies and diversity across societies, explaining that cross-cultural exchange enhances diversity within society but disfavors diversity across societies by making societies more alike.²²² Diversity across societies is a collectivist notion, as it compares societies or countries to one another.²²³ Diversity within society looks at the individual and compares the choices faced by one individual to the choices faced by another.²²⁴ In this sense, societies may be more "commonly diverse," meaning that different societies may resemble each other more, but offer more diversity within.²²⁵ Greater diversity within society means that

individuals can pursue diverse paths without having their destinies determined by their place of origin; indeed this is central to the notion of freedom [D]ifferent regions may look more similar than in times past, but the individuals in those locales will have greater scope to

²¹⁸ *Id.* at 369 (comparing French language legislation to the Official English movement and noting that such laws pursuing "some elusive goal of cultural harmony or national unity" would "chip away at the First Amendment."). The question of implementing an English-only law in the U.S. deserves some discussion. There is no substantial difference between an English-only law and a French-only law because protectionism underlies both. This paper's argument thus applies in the same way to an English-only law: it would violate the rights of those who want to conduct business in Spanish and ultimately prove inefficient and ineffective. It is true that an English-only law might save costs in translating, as many jurisdictions and private businesses already provide both Spanish and English translations, but this is only more efficient at the margin. Over time, enforcement costs would probably render an English-only law inefficient, and such a law would penalize businesses seeking to attract Spanish customers. Moreover, the incentive to learn English is strong. Because it is the modern *lingua franca*, entities that limit themselves to Spanish put themselves at a disadvantage in the long run. For an argument against language regulation in America, see generally Paul Conroy Hale, Note, *Official, National, Common or Unifying: Do Words Giving Legal Status to Language Diminish Linguistic Rights?*, 36 GA. J. INT'L & COMP. L. 221 (2007).

²¹⁹ Edelstein, *supra* note 107, at 1148-49.

²²⁰ *Id.* at 1200.

²²¹ HAYEK, *supra* note 137, at 26.

²²² COWEN, *supra* note 19, at 14-15.

²²³ *Id.* at 15. See also *id.* at 130 (noting that diversity across societies "assumes that diversity takes the form of cultural differentiation across geographic space, and that this differentiation should be visible to the naked eye . . ." like when we cross the border into another country).

²²⁴ *Id.* at 15.

²²⁵ *Id.* at 129.

pursue different paths for their lives, and will have a more diverse menu of choice for their cultural consumption.²²⁶

Diversity available to individuals within a society therefore increases when that society's diversity decreases.²²⁷ Greater diversity within societies should be preferred because the individual is the relevant unit of analysis.²²⁸ "Collective utility" is no more than a metaphor.²²⁹ Because diversity allows for greater information, "diversity of individual purposes leads to a greater power to satisfy needs generally."²³⁰

Many individuals may nevertheless favor preserving their cultural identity, in part through language regulation, over increased choice.²³¹ After all, cultural identity is often implicit in language.²³² But, "[i]nvoicing an absolute 'right' to one's original culture" is problematic for two reasons.²³³ First, the "original culture" is itself synthetic—the product of previous cultures' influences.²³⁴ Second, individuals who invoke this "right" do so at the expense of other individuals in society who prefer, or at least do not mind, a different culture; in this sense, it is an attempt by some at limiting others' choices.²³⁵ "[P]eople must decide for themselves, individually, whether material comfort and advanced culture is worth the sacrifices involved. They should, of course, not be forced to modernise [sic]; *nor should they be prevented, through a policy of isolation, from seeking the opportunities of modernisation* [sic]."²³⁶ Value is subjective, increasing

²²⁶ *Id.* at 15.

²²⁷ See COWEN, *supra* note 19, at 129.

²²⁸ For a discussion of methodological individualism, see LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS 41-43 (Scholar's ed., Ludwig von Mises Institute 2008) (1949).

²²⁹ HAYEK, *supra* note 137, at 98.

²³⁰ *Id.* at 95.

²³¹ COWEN, *supra* note 19, at 131.

²³² See HAYEK, *supra* note 137, at 106 (noting that language is often vague and rests on interpretation of our surroundings; hence, many beliefs are only implicit in words or phrases).

²³³ COWEN, *supra* note 19, at 135.

²³⁴ *Id.* at 6.

²³⁵ *Id.* at 135. Language legislation should be attributed to "an attitude that we may . . . admire in the ascetic who has chosen to be content with a small share of the riches of this world, but which, when actualised [sic] in the form of restrictions on profits of others, is selfish to the extent that it imposes asceticism, and indeed deprivations . . . on others." HAYEK, *supra* note 137, at 105.

²³⁶ HAYEK, *supra* note 137, at 126 (emphasis added).

only insofar as it fulfills human purposes.²³⁷ A language's value, therefore, rests on the purposes it serves.²³⁸

While modernization can put an end to many traditions, it also provides opportunities and moves society forward. Hence, "when given the option to choose freely, peoples, sometimes counter to what their leaders or intellectual traditionalists would like, opt for modernization without the slightest ambiguity."²³⁹ According to Cowen, French cultural protectionism, in particular, is "an elitist Parisian insider culture" imposing itself on the rest of the country to combat American culture, which it views as a threat to provincial control.²⁴⁰

In addition to diversity across and within societies, diversity exists over time and can be distinguished between objective diversity (apparent diversity) and operative diversity—how effectively one can enjoy diversity.²⁴¹ A broader menu of choice brought by free exchange comes with a caveat—"older synthetic cultures must give way to newer synthetic cultures"²⁴² where again, "the relevant unit of cultural identification" is not society, but the individual.²⁴³

If one considers only diversity across societies, it is true that the world is experiencing less diversity.²⁴⁴ This is due to modernization rather than globalization; globalization is the effect of modernization, not the cause (due to widespread acceptance of increased technology and luxuries that modernity affords).²⁴⁵ Modernization is inevitable—infiltrating countries like Cuba or North Korea whose totalitarian leaders have attempted to close these countries to preserve their identity.²⁴⁶ It may be possible in theory for a country to rigidly preserve cultural identity, "but only if—like certain remote tribes in Africa or the Amazon—it decides to live in total isolation, cutting off all exchange with other nations and practicing

²³⁷ *See id.* at 95. Economics' "subjective" or "marginal utility" revolution began with the works of William Stanley Jevons, Carl Menger, Léon Walras, and the Austrian school following Menger. *Id.* at 97. The notion that value is subjective "marks the emancipation of the individual," "the freedom to be guided by one's own knowledge and decisions, rather than being carried away by the spirit of the group." *Id.* at 100.

²³⁸ Just like Adam Smith recognized that capital-attracting industries are those likely to produce the most value, the choice of language one employs is that which produces the greatest value for the user. *See id.* at 14 (citing to Adam Smith's theory in *The Wealth of Nations*). This is not based on a calculation of what is likely to enable greater success; rather, it is based on what actually does enable greater success. *Id.* at 16.

²³⁹ Llosa, *supra* note 16, at 2. *See also* HAYEK, *supra* note 137, at 134.

²⁴⁰ COWEN, *supra* note 19, at 142.

²⁴¹ *Id.* at 16 (noting that the world was quite diverse in 1450, but very few individuals could actually benefit from it).

²⁴² *Id.* at 17.

²⁴³ *See id.* at 138.

²⁴⁴ Llosa, *supra* note 16, at 2.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

self-sufficiency.”²⁴⁷ Such an attempt would, of course, vastly lower that society’s standard of living.²⁴⁸ Indeed, the only cultures that have remained unchanged against inevitable modernization are the “small and primitive magical-religious communities that live in caves, worship thunder and beasts, and, due to their primitivism, are increasingly vulnerable to exploitation and extermination.”²⁴⁹ Leaders seeking to preserve cultural identity often regulate to prevent “an ideology of individualist self-fulfillment, bred through democracy, relatively free markets, and modern commercial society” from spreading.²⁵⁰ Individuals have a right to live free from this kind of government coercion.²⁵¹

Government legislation does not create culture; culture emerges from non-deliberate human action.²⁵² Like the market economy, culture is a mixed product, the result of voluntary exchange by free individuals.²⁵³ “[T]hose who clamor for ‘conscious direction’—and who cannot believe that anything which has evolved without design (and even without our understanding it)” should remember that the key to success in any system, including that of a “language market,” is “to dispense with the need of conscious control, and . . . provide inducements which will make the individuals do the desirable things without anyone having to tell them what to do.”²⁵⁴

Free speech presumes we should allow free cultural exchange.²⁵⁵ Our society’s current practices and institutions were built “upon habits and institutions which have proved successful in their own sphere.”²⁵⁶ The reason for any “cultural clash” is because many individuals chose to import parts of another culture.²⁵⁷ Hence, cultural and language protectionism are an issue in France because many French people freely choose to adopt facets of American culture and English vocabulary.

“Cultural identity” is a dangerous concept not from a social perspective as an “artificial concept,” but rather a political perspective, because it threatens freedom.²⁵⁸ Although people belonging to the same culture have many things in common, that “collective denominator” does not define each

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ COWEN, *supra* note 19, at 70.

²⁵¹ *See* Wexler, *supra* note 74, at 292 (stating that people have “the right to be free from governmental interference in spheres involving fundamental freedoms”).

²⁵² *See* HAYEK, *supra* note 137, at 25.

²⁵³ *See generally* RUDOLF ROCKER, NATIONALISM AND CULTURE 244 (1998) (1937) (noting that cultural nationalism leads to “national dictatorship”).

²⁵⁴ Hayek, *supra* note 157, at 527.

²⁵⁵ COWEN, *supra* note 19, at 145.

²⁵⁶ Hayek, *supra* note 157, at 528.

²⁵⁷ COWEN, *supra* note 19, at 147.

²⁵⁸ Llosa, *supra* note 16, at 2-3.

individual within that group.²⁵⁹ Focusing on “collective identity” ignores the individual.²⁶⁰

The concept of identity, when not employed on an exclusively individual scale, is inherently reductionist and dehumanizing, a collectivist and ideological abstraction of all that is original and creative in the human being, of all that has not been imposed by inheritance, geography, or social pressure. Rather, true identity springs from the capacity of human beings to resist these influences and counter them with free acts of their own invention.²⁶¹

At its extreme, collective identity forms the basis of nationalistic thought; it ignores “the margin of initiative and creativity”—the identity of different members of the group.²⁶²

CONCLUSION

“A living language is like a man suffering incessantly from small hemorrhages, and what it needs above all else is constant transfusions of new blood from other tongues. The day the gates go up, that day it begins to die.”²⁶³ Indeed, competition is essential to preserve existing achievements.²⁶⁴ France may be anxious about having lost its status as “world cultural leader” to the U.S.²⁶⁵ Nonetheless, language regulation is futile because legal institutions cannot control the growth of language in a free society.²⁶⁶ On the other hand, globalization creates the possibility for all individuals

to construct their individual cultural identities through voluntary action, according to their preferences Now, citizens are not always obligated, as in the past and in many places in the present, to respect an identity . . . that is imposed on them through the language, nation, church, and customs of the place where they were born. In this sense, globalization . . . notably expands the horizons of individual liberty.²⁶⁷

²⁵⁹ *Id.* at 3.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ KNIGHT, *supra* note 8, at 28 (quoting HENRY LOUIS MENCKEN, *THE AMERICAN LANGUAGE: AN INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES* (2d ed. 1921)). Novelist Jean d’Ormesson has said “we must accept foreign words. Don’t be afraid of saying ‘weekend’ or ‘parking.’ It is a spirit of adventure that will save the French language not a spirit of conservatism.” Nelms-Reyes, *supra* note 1, at 280 n.38.

²⁶⁴ HAYEK, *supra* note 137, at 26.

²⁶⁵ COWEN, *supra* note 19, at 141.

²⁶⁶ Wexler, *supra* note 74, at 368.

²⁶⁷ Llosa, *supra* note 16, at 3.

What Hayek calls the “fatal conceit” is the belief “that man is able to shape the world around him according to his wishes.”²⁶⁸ Custom and tradition are based on human experience, not reasoned conclusions, and thus “stand *between* instinct and reason.”²⁶⁹ Moreover, reason must acknowledge its own limitations.²⁷⁰ Like language and culture, evolution also formed man’s reason.²⁷¹ Consequently, “[t]he idea that reason, itself created in the course of evolution, should now be in a position to determine its own future evolution (not to mention any number of other things which it is also incapable of doing) is inherently contradictory.”²⁷² Hence, effective centralized control is impossible.²⁷³

France should adopt a *laissez-faire* approach to language and be more open to English’s role in the international marketplace. Protectionism is bad policy that, when applied, usually results in retrogression. If the French language is to survive and experience continued use, it must be open to some degree of change. France should stop viewing state policy, especially legislation that governs behavior and restricts individual choice, as the solution to its problems. Instead, it should focus on increasing innovation and minimizing rigidity in the economic sphere.²⁷⁴ France would facilitate its own economic well-being by adopting a more hands off approach and “let[ing] language follow its own natural course.”²⁷⁵

English has prospered in part because of a lack of regulation.²⁷⁶ This is probably due to the American concept of the “free trade in ideas.”²⁷⁷ France must recognize that all cultures are subject to influence and cultural influence can be beneficial.²⁷⁸ France’s failure to acknowledge this truth will likely transform the *art de vivre* into the *art de survivre*.²⁷⁹ At least one French official remains optimistic, however, believing that “French holds the capacity to convey the realities of today and the future, possessing the

²⁶⁸ HAYEK, *supra* note 137, at 27. Hayek’s goal in writing *The Fatal Conceit* was to show “the limits of reason and planning in the social sciences.” W. W. Bartley, III, *Editorial Foreword* to HAYEK, *supra* note 137, at xi.

²⁶⁹ HAYEK, *supra* note 137, at 23.

²⁷⁰ *See id.* at 8. “The curious task of economics is to demonstrate to men how little they really know about what they imagine they can design.” *Id.* at 76.

²⁷¹ *Id.* at 21.

²⁷² *Id.* at 22.

²⁷³ *Id.* at 87 (noting that “the whole idea of ‘central control’ is confused”).

²⁷⁴ “It’s not our vocabulary that is the cause, it’s our place in the economy, our capacity to innovate. Language is shaped by economic realities, facts that are objective: economic, commercial, and if need be, military power.” Janier, *supra* note 6 (interviewing and quoting Xavier North, Director General of the French Language and Languages of France).

²⁷⁵ Belluzzi, *supra* note 4, at 134, 151.

²⁷⁶ Wexler, *supra* note 74, at 369.

²⁷⁷ Prowda, *supra* note 200, at 208 (quoting Justice Holmes as saying “[t]he ‘marketplace of ideas’ will determine the truth of any competing idea.”).

²⁷⁸ *Id.* at 210.

²⁷⁹ Vanston, *supra* note 3, at 193 (saying this has already happened).

necessary resources to reinvent itself.”²⁸⁰ Like English, French too can prosper without regulation.²⁸¹

²⁸⁰ Janier, *supra* note 6 (interviewing and quoting Xavier North, Director General for the French Language and Languages of France).

²⁸¹ *Id.* According to Xavier North, French’s change in status from an international language of communication to a language of “global influence” does not signify a decline; in absolute numbers, French is making progress considering demographic expansion and a rise in literacy. *Id.*

VEGETATION AS A NUISANCE

*Daniel J. Wisniewski**

INTRODUCTION

Can you require your neighbor to cut down a tree on their property when it grows onto and damages your property? In some states, the answer is yes.¹ This question implicates the most fundamental of property rights—namely, the right to exclude, the rights of use and enjoyment, and the *ad coelum* doctrine.² This comment argues that enjoining the continued growth of damaging cross-boundary vegetation upholds the *ad coelum* doctrine and is the preferred distribution of property entitlements. This conclusion is also an application of the old equity maxim *sic utere tuo ut alienum non laedas*—“so use your own as not to injure another’s property.”³

Traditionally, a nuisance lies where one property owner uses his land in an unreasonable way that interferes with a neighbor’s use and enjoyment of his own land.⁴ But when is a use “unreasonable”? The traditional Restatement Rule defines an unreasonable use as one where “the gravity of the [actor’s] harm outweighs the utility of the actor’s conduct.”⁵ However, some scholars have suggested that viewing *all* property uses as reasonable better represents the fact that property owners have the right to use their own property as they see fit.⁶ Between the two analytical approaches the essential question remains the same: which land use should prevail? The

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¹ *E.g.*, Whitesell v. Houlton, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981); Mahurin v. Lockhart, 390 N.E.2d 523, 524-25 (Ill. App. Ct. 1979); Pierce v. Casady, 711 P.2d 766, 767-68 (Kan. Ct. App. 1985); Abbinett v. Fox, 703 P.2d 177, 181 (N.M. Ct. App. 1985); Turner v. Coppola, 424 N.Y.S.2d 864, 867 (N.Y. Sup. Ct. 1980); Mead v. Vincent, 187 P.2d 994, 996 (Okla. 1947); Lane v. W.J. Curry & Sons, 92 S.W.3d 355, 366 (Tenn. 2002); Fancher v. Fagella, 650 S.E.2d 519, 522-23 (Va. 2007). Other states (and the federal district) say no. *See, e.g.*, Sterling v. Weinstein, 75 A.2d 144, 148 (D.C. 1950); Schwalbach v. Forest Lawn Mem’l Park, 687 S.W.2d 551, 552 (Ky. Ct. App. 1985); Melnick v. C.S.X. Corp., 540 A.2d 1133, 1137-38 (Md. 1988); Michalson v. Nutting, 175 N.E. 490, 490-91 (Mass. 1931); Langer v. Goode, 131 N.W. 258, 260-61 (N.D. 1911).

² The *ad coelum* doctrine is the concept that an owner’s right to exclude extends from the heavens to the center of the earth. BLACK’S LAW DICTIONARY 42 (9th ed. 2009).

³ *Id.* at 1872.

⁴ *See* RESTATEMENT (SECOND) OF TORTS § 826 (1979).

⁵ *Id.*

⁶ *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960) (explaining the “reciprocal nature” of the nuisance problem, in that both parties have land use rights that conflict with one another).

latter approach weighs the competing interests from an explicitly economic standpoint and asks which party values his land use more and whether society accepts that valuation.⁷ The difficulty arises in situations when the competing land use valuations are hidden, hard to value, or nearly equal. For example, plants and structures are both reasonable, if not expected, property uses.⁸ So which property use is valued more?

Consider the situation where you have two neighbors—a tree owner and a homeowner. A common example of conflicting uses in this scenario is where the tree owner's roots grow into and damage the foundation of the homeowner's home.⁹ In this event, virtually all courts allow the homeowner to cut the tree roots back to the property line (self-help)—enforcing the *ad coelum* rule.¹⁰ What happens though if the tree roots continue to grow back and damage the homeowner's foundation? Courts are divided over this issue, with some holding, essentially, that the homeowner is out of luck and self-help is the only remedy.¹¹ Other courts hold that the homeowner can obtain an injunction requiring the tree owner to remove the tree from his property and a monetary award for damages done to the homeowner's foundation.¹²

The prior two outcomes are not the only ones. There are currently four primary variations of nuisance law applied to cases of cross-boundary vegetation in the individual states.¹³ First, the Virginia Rule only allows for the removal of “noxious” vegetation that has caused actual damage or imminent harm.¹⁴ Second, the Restatement Rule allows for removal only if the offending vegetation is “artificial” and has caused actual or imminent harm.¹⁵ These two rules have been abandoned by most states, largely due to the difficulty of defining what plants are “noxious” or “artificial.”¹⁶ Third,

⁷ See generally Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁸ See, e.g., *Harndon v. Stulz*, 100 N.W. 329, 330 (Iowa 1904) (“The raising of trees is a legitimate use to which the owner may put his land.”); *Skinner v. Buchanan*, 142 A. 72, 75 (Vt. 1928) (The owner has a right to “adornment of his premises by trees and ornamental shrubs.”).

⁹ See, e.g., *Michalson v. Nutting*, 175 N.E. 490, 490 (Mass. 1931); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 356 (Tenn. 2002); *Fancher v. Fagella*, 650 S.E.2d 519, 520 (Va. 2007).

¹⁰ See, e.g., *Cannon v. Dunn*, 700 P.2d 502, 503 (Ariz. Ct. App. 1985); *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981); *Michalson*, 175 N.E. at 490; *Fancher*, 650 S.E.2d at 522.

¹¹ See, e.g., *Michalson*, 175 N.E. at 491.

¹² See, e.g., *Whitesell*, 632 P.2d at 1078-79.

¹³ See, e.g., *Dunn*, 700 P.2d at 504; *Michalson*, 175 N.E. at 491; *Corts*, 316 N.W.2d at 261; *Fancher*, 650 S.E.2d at 522-23. A detailed explanation of the four rules is provided *infra* Part III.

¹⁴ *Dunn*, 700 P.2d at 504. Virginia abandoned the Virginia Rule in 2007 in *Fancher*, 650 S.E.2d at 521. It is still followed by at least one state, Arizona. See *Dunn*, 700 P.2d at 504.

¹⁵ *Fancher*, 650 S.E.2d at 521 (“The ‘Restatement Rule,’ . . . imposes an obligation on a landowner to control vegetation that encroaches upon adjoining land if the vegetation is ‘artificial,’ i.e., planted or maintained by a person, but not if the encroaching vegetation is ‘natural.’”); RESTATEMENT (SECOND) OF TORTS §§ 839, 840 (1979).

¹⁶ *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 361-62 (Tenn. 2002).

the Massachusetts Rule does not allow for the removal of offending vegetation, even in cases of actual damage, and limits property owners remedy to self-help—cutting back vegetation to the boundary line.¹⁷ Fourth, the Hawaii Rule allows for removal of offending vegetation where there is a showing of actual or imminent harm to a neighbor's property.¹⁸ The Massachusetts and Hawaii Rules are the most commonly used.¹⁹ Virtually all states allow property owners to cut vegetation back to the property line, regardless of whether the vegetation has caused damage.²⁰

Since the 1980s, states have trended towards adopting the Hawaii Rule.²¹ The rule's underlying policy rationale is that as people increasingly live closer together, the likelihood of conflict between growing plants and structures also increases—and so should the responsibility of the owners.²² This comment explores these competing land uses and concludes that in most cases development should win out. In some situations, however, the plant owner should be compensated for the removal of their vegetation—a liability rule—when they are using the vegetation productively.²³

Part II provides a background on property rights, trespass, and nuisance, and explains how negligence comes into play in this context. Part III details the four different nuisance rules in cross-boundary vegetation cases as they currently stand. It also analyzes the four rules through Guido Calabresi and Douglas Melamed's property and liability rules framework²⁴ to explain how courts allocate and enforce property use entitlements. Part IV uses the property and liability rules framework to explain the four state doctrines. Part V argues for a modified Hawaii Rule and applies it to factual scenarios from actual cases. Part VI concludes.

¹⁷ *Michalson*, 175 N.E. at 490-91.

¹⁸ *Fancher*, 650 S.E.2d at 521-22.

¹⁹ See cases cited *supra* note 1.

²⁰ See, e.g., *Cannon v. Dunn*, 700 P.2d 502, 503 (Ariz. Ct. App. 1985); *Michalson*, 175 N.E. at 490-91; *Fancher*, 650 S.E.2d at 522.

²¹ *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981); *Chandler v. Larson*, 500 N.E.2d 584, 588 (Ill. App. Ct. 1986); *Pierce v. Casady*, 711 P.2d 766, 768 (Kan. Ct. App. 1985); *Abbinett v. Fox*, 703 P.2d 177, 181 (N.M. Ct. App. 1985); *Rautsaw v. Clark*, 488 N.E.2d 243, 245 (Ohio Ct. App. 1985); *Lane*, 92 S.W.3d at 362-63; *Fancher*, 650 S.E.2d at 522.

²² See *Lussier v. San Lorenzo Valley Water Dist.*, 253 Cal. Rptr. 470, 474 (Cal. Ct. App. 1988) (“[A]s civilization advances in complexity and the development of land expands, the trend is to broaden the duties arising from natural conditions of the land in accordance with society's increasing regard for human safety.”).

²³ For example, consider the case of an apple orchard.

²⁴ See Calabresi and Melamed, *supra* note 7.

I. BACKGROUND: PROPERTY RIGHTS, TRESPASS, AND NUISANCE

Courts diverge over which legal doctrine applies to cases of encroaching vegetation. The vast majority of courts apply nuisance principles by weighing competing land uses.²⁵ Somewhat confusingly, other courts apply negligence principles.²⁶ The choice of doctrine is important for clear and understandable adjudication and so that property owners know where their property rights begin and end. This confusion requires a short background section to describe the doctrines as applied to cases of cross-boundary vegetation.

A. *The Property Rights of Landowners*

The most important property right is the right to exclude others.²⁷ This right to exclude, as expressed in the traditional *ad coelum* doctrine, extends from the center of the earth to the heavens.²⁸ This conception of real property chops up parcels of land into “geometric-box”²⁹ shapes, where each property owner can exclude intrusions into any part of that box, whether it is above or below the soil.³⁰ By enforcing the geometric-box concept, courts make clear and defined property rights.³¹ This clarity makes land transactions between parties easier because purchasing parties readily know what they are buying.³² Enforcing this geometric-box principle is important.

²⁵ Courts following the four major state doctrines analyze cases of cross-boundary vegetation under nuisance principles. See cases cited *supra* note 1.

²⁶ See, e.g., *Hasapopoulos v. Murphy*, 689 S.W.2d 118, 121-22 (Mo. Ct. App. 1985); *Carvalho v. Wolfe*, 140 P.3d 1161, 1164 (Or. Ct. App. 2006).

²⁷ Thomas W. Merrill, *Trespass, Nuisance And The Costs Of Determining Property Rights*, 14 J. LEGAL STUD. 13, 13 (1985). But see Eric R. Claeys, *Tragedies of the Gridlock Economy: How Mis-Configuring Property Rights Stymies Social Efficiency: Exclusion and Exclusivity in Gridlock*, 53 ARIZ. L. REV. 9, 20-21 (2011) (arguing that a focus on the *use* of land might be a better way to describe what property is, conceptually).

²⁸ See Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 55, 104 n.2 (1987); BLACK'S LAW DICTIONARY 42 (9th ed. 2009).

²⁹ Sterk, *supra* note 28, at 55.

³⁰ The *ad coelum* doctrine does have a variable ceiling. Specifically, Congress has effectively asserted federal control over navigable airspace. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 15 (Foundation Press 2007). Generally speaking, a property owner can “own” as much of the sky as he can actually possess (subject to zoning and other restraints). *Id.* at 14.

³¹ R. Lisle Baker, *My Tree Versus Your Solar Collector or Your Well Versus My Septic System? – Exploring Responses to Beneficial But Conflicting Neighboring Uses of Land*, 37 B.C. ENVTL. AFF. L. REV. 1, 6 (2010).

³² *Id.*

B. *Trespass*

Trespass law protects the geometric box from actual physical invasions by others—their “persons, cars, buildings and the like.”³³ A trespass is the most intrusive invasion of property, mainly because it is a gross physical invasion into the geometric box³⁴ that deprives an owner of his exclusive right to possession.³⁵ Because of the severity of the intrusion, trespass is governed by a regime of strict liability (liability for both unintentional and intentional trespassory acts) without a requirement of actual harm.³⁶ With this said, trespass, like most torts, still requires a positive act by the offending party before liability attaches.³⁷ This makes applying the doctrine of trespass to cases of encroaching vegetation conceptually difficult, as plant growth is not, ostensibly, a positive act.

C. *Common Law Nuisance*

In contrast, common law nuisance focuses more on the land *uses* of an individual, rather than a single positive *act*, to determine liability.³⁸ This makes nuisance a more suitable doctrine for determining liability in cases of encroaching vegetation. Nuisance law protects property owners from that which interferes with the use and enjoyment of their land,³⁹ such as “indirect and intangible” intrusions like smoke, noise, and odors.⁴⁰ The right to use and enjoy property is the logical inverse of the right to exclude—“opposite sides of the same coin.”⁴¹

A fault-based regime traditionally protected a property owner’s right to use and enjoy his land.⁴² This meant that the “reasonableness” or “wrongfulness” of the defendant’s land use was at issue,⁴³ which required a court to make a “normative evaluation of reasonableness within a natural rights

³³ Merrill, *supra* note 27, at 14.

³⁴ *See id.* at 14, 16.

³⁵ RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 11 (9th ed. Wolters Kluwer 2008).

³⁶ MERRILL & SMITH, *supra* note 30, at 7-8.

³⁷ EPSTEIN, *supra* note 35, at 11, 684.

³⁸ *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 826 (1979) (referring to a landowner’s “conduct”); Coase, *supra* note 6, at 1 (concerning the “actions of business firms which have harmful effects on others”); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 967-69 (2004) (referring to the competing “activities” of landowners).

³⁹ *See* Penner, *supra* note 4, at 18.

⁴⁰ Merrill, *supra* note 27, at 14.

⁴¹ Penner, *supra* note 4, at 18.

⁴² *See* Alexander E. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance Bound*, 73 N.Y.U. L. REV. 1694, 1699-1700 (1998).

⁴³ *Id.* at 1700.

framework.”⁴⁴ Therefore, the nuisance question also considered the plaintiff’s actions—for example, moving near or “com[ing] to the nuisance.”⁴⁵

D. *Negligence Doctrine as Applied in Cases of Cross-Boundary Vegetation*

Logically, nuisance doctrine cannot supply a remedy for all cases where cross-boundary vegetation causes actual property damage. For example, many courts apply traditional negligence principles when a tree or tree branch falls onto a neighbor’s property and damages the property or injures a person.⁴⁶ Like any negligence question, the courts ask whether the plant owner had a duty to protect the neighbor from falling vegetation, whether that duty was breached, and whether that breach caused the injury.⁴⁷ These cases usually turn on the breach element, specifically whether the tree owner knew that the tree was in a dangerous condition (visually dead, rotted, or otherwise susceptible to falling) and failed to attempt a reasonable safeguard.⁴⁸

The reason why negligence principles should not be applied to other cases of damaging cross-boundary vegetation is subtle. While it may be incidental to tree ownership, a falling tree limb is a single isolated act, and not an ongoing event (which could be called a “use”). On the other hand, tree root and limb growth are not really “acts,” but are better described as ongoing uses necessary to tree growth. And as nuisance doctrine is in the business of governing land uses, it provides a more intuitive framework for resolving most cross-boundary vegetation disputes.

At least one court has confusingly applied negligence principles to a case where plant *growth* caused actual damage to a neighboring property.⁴⁹ In *Hasapopoulos v. Murphy*, the roots of a Chinese elm tree cracked a neighboring driveway, causing about \$2,900 in damage.⁵⁰ Using negligence principles, the court held that there was no liability because there was no evidence that the tree was “defective,” dangerous, or rotted.⁵¹ The reason

⁴⁴ Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 211 (1990).

⁴⁵ See Reinert, *supra* note 42, at 1700, 1702. When plaintiffs moved to a known nuisance they may be denied a remedy because they were “at fault for their predicament.” *Id.* at 1700. This note implicitly argues that more emphasis should be placed on an owner’s fundamental right to use his land, regardless of when he asserts that use.

⁴⁶ See, e.g., *Wade v. Howard*, 499 S.E.2d 652 (Ga. Ct. App. 1998); *Eckburg v. Presbytery of Blackhawk of the Presbyterian Church (USA)*, 918 N.E.2d 1184 (Ill. App. Ct. 2009); *Brown v. Milwaukee Terminal Ry.*, 227 N.W. 385 (Wis. 1929).

⁴⁷ See, e.g., *Harvey v. Hansen*, 445 A.2d 1228, 1233-35 (Pa. Super. Ct. 1982).

⁴⁸ See, e.g., *Wade*, 499 S.E.2d at 654.

⁴⁹ *Hasapopoulos v. Murphy*, 689 S.W.2d 118 (Mo. Ct. App. 1985).

⁵⁰ *Id.* at 119.

⁵¹ *Id.* at 121-22.

why the court held that a rotted or dangerous condition must exist before liability attaches, when the tree had already caused substantial actual damage, is elusive. Whether the tree was rotten was irrelevant to the root growth, which was the source of the damage. The reasoning would have made sense if the source of the driveway damage was a fallen limb caused by rot or another dangerous condition that the owner should have known (or did know) about and failed to take reasonable remedial measures. This situation would then be a straightforward negligence case.

Even more confusingly, the court declined to follow existing precedent that applied nuisance doctrine to cases of cross-boundary vegetation.⁵² It also declined to adopt the Restatement Rule or the Hawaii Rule,⁵³ which apply variants of nuisance law in determining liability.⁵⁴ The court favored the Massachusetts Rule's reasoning, but ultimately decided to apply negligence principles in finding no liability for the driveway damage.⁵⁵

From this point forward, except where otherwise expressly stated, this article will refer to plant growth when speaking of nuisances, and not falling limbs or trees. It will analyze situations of cross-boundary nuisances, and not negligence.

II. THE FOUR STATE DOCTRINES

As previously noted there are four different nuisance doctrines used in the various states.⁵⁶

1. The Virginia Rule. Allows for the removal of offending vegetation, but only when it is "noxious" and causes actual damage to neighboring property. ⁵⁷	2. The Restatement Rule. Allows for the removal of offending vegetation, but only when it is artificial in nature and causes actual damage to neighboring property. ⁵⁸
3. The Massachusetts Rule. Does not allow for the removal of offending vegetation, even when it is causing actual damage to neighboring property. ⁵⁹	4. The Hawaii Rule. Allows for the removal of offending vegetation, but only when it causes actual damage to neighboring property. ⁶⁰

⁵² The court declined to apply *Tanner v. Wallbrunn*, 77 Mo. App. 262 (Mo. Ct. App. 1898) (holding that if roots had caused actual damage to a house's foundation, then actionable nuisance would lie).

⁵³ *Hasapopoulos*, 689 S.W.2d at 120.

⁵⁴ *See, e.g., Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981) (Hawaii Rule); *Ken Cowden Chevrolet, Inc. v. Corts*, 316 N.W.2d 259, 261 (Mich. Ct. App. 1982) (Restatement Rule).

⁵⁵ *Hasapopoulos*, 689 S.W.2d at 122.

⁵⁶ *See, e.g., Cannon v. Dunn*, 700 P.2d 502 (Ariz. Ct. App. 1985); *Michalson v. Nutting*, 175 N.E. 490 (Mass. 1931); *Corts*, 316 N.W.2d 259; *Fancher v. Fagella*, 650 S.E.2d 519 (Va. 2007).

⁵⁷ *Smith v. Holt*, 5 S.E.2d 492, 495 (Va. 1939).

⁵⁸ *See* RESTATEMENT (SECOND) OF TORTS §§ 839, 840 (1979).

⁵⁹ *Michalson*, 175 N.E. at 490-91.

⁶⁰ *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981).

A. *The Virginia Rule*

In 2007, the Virginia Supreme Court abandoned its own long-standing rule in favor of the Hawaii Rule.⁶¹ The Virginia Rule has its modern origins in *Smith v. Holt*.⁶² In *Smith*, the Virginia Supreme Court adopted the rule that a plant is a nuisance only if it is “noxious” and causes “sensible injury.”⁶³ Without this showing, a property owner is limited to self-help as a remedy.⁶⁴ In *Smith*, the branches and roots of a privet hedge extended onto the property of a neighbor but did not cause actual property damage.⁶⁵ The court also held that the privet hedge was not noxious.⁶⁶

Today, the Virginia Rule is followed by only one state, Arizona.⁶⁷ Virginia abandoned its own rule primarily because noxiousness is in the “viewpoint of the beholder.”⁶⁸ The Virginia Supreme Court criticized this method for determining liability as an “unworkable standard.”⁶⁹ And this rule disallows a remedy in cases of actual damage where a plant is not considered “noxious.”⁷⁰

⁶¹ In *Fancher*, 650 S.E.2d 519, the Virginia Supreme Court overruled its decision in *Smith*, 5 S.E.2d 492.

⁶² *Smith*, 5 S.E.2d 492. The origins of the “Virginia” rule—requiring noxiousness—go back further than the *Smith* case, but most courts since *Smith* have referred to it when describing the Virginia Rule. For older examples see *Buckingham v. Elliot*, 62 Miss. 296 (1884), and *Countryman v. Lighthill*, 31 N.Y. Sup. Ct. 405 (1881).

⁶³ *Smith*, 5 S.E.2d at 495. *Smith* requires a showing of “sensible injury.” There is no indication that sensible injury means something different from “actual harm,” which is the term used in this article.

⁶⁴ *Id.* at 494-95.

⁶⁵ *Id.* at 495.

⁶⁶ *Id.*

⁶⁷ *Cannon v. Dunn*, 700 P.2d 502, 504 (Ariz. 1985). Perhaps the Virginia Rule should be renamed the “Arizona Rule.”

⁶⁸ *Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007).

⁶⁹ *Id.* at 522. See also *Melnick v. C.S.X. Corp.*, 540 A.2d 1133, 1137 (Md. 1988) (“Few states have followed [the Virginia Rule]. Part of the reason may be the difficulty of determining exactly what is a ‘noxious’ tree or plant.”). Some courts even define noxiousness as any plant which causes actual property damage, and not a plant which is in some other way undesirable, offensive, or poisonous. See *Sterling v. Weinstein*, 75 A.2d 144, 147 (D.C. Cir. 1950) (pointing out the difficulty that courts have had when defining noxiousness); compare, e.g., *Buckingham v. Elliot*, 62 Miss. 296, 300 (1884) (“It is an admitted fact in this case that the roots [caused actual damage]. That proves the[ir] noxious character . . .”), with *Stevens v. Moon*, 202 P. 961, 963 (Cal. Ct. App. 1921) (referring to noxious plants as being “poisonous,” but then finding that the plants at issue were noxious merely because their roots destroyed the fertility of the neighbor’s soil).

⁷⁰ See *Cannon*, 700 P.2d at 504 (“[T]he landowner upon whom a sensible injury has been inflicted by the protrusion of the roots of a noxious tree or plant . . . can bring an action for injunctive relief to abate the nuisance.”).

B. *The Restatement Rule*

In 1979, the Restatement (Second) of Torts adopted nuisance law as it was applied in many states at the time.⁷¹ Those states applied a rule where a plant owner is liable for damage to his neighbor's property caused by the plant, but only when the plant is "artificial" and not "natural."⁷² For example, in *Griefield v. Gibraltar Fire & Marine Ins. Co.*, the Mississippi Supreme Court found no liability where a naturally growing oak tree's limbs were rubbing the roof of a neighbor's house, causing damage.⁷³ This rule became the Restatement Rule.

The Restatement Rule has fallen out of favor and is only used in a few jurisdictions today.⁷⁴ Under this rule, it is difficult to determine whether the origin of a plant's growth is natural or artificial.⁷⁵ Even if the origin of a plant could be easily determined, using the plant's origin to determine liability has been called "arbitrary at best."⁷⁶ The Restatement Rule disallows a remedy in cases of actual property damage, where the plant is naturally growing, no matter how severe the damage.

⁷¹ While the underlying law behind the Restatement Rule was fairly popular at the time of adoption, it seems that it was largely inspired by cases that had nothing to do with vegetation. *See, e.g.,* *Griffith v. Lewis*, 17 Mo. App. 605 (1885) (waste water percolating from a privy); *Rose v. Standard Oil Co. of New York*, 185 A. 251 (R.I. 1936) (petroleum leaking from a pipe); *Bowie v. Hill*, 258 S.W. 568 (Tex. Civ. App. 1923) (city dump adjacent to plaintiff's property). For more examples of unnatural acts, see the cases included in the notes of the RESTATEMENT (SECOND) OF TORTS § 839 (1979). For examples of cases involving vegetation, see *Coates v. Chinn*, 332 P.2d 289 (Cal. 1958), *Merriam v. McConnell*, 175 N.E.2d 293 (Ill. App. Ct. 1961), and *Falco v. Bryn Mawr Trust Co.*, 10 Pa. D. & C. 115 (1927).

⁷² *See* RESTATEMENT (SECOND) OF TORTS §§ 839, 840 (1979).

⁷³ *Griefield v. Gibraltar Fire & Marine Ins. Co.*, 24 So. 2d 356, 356-57 (Miss. 1946).

⁷⁴ At least three states still follow the Restatement Rule: Michigan, Mississippi, and New Hampshire. *See Ken Cowden Chevrolet, Inc. v. Corts*, 316 N.W.2d 259, 261 (Mich. Ct. App. 1982); *Griefield*, 24 So. 2d at 357-58; *Belhumeur v. Zilm*, 949 A.2d 162, 164 (N.H. 2008).

⁷⁵ *Sterling v. Weinstein*, 75 A.2d 144, 147 (D.C. Cir. 1950) ("[I]n this case, and many others, it would be difficult and perhaps impossible to determine if the trees are of natural growth."); *Hasapopoulos v. Murphy*, 689 S.W.2d 118, 119 (Mo. Ct. App. 1985) (rejecting the Restatement Rule because of "the virtual impossibility of obtaining evidence concerning the origin of trees in many instances").

⁷⁶ *Harvey v. Hansen*, 445 A.2d 1228, 1231 (Pa. Super. Ct. 1982). *See also Sterling*, 75 A.2d at 147 ("From a practical viewpoint it is difficult to place liability on one who plants a desirable and attractive tree on his land, and deny liability against another who permits a scrubby and unattractive tree of natural growth to exist on his land."); *Melnick v. C.S.X. Corp.*, 540 A.2d 1133, 1136-37 (Md. 1988) ("[T]he distinction between 'artificial' and 'natural' vegetation is unworkable, and should not control the question of a landowner's duty.").

C. *The Massachusetts Rule*

The Massachusetts Rule, the second most popular of these four rules, is losing popularity in favor of the newer Hawaii Rule.⁷⁷ The rule gets its name from the Massachusetts case *Michalson v. Nutting*.⁷⁸ In *Michalson*, the roots of a poplar tree grew into a neighbor's sewage pipes and home foundation, causing the foundation to severely crack.⁷⁹ The Supreme Judicial Court of Massachusetts held that the only remedy available to the injured homeowner was self-help in the form of cutting back the offending roots.⁸⁰ The court held that nuisance law does not allow for the removal of a neighbor's vegetation, even when the encroaching vegetation causes actual damage to property.⁸¹ The court stated that allowing a damage award in cases of cross-boundary vegetation would give landowners an incentive to bring vexatious law suits, considering how commonly vegetation grows across property lines.⁸²

Other courts have criticized the Massachusetts Rule for failing to provide an adequate remedy for damaged property owners.⁸³ Particularly, self-help is criticized for not providing adequate redress to landowners who suffer continuing damage to their property.⁸⁴ Such vegetation places an unfair burden on the injured owner instead of the vegetation owner. This rule disallows a remedy in all cases of actual damage, no matter how severe.⁸⁵

⁷⁷ See, e.g., *Whitesell v. Houlton*, 632 P.2d 1077, 1078-79 (Haw. Ct. App. 1981); *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 363 (Tenn. 2002); *Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007).

⁷⁸ *Michalson v. Nutting*, 175 N.E. 490, 490 (Mass. 1931).

⁷⁹ *Id.*

⁸⁰ *Id.* at 490-91. Self-help does not allow a person to enter the property of another and cut down their vegetation or cut vegetation back further than the boundary line. *Melnick*, 540 A.2d at 1135.

⁸¹ *Michalson*, 175 N.E. at 490-91.

⁸² See *id.* at 491; *Melnick*, 540 A.2d at 1138.

⁸³ See, e.g., *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 361 (Tenn. 2002) (“[S]ome courts have questioned whether the Massachusetts rule is fair given that it deprives deserving plaintiffs of any meaningful redress when their property is damaged.”).

⁸⁴ See *id.*

⁸⁵ See *Michalson*, 175 N.E. at 490-91 (denying relief where a homeowner had to continuously dig up and clear his sewage pipes that became clogged by his neighbor's poplar tree roots, which also caused the home's foundation “to crack and crumble and threatening seriously to injure the foundation of the dwelling”); *Lane*, 92 S.W.3d at 364 (pointing out that the Massachusetts Rule, if adopted in the case at bar, would deny relief where tree roots clogged the homeowner's drainage pipes so badly that she was unable to use her bathroom for multiple years and its limbs had rested against the roof of her home, preventing it from drying and causing it to rot).

D. *The Hawaii Rule*

The relatively recently created Hawaii Rule has been gaining popularity.⁸⁶ The rule gets its name from the Hawaii case *Whitesell v. Houlton*.⁸⁷ In *Whitesell*, a banyan tree's limbs hung precariously low over the homeowner's property and caused damage to the homeowner's garage roof and van.⁸⁸ The homeowner had to hire a company to cut the limbs back to the property line after the tree owner declined to trim the limbs.⁸⁹ The *Whitesell* court awarded compensation for the damage done to the garage roof and the van as well as the cost of hiring the tree-trimming company.⁹⁰

The *Whitesell* court expressly rejected the Massachusetts Rule because despite being "simple and certain," it is not "realistic [or] fair."⁹¹ The Hawaii Rule holds that an encroaching plant is an actionable nuisance when it causes actual property damage or poses imminent harm to a neighbor's property (other than to other plant life).⁹² The rule categorically exempts casting shade and small falling objects such as falling leaves, flowers, or fruit.⁹³ These intrusions do not constitute actual harm under the Hawaii Rule.⁹⁴ Injured owners can recover damages and require their neighbors to cut down the offending vegetation, if the situation requires.⁹⁵

III. ECONOMIC APPROACH TO NUISANCE LAW

A. *Conflicting Uses, Not Wrongful Uses*

Modern nuisance theory strongly supports treating vegetation as a nuisance, as it emphasizes the incompatibility of land uses instead of their inherent wrongfulness.⁹⁶ Under modern nuisance theory, conflict arises when neighboring parties use their property in ways that are incompatible with one another.⁹⁷ For example, a factory does not conflict with other sur-

⁸⁶ See, e.g., *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981); *Lane*, 92 S.W.3d 355, 362; *Fancher v. Fagella*, 650 S.E.2d 519, 544 (Va. 2007).

⁸⁷ *Whitesell*, 632 P.2d at 1079.

⁸⁸ The opinion does not say exactly how the tree limbs damaged the garage and van. *Id.* at 1078.

⁸⁹ After a storm, the tree limbs of the tree posed an imminent threat to the carport and driveway of the plaintiff. *Id.*

⁹⁰ *Id.* at 1078-79.

⁹¹ *Id.* at 1079.

⁹² *Id.*

⁹³ *Whitesell*, 632 P.2d at 1079.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See generally Coase, *supra* note 6; Calabresi & Melamed, *supra* note 7.

⁹⁷ See Coase, *supra* note 6, at 2.

rounding factories when it produces factory-like noise and emissions, but it is a nuisance when surrounded by property owners who want their properties free from factory-like noise and pollution—like homeowners.⁹⁸

Modern nuisance theory is especially helpful in resolving cases of offending vegetation. There is no inherent wrongfulness in allowing the growth of plants or vegetation on one's property; indeed, plant growth is a legitimate and often expected use of property.⁹⁹ Because of this realization, overgrowth of plant roots or branches is from the outset, reciprocal.¹⁰⁰ The Massachusetts Rule adopts the "live and let live"¹⁰¹ approach to encroaching vegetation, which implies that both property owners benefit by being free from litigation over such vegetation.

The Massachusetts Rule, however, ignores population growth and development in the United States, especially given that neighbors are living increasingly closer together.¹⁰² The Hawaii Rule provides a remedy for the modern era.¹⁰³

B. *Property Entitlements*

Property owners are entitled to use their property.¹⁰⁴ In an ideal world, when land uses conflict, the use entitlement would be allocated to the property owner who maximizes the total wealth of society through his land use.¹⁰⁵ Wealth maximization is determined by identifying where the property entitlement would end up in a frictionless marketplace (i.e., a world without transaction costs).¹⁰⁶ Would the injured land user buy the plant-

⁹⁸ See *id.* at 1-2.

⁹⁹ See *Harndon v. Stulz*, 100 N.W. 329, 330 (Iowa 1904) ("The raising of trees is a legitimate use to which the owner may put his land.").

¹⁰⁰ EPSTEIN, *supra* note 35, at 685.

¹⁰¹ *Id.* at 685-86.

¹⁰² See *Mahurin v. Lockhart*, 390 N.E.2d 523, 524 (Ill. App. 1979) ("The traditional rule of non-liability [for damage caused by cross-boundary vegetation] developed at a time when land was mostly unsettled and uncultivated.").

¹⁰³ See *Fancher v. Fagella*, 650 S.E.2d 519, 522 (Va. 2007) ("The 'Massachusetts Rule' has been criticized on the ground that it is unsuited to modern urban and suburban life . . .").

¹⁰⁴ RESTATEMENT (SECOND) OF TORTS § 822 (1979) (protecting one's "interest in the private use and enjoyment of land").

¹⁰⁵ Merrill, *supra* note 27, at 20-21. In this case there are two basic entitlements in consideration. One is the plant-owner's right to let his plant grow onto a neighbor's property at all costs. The other is the neighboring property owner's right to be free from damaging plant encroachment. *Id.*

¹⁰⁶ See *id.* As described best in Ronald Coase's seminal work, *The Problem of Social Cost*, transaction costs include a wide spectrum of barriers to trade, including "discover[ing] who it is that one wishes to deal with, . . . inform[ing] people that one wishes to deal and on what terms, . . . negotiations leading up to the bargain, . . . draw[ing] up the contract, . . . underta[king] the inspection needed to make sure the terms of the contract are observed, and so on. These operations are often extremely costly,

growth right from his neighbor, or would the plant grower outbid the injured land user to continue growing his or her plants?

According to the Coase Theorem, in a frictionless marketplace the property use entitlement would end up with the party who values it the most.¹⁰⁷ Parties would bargain with one another until all property is with the owner who values it most, creating wealth within society.¹⁰⁸ This is called Pareto optimality.¹⁰⁹ Theoretically, in a world with no transaction costs, bargaining parties would resolve all situations of cross-boundary vegetation.¹¹⁰ However, in the real world, there are significant barriers to trade between parties.

The two most significant barriers to trade in the case of cross-boundary vegetation are (1) the bilateral market in which neighbors bargain, and (2) the difficulty in identifying each neighbor's entitlements at the outset. Both parties might be unwilling to proceed with a contract if they are unsure of what exactly they are selling or buying.¹¹¹ In addition, the parties may not be able to reach agreement because they are stuck in a bilateral monopoly situation.¹¹² In a bilateral monopoly, where only one seller and one buyer exist (e.g., neighbors), many of the typical transaction costs preventing a bargain also do not exist.¹¹³ However, because bilateral markets lack competitors, "each party may engage in strategic behavior designed to maximize his own share of gains from trade resulting from a bargain."¹¹⁴ In these situations, one neighbor could be unwilling to accept another neighbor's unrealistically high subjective valuation of his property right, or he could be hesitant to accept a high subjective valuation for fear of paying too much (a shrewd neighbor could hold out, requesting an amount more than what he actually values his property right at).¹¹⁵ This is because there is no competitive market in which the land use right can be valued.¹¹⁶ In such situations, it is in both parties' interest to hide their sub-

sufficiently costly at any rate to prevent many transactions [that would otherwise occur.]" 3 J.L. & ECON. 1, 15 (1960).

¹⁰⁷ See Calabresi & Melamed, *supra* note 7, at 1094-95.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1093-94 ("[Pareto optimality is achieved when] no one could be made better off as a result of further transactions without making someone else worse off.").

¹¹⁰ *See id.*

¹¹¹ See Sterk, *supra* note 28, at 74-75.

¹¹² When a market has only one seller and one buyer, a situation exists which is known as a bilateral monopoly. *Id.* at 58. In this case, the market is cross-boundary rights between two specific neighbors.

¹¹³ *Id.* at 57-58. For example, parties do not need to incur costs discovering who it is that one wishes to deal with and informing the market that one wishes to deal.

¹¹⁴ *Id.* at 70. In this context, for example, a homeowner whose foundation is being damaged by a neighbor's root growth has no other party to bargain with than that neighbor.

¹¹⁵ *Id.* at 74-75.

¹¹⁶ *Id.*

jective valuations in order to extract the most gains possible from the bargain.¹¹⁷

Second, parties will be hesitant to trade before they actually know who owns what rights.¹¹⁸ This uncertainty is pronounced in a legal system with numerous land use distributions (such as the four distinct state rules in the American system) that make entitlement ownership unclear.¹¹⁹ Unknowingly, a party could buy a right to grow a tree cross-boundary when he already owns that land use entitlement (like under the Massachusetts Rule). Parties would have to incur costs in identifying which party already owns what rights in a particular jurisdiction.¹²⁰ After identifying ownership rights, the parties could then bargain around this land use distribution by buying or selling entitlements, such as the right to grow a plant cross-boundary or to build.¹²¹ The use of multiple nuisance rules causes uncertainty and inefficiency in the market of cross-boundary entitlements. Without transaction costs, cases of cross-boundary vegetation would, theoretically, be resolved.

To reach a comparable resolution in the real world, the courts should mimic how the frictionless marketplace would function in cases of cross-boundary vegetation. This arrangement is desirable because it better reflects how objective and reasonable buyers would value their rights and would entitle land users to the rights they would likely buy from their neighbor if not faced with a bilateral monopoly. If the courts get this allocation right, then the total wealth of society as a whole should increase.¹²²

Ultimately, this analysis boils down to one question: does the plant owner value his plant growth more, or does the building owner value his building more? Both owners assign a subjective value to their properties. Plants have desirable aesthetic qualities—they make the world more interesting to live in. Functionally, they provide shade and serve as boundaries between properties. More importantly, farmers rely on plants for their livelihood. Buildings and other structures also serve very useful functions. Homes provide shelter for people and personal property. Pipes provide running water to and waste removal from homes. Driveways and roads allow for access to property. Retaining walls allow for denser construction of structures where the natural landscape is uneven. Structures also provide places for people to conduct business.

¹¹⁷ See Sterk, *supra* note 28, at 74-75. The plant owner would claim that the plant's value is much higher than it really is, and the homeowner would also claim that the value of their home use right is also higher than it really is. Faced with these high prices, neither party would want to contract and the problem would go unresolved. *Id.*

¹¹⁸ See Baker, *supra* note 31, at 6.

¹¹⁹ See Sterk, *supra* note 28, at 75 ("a rule that is sufficiently uncertain in application would increase the frequency of litigation.").

¹²⁰ Merrill, *supra* note 27, at 23-25.

¹²¹ *Id.*

¹²² *Id.* at 20-21.

It is the court's role to assign valuations to these land uses when they conflict. They must approximate the valuations that competing parties assign to their land uses. Such an exercise is not as simple as merely saying that trees win all of the time, or that structures win all of the time; the decision must be made in context.

One classic example occurs when a tree's roots grow into and damage a neighboring home foundation. Where the tree is maintained purely for aesthetic reasons, the equitable solution is to give the land use entitlement to the homeowner.¹²³ The homeowner likely values his home very much as a land use—a place for shelter, raising a family, storing personal property, and maybe even conducting business. On the other hand, the aesthetic tree owner can only gain comfort from looking at the tree, using its shade, or gaining solace from some deeper personal attachment.

However, the result might change when the plant owner's valuation of his plant is greater *and* more apparent. For example, when the tree is part of an orchard, the question becomes much more difficult. An orchard tree is more valuable to society as a whole because it is worth a great deal of capital to the orchard owner,¹²⁴ and its objective value is more easily determinable than an aesthetic tree.¹²⁵ The tree is part of the orchard owner's business and livelihood as well as a productive use of property in and of itself. The holdout problem in situations like this could be more severe when both neighboring landowners view their respective land uses as greatly valuable and legitimate. This land conflict scenario is not insurmountable, as will be shown.

Society's "wealth distribution preferences" also explain the allocation of property use entitlements in nuisance cases concerning vegetation.¹²⁶ One such preference is land use and productivity.¹²⁷ Calabresi and Melamed state that one preference society may have is that "producers ought to

¹²³ The possible exception is the case where a tree or plant has objective historical or scientific value (such as ancient redwoods, the copse of trees on Cemetery Ridge, or endangered plant species). This is a peculiar situation where the tree owner might win out.

¹²⁴ See *Miller v. Schoene*, 276 U.S. 272 (1928). In *Miller*, the Supreme Court held that it was not a denial of due process under the 14th Amendment for the state of Virginia to have diseased trees removed without compensation, when they threatened a nearby apple orchard. *Id.* at 279-280. Without deciding whether the diseased trees constituted a common law nuisance, the *Miller* Court held that Virginia's removal of the trees was valid because it was stuck with making a "choice between the preservation of one class of property and that of the other where[] both existed in dangerous proximity." *Id.* The Court upheld Virginia's implicit protection of productive use of land—the orchard. See *id.* at 280 (referring to "social policy" and "public interest"). Similar logic can be applied to cases where vegetation is causing damage to neighboring orchards by root or limb growth.

¹²⁵ See *McBride v. Duckworth*, 232 So. 2d 122, 124-5 (La. Ct. App. 1970) (valuing naturally growing trees less than those that are part of a "landscape plan"); see also Calabresi & Melamed, *supra* note 7, at 1110.

¹²⁶ *Id.* at 1098.

¹²⁷ *Id.*

be rewarded since they will cause everyone to be better off in the end.”¹²⁸ In cases where an aesthetic tree is causing damage to a structure, it might make sense to side with the structure owner to further a societal preference for development. In contrast, society’s preference for development is not as clear in cases where a cash crop, such as an orchard tree, causes damage to a structure. In this situation, the distributional preference of society is likely split between both parties.

C. Remedies in Property and Liability Rules

There are multiple ways to enforce property entitlements. After the property entitlement is determined, Calabresi and Melamed propose two alternatives for protecting the entitlement: a property rule or a liability rule.¹²⁹

A property rule allows the entitlement owner to continue his land use, with the other party’s recourse limited to voluntarily buying the right from its owner.¹³⁰ For example, consider the situation where a property owner has a tree on his property whose roots grow into and damage the foundation of his neighbor’s home. In this situation, if the land use entitlement is given to the homeowner, protected by a property rule, the tree owner would have to remedy the nuisance by cutting down the tree or cutting back its roots. On the other hand, if the land use entitlement is given to the tree owner, protected by a property rule, the homeowner’s only remedy would be to cut the tree roots back to the boundary line—even if they are a recurring problem. Both parties, regardless of the land use entitlement allocation, have the option of voluntarily purchasing the entitlement from the opposite party. This might include purchasing a portion of the other party’s property, maintaining the damage caused by the tree, or managing the growth of the tree.

A liability rule would allow the entitlement holder to continue his land use, but only after paying the other party for damages associated with that use.¹³¹ Consider the situation above, except now a liability rule is used to protect the land use entitlement. If the homeowner is given the land use entitlement, he could have the tree owner cut down the tree or cut back its roots at his own expense. Conversely, if the tree owner is given the land use entitlement, he could continue to grow the tree, but only after paying for damages caused by root growth, such as cracks in the homeowner’s foundation or clogged plumbing. The difference from the property rule protection is that the party receiving the entitlement has to pay to use it.¹³²

¹²⁸ *Id.*

¹²⁹ *Id.* at 1105-08.

¹³⁰ *Id.* at 1105.

¹³¹ Calabresi & Melamed, *supra* note 7, at 1105-06.

¹³² *See id.* at 1105-06; Sterk, *supra* note 28, at 75.

If the transaction costs of transferring the entitlement are high, a liability rule is preferable.¹³³ If the costs are low, a property rule is preferable.¹³⁴ These preferences are evident in situations where the court can more efficiently impose a collective valuation of the entitlement than the voluntary market.¹³⁵ For example, in the context of cross-boundary vegetation, where a bilateral monopoly exists, it might make more sense for the court to force a compromise on the parties with a liability rule.¹³⁶ This is especially true in cases where the subjective value of the parties is presumably very great, but hidden.¹³⁷

The selection of a property rule or a liability rule in the case of cross-boundary vegetation depends on the circumstances of each case. First, where the roots of an aesthetic tree are damaging a neighbor's foundation, the application of a property rule might make more sense. The respective valuations of the competing parties are quite lopsided, with the homeowner likely valuing his land use more. By giving the entitlement to the homeowner protected by a property rule, the entitlement goes to the party that likely values it more and a benchmark is established for future transactions.¹³⁸ While the parties might not be able to easily determine objective prices right now, they can likely foresee how a court would resolve the matter.¹³⁹ This guidepost gives them a standard to bargain by, with the aesthetic tree owner realizing that he would not be able to sell his right for an unrealistically high price because he could lose if taken to court.¹⁴⁰ More importantly, employing a property rule in cases of aesthetic vegetation furthers society's preference for the development of land.¹⁴¹

However, in closer cases where the valuations of the competing parties are closer, such as the above-described orchard example, then a liability rule would be preferable. Because of a more severe bilateral monopoly problem, the parties might not be able to agree on what property rights belong to each party. The court could supply the answer in these situations with an equitable remedy that might require the orchard tree owner to remove the tree, but requiring the home/structure owner to pay for the orchard tree and the loss of that tree's productivity.

¹³³ See Calabresi & Melamed, *supra* note 7, at 1106.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1109-10.

¹³⁶ See Merrill, *supra* note 27, at 14; Calabresi & Melamed, *supra* note 7, at 1106-07.

¹³⁷ Calabresi & Melamed, *supra* note 7, at 1106-07.

¹³⁸ See Sterk, *supra* note 28, at 75.

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ See Calabresi & Melamed, *supra* note 7, at 1110.

An objective value can likely be placed on orchard trees (or crops in another situation) because their produce is traded on the open market.¹⁴² Courts can pinpoint the productivity of these plants and their value to their respective owners better than a purely aesthetic plant. By essentially forcing a compromise onto the parties with a liability rule, the court also better respects society's preference for development of land¹⁴³ by giving almost equal value to crops and structures.

D. *Explaining the Currently Existing State Doctrines With Property and Liability Rules*

The Virginia Rule allocates the land use entitlement based upon the noxiousness of the plant at issue.¹⁴⁴ The rule does not consider wealth maximization between the parties or society's likely interest in promoting productive property use.¹⁴⁵ If the tree is noxious, the homeowner has the land use entitlement, which is protected by a property rule. If the tree is not noxious, the tree owner has the land use entitlement, also protected by a property rule. In the situation where the tree owner has a non-noxious tree (such as the privet hedge in *Smith*) that causes substantial damage to the homeowner's foundation, the homeowner is out of luck, short of buying the use right from the neighbor.¹⁴⁶

The Restatement Rule allocates the land use entitlement based upon the nature of the tree's origin—natural or artificial.¹⁴⁷ The land use entitlement goes to the tree owner if the vegetation is natural or to the homeowner if the vegetation is artificial.¹⁴⁸ This result is arbitrary for the same reasons cited as the Virginia Rule,¹⁴⁹ as well as the Restatement Rule's attempt to borrow trespass doctrine's requirement of a positive act for liability (that of planting the vegetation).¹⁵⁰ More importantly, the rule snubs development by assigning liability to the party that affirmatively plants vegetation on his

¹⁴² See, e.g., *Virginia Market News Service*, VA. DEP'T OF AGRIC. AND CONSUMER SERV., <http://www.vdacs.virginia.gov/marketnews/index.shtml> (last visited Jan. 9, 2011) (an example of the availability of agricultural commodity prices in Virginia).

¹⁴³ See Calabresi & Melamed, *supra* note 7, at 1110.

¹⁴⁴ See, e.g., *Smith v. Holt*, 5 S.E.2d 492, 495 (Va. 1939) (finding that liability is determined based on noxiousness of the plant).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., *Ken Cowden Chevrolet, Inc. v. Corts*, 316 N.W.2d 259, 261 (Mich. Ct. App. 1982).

¹⁴⁸ *Id.*

¹⁴⁹ The Restatement Rule also does not consider wealth maximization between the parties, or society's likely preference for productive land use. See, e.g., *Smith*, 5 S.E.2d at 495 (finding that liability is determined based on noxiousness of the plant).

¹⁵⁰ See, e.g., *Corts*, 316 N.W.2d at 261 ("In order to create a legal nuisance, the act of man must have contributed to its existence.") (quoting *Merriam v. McConnell*, 175 N.E.2d 293, 296 (Ill. App. Ct. 1961)).

property, presumably with some plan in mind, instead of to the party allowing existing or natural vegetation to grow wildly.

The Massachusetts Rule gives the use entitlement to the plant owner, protected by a property rule. The rule does not allow the homeowner to recover from the tree owner, even where the tree root growth causes actual damage to the homeowner's foundation.¹⁵¹ The only way the injured homeowner can abate the nuisance is by self-help or purchasing of the tree owner's use entitlement.¹⁵² The self-help remedy provided by the Massachusetts Rule is insufficient because the tree roots often grow back, causing the homeowner to continually trim the tree roots. This puts a burden on the homeowner to contain the tree owner's land use, when the tree owner should have the responsibility to ensure that his tree does not damage others' property.¹⁵³

Alternatively, having the homeowner purchase the land use entitlement from the tree owner is also insufficient. The tree owner may value his tree use very highly and make the cost for purchasing the tree use entitlement very expensive for the homeowner. The tree owner may also be a dishonest bargainer who prices the tree value very high even though it has a low subjective value to him. This would put the homeowner in the same situation he would be in if the tree owner priced his value honestly, but it would allow the tree owner to capture extra profit. Courts should not allocate the property rule-protected use entitlement to the vegetation owner because it does not maximize the wealth of society. It perversely favors the tree owner who is idle with his land use over those who develop and use their land.

The Hawaii Rule allows an injured landowner to have his neighbor cut down vegetation that causes actual or imminent harm to his property.¹⁵⁴ In the situation of a tree owner whose roots damage the foundation of a homeowner, the tree owner would likely be required to remove the tree from his property or to continually cut back the roots as well as pay for any damage already caused by the tree.¹⁵⁵ This rule gives the property rule-protected land use entitlement to the homeowner.¹⁵⁶ It favors development of land over uncontrolled plant growth.

¹⁵¹ Michalson v. Nutting, 175 N.E. 490, 490-91 (Mass. 1931).

¹⁵² See *id.*

¹⁵³ This is consistent with the equity maxim *sic utere tuo ut alienum non laedas*—"so use your own as not to injure another's property." BLACK'S LAW DICTIONARY 1872 (9th ed. 2009).

¹⁵⁴ Whitesell v. Houlton, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.* at 1077, 1079 (deciding in favor of a homeowner by requiring the plant owner to pay for all damages caused to the homeowner's garage and van by a tree's limb growth).

E. *Self-Help and the Property/Liability Rules Analysis*

Calabresi and Melamed did not address self-help in their discussion of property and liability rule remedies.¹⁵⁷ Self-help in abating a vegetation nuisance is an extra-judicial remedy, following the geometric-box that the *ad coelum* doctrine conceptualizes.¹⁵⁸ Self-help, however, does not affect how the economic analysis applies to situations where vegetation nuisance issues go to court because self-help is a remedy that allows an owner to abate a nuisance without resorting to the judicial system.¹⁵⁹

In the context of cross-boundary vegetation, at least one court has said that self-help creates a “law of the jungle” mentality amongst neighbors.¹⁶⁰ But generally, all courts allow self-help where cross-boundary vegetation is at issue.¹⁶¹ In cases of encroaching vegetation, the party using self-help only cuts the vegetation to the boundary line and does not enter the property of another. The *ad coelum* doctrine provides a cognizable limit on self-help because people usually understand their property boundaries, and therefore, how far back they can cut objectionable vegetation.

Ultimately, self-help does not pose a problem for this analysis, and can be sidestepped by focusing on those nuisance cases where the plant growth is absolutely incompatible with the neighboring landowner. After all, cases where land uses are absolutely incompatible, in this context, are usually those where self-help has failed and the offending vegetation has regrown, causing further property damage to a neighbor. Simply put, if self-help was an adequate remedy in a particular situation, it is unlikely that courts would ever hear that case anyway.

¹⁵⁷ See Calabresi & Melamed, *supra* note 7.

¹⁵⁸ *Aman v. Aushwitz*, 1984 WL 179972, at *2 (Wis. Ct. App. Dec. 21, 1984).

¹⁵⁹ See Jon K. Wactor, *Self-Help: A Viable Remedy for Nuisance? A Guide for the Common Man's Lawyer*, 24 ARIZ. L. REV. 83, 88-89 (1982).

¹⁶⁰ *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 361 (Tenn. 2002).

¹⁶¹ See *Garcia v. Sanchez*, 772 P.2d 1311, 1314 (N.M. 1989) (quoting Robert Roy, *Enforcement of Trees, Shrubbery, or Other Vegetation Across Boundary Line*, 65 A.L.R. 4TH 603, 616-17 (1988)) (“The courts have generally recognized that vegetation penetrating adjacent property presents a type of legal problem for which the remedy of self-help can be invoked.”); *Aman*, 1984 WL 179972 at *2 (“This absolute self-help removal right, when tested in any American court, has been universally approved.”).

V. THE MODIFIED HAWAII RULE & EXAMPLE APPLICATIONS TO ACTUAL CASES

A. *Why A Modified Hawaii Rule Is Preferable*

The Hawaii Rule provides redress to those who only suffer actual damage.¹⁶² The rule is limited to cases where land uses fundamentally conflict, where self-help is not an option, or where self-help has failed.¹⁶³ As previously described, courts have increasingly favored the development of property over less productive (albeit still enjoyable) uses of land, such as viewing and enjoying vegetation.¹⁶⁴

However, because of this preference for land development, the Hawaii Rule does not adequately protect the interests of farmers and others who objectively value their plants. The rule does not protect plants against damage from other plants¹⁶⁵ or cash crops that damage buildings.¹⁶⁶ In the orchard example given earlier, the Hawaii Rule would require the removal of the offending trees without compensating the orchard owner. However, we have established that the orchard owner likely values these trees highly, given their role in his livelihood. So in this case, where the transaction costs are high and the parties' respective rights (and valuation) are unclear, the court should use a liability rule to protect the parties' respective interests. This means that in "tiebreaker" situations, the court should require the winner of the land use entitlement (usually a structure owner) to pay for their land use by employing a liability rule.¹⁶⁷ In addition, the court can award a legal remedy by requiring the orchard owner to pay for repairs to the homeowner's property. In the case of objectively valuable vegetation, a modified Hawaii Rule is preferable.

B. *Tree Roots and Branches: The Classic Example*

In *Fancher v. Fagella*, the plaintiff, an injured homeowner, sued for property damages caused by overhanging tree limbs and invasive roots

¹⁶² See, e.g., *Whitesell v. Houlton*, 632 P.2d 1077, 1079; *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 362 (Tenn. 2002); *Fancher v. Fagella*, 650 S.E.2d 519, 521 (Va. 2007).

¹⁶³ See, e.g., *Lane*, 92 S.W.3d at 358 (showing that self-help proved ineffective because the tree limbs grew back).

¹⁶⁴ See, e.g., *Whitesell*, 632 P.2d at 1077; *Lane*, 92 S.W.3d at 355; *Fancher*, 650 S.E.2d at 519.

¹⁶⁵ See *Whitesell*, 632 P.2d at 1079 (holding that "overhanging branches or protruding roots constitute a nuisance only when they actually cause, or there is imminent danger of them causing, sensible harm to property other than plant life").

¹⁶⁶ The rule does not distinguish among types of plants that cause actual damage. See *id.*

¹⁶⁷ See *Merrill*, *supra* note 27, at 14.

from his neighbor's tree.¹⁶⁸ The tree damaged the homeowner's masonry retaining wall, displaced his patio pavers, blocked his sewage system, and "impaired" his house's foundation.¹⁶⁹ The homeowner used self-help to cut back the overhanging branches and roots. He attempted to repair the retaining wall separating the parties, but the tree's roots and branches grew back, causing continuing damage to the homeowner's property.¹⁷⁰

Applying the Hawaii Rule, the court would require the plant owner to cut down his tree and pay damages to cover the cost of repairing the homeowner's masonry wall, displaced pavers, blocked sewage system, and damaged foundation.¹⁷¹ The court would not require the plant owner to pay for the falling leaves and debris if the homeowner did not show actual damages.¹⁷² This result protects the homeowner's property use entitlement by a property rule.

In *Lane v. W.J. Curry & Sons*, the homeowner sued for damages caused to her home by the overhanging limbs and invading roots of her neighbor's tree.¹⁷³ The overhanging branches rested on the homeowner's roof, preventing it from drying and causing it to rot.¹⁷⁴ Water leaked into the home, causing pieces of the ceiling to fall.¹⁷⁵ The tree's roots clogged the homeowner's septic lines, causing "severe" plumbing problems.¹⁷⁶ Raw sewage "bubbled" up into the homeowner's bathtub, and she was unable to use her toilet, bathtub, or sink for several years.¹⁷⁷ Needless to say, the damage caused in this case was quite severe.¹⁷⁸

Moreover, the homeowner was physically incapable of effecting self-help and could not afford to hire someone.¹⁷⁹ She contacted her neighbor in an effort to remedy the problem.¹⁸⁰ The tree owner had some of the tree limbs cut to the property line, but they grew back.¹⁸¹ The tree owner declined to maintain them going forward.¹⁸²

Applying the Hawaii Rule, the court would require an extensive remedy.¹⁸³ The tree owner would have to pay to repair the homeowner's roof,

¹⁶⁸ *Fancher*, 650 S.E.2d at 520.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 523.

¹⁷² *Id.* at 522.

¹⁷³ *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 356 (Tenn. 2002).

¹⁷⁴ *Id.* at 357.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ *Lane*, 92 S.W.3d at 357.

¹⁸⁰ *Id.* at 358.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See id.* at 365-66.

ceiling, septic lines, toilet, bathtub, and sink.¹⁸⁴ This result is especially informative because it is a scenario where the court protects a structure owner who lacks the physical capability to engage in self-help. On the other hand, if the Massachusetts Rule were applied, the homeowner would have no equitable or legal remedy.¹⁸⁵

C. *Small Falling Objects Such as Leaves and Fruit*

In *Bandy v. Bosie*, a homeowner sued for the removal of his neighbors' trees which dropped leaves and tree sap onto his property, and whose roots caused his septic line to clog.¹⁸⁶ The homeowner did not allege that actual harm resulted from the falling leaves or tree sap.¹⁸⁷ The *Bandy* court relied on the Restatement Rule, finding that the homeowner failed to allege that the tree was artificial (i.e., planted).¹⁸⁸ When applying the Hawaii Rule, the falling leaves and sap also do not constitute a nuisance because they did not cause actual harm.¹⁸⁹

D. *Objectively Valuable Vegetation/Cash Crops*

In *Langer v. Goode*, a crop owner sued when his neighbor's mustard plants grew onto his property.¹⁹⁰ The mustard plants caused a loss of crops equaling \$1,500 in 1911.¹⁹¹ The court, following a precursor to the Massachusetts Rule, declined to award damages, holding that the mustard owner had no duty to the crop owner.¹⁹²

In this case a modified Hawaii Rule is preferable to the four rules used in practice. Where a party, in this case a farmer,¹⁹³ uses his land to profit primarily from growing plants (say, crops), the crops should be protected. Because the mustard owner never alleged that the mustard was maintained for profit,¹⁹⁴ and not just growing wildly on his property, it would be treated as an aesthetic plant. The modified Hawaii Rule would benefit the crop

¹⁸⁴ *Id.*

¹⁸⁵ *See, e.g.*, Michalson v. Nutting, 175 N.E. 490, 490-91 (Mass. 1931).

¹⁸⁶ *Bandy v. Bosie*, 477 N.E.2d 840, 840 (Ill. App. Ct. 1985).

¹⁸⁷ *See id.* at 840-41. The court denied plaintiff's claim that defendant's tree roots damaged her plumbing because the plaintiff did not allege that the tree at issue was artificially planted, failing to satisfy the Restatement (Second) of Torts rule applied by the courts. *Id.* at 841.

¹⁸⁸ *Id.* at 841.

¹⁸⁹ *See, e.g.*, Whitesell v. Houlton, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981).

¹⁹⁰ *Langer v. Goode*, 131 N.W. 258, 258 (N.D. 1911).

¹⁹¹ *See id.*

¹⁹² *Id.* at 260-61 (the statute on point was interpreted by the court to not allow for liability).

¹⁹³ *See id.* at 258.

¹⁹⁴ *See id.* at 258-61.

owner through a property rule using objective valuation of the crops to determine damages.¹⁹⁵ In addition, his productive use of land would be protected because of society's preference for development.¹⁹⁶ The modified Hawaii Rule recognizes that aesthetic plant owners and cash crop owners probably value their plants differently.

E. *Imminent Harm*

In *Cannon v. Neuberger*, a building owner sued his neighbor for the removal of five trees that had extensive root systems and threatened to fall onto his property.¹⁹⁷ The three trees were tall and partially dead.¹⁹⁸ Although the *Neuberger* opinion is not clear as to whether the trees imminently threatened actual property damage, it does state that buildings were on the plaintiff's property.¹⁹⁹

There is no evidence that the building owner in *Neuberger* tried to effect self-help.²⁰⁰ This is probably because abating the threat from falling trees would require a trespass onto the plant owner's property.

Applying the Hawaii Rule, assuming the trees posed actual imminent property damage, the court would require the plant owner to eliminate the source of the threat.²⁰¹ This might not require the elimination of the offending vegetation in its entirety. For example, in *Neuberger* the court required the plant owner to remove the top twenty feet and any dead portions of the three trees.²⁰²

CONCLUSION

The modified Hawaii Rule is a modern application of the old equity maxim: *sic utere tuo ut alienum non laedas*—"so use your own as not to injure another's property."²⁰³ When a plant crosses onto another person's property and causes actual damage, the damaged property owner should have a remedy.

In a frictionless marketplace, parties would contract with one another to resolve cases of damaging cross-boundary vegetation. A homeowner

¹⁹⁵ See Calabresi & Melamed, *supra* note 7, at 1110.

¹⁹⁶ See *id.* at 1098 (discussing societal wealth distribution preferences and the conceptual frameworks in which those preferences may be analyzed).

¹⁹⁷ *Cannon v. Neuberger*, 268 P.2d 425, 425-426 (Utah 1954).

¹⁹⁸ See *id.*

¹⁹⁹ *Id.* at 426.

²⁰⁰ See *id.* at 425-26.

²⁰¹ See, e.g., *Whitesell v. Houlton*, 632 P.2d 1077, 1079 (Haw. Ct. App. 1981).

²⁰² *Neuberger*, 268 P.2d at 425-26 (upholding the remedy granted in the lower court).

²⁰³ BLACK'S LAW DICTIONARY 1872 (9th ed. 2009).

would buy his neighbor's right to tree growth (to maintain his home or its foundation), and the tree owner would buy the homeowner's right to build a structure (to keep his tree). In a perfect world, the party that values his land use more would obtain the property right. However, transaction costs prevent these transactions from ever occurring. It is the duty of the courts to mimic the market to protect the landowner who values their land use the most.

A modified Hawaii Rule best mimics the market. In most cases, the rule would side with structure owners and their naturally high subjective value and reflect society's preference for development. But it would also respect those people who objectively value plants (such as farmers) by protecting the interest they have in their plants with a liability rule. A modified Hawaii Rule should be adopted in the individual states. A uniform rule would clarify property rights, reduce litigation, and protect traditional notions of property—namely, the right to exclude, the right of use and enjoyment, and the *ad coelum* rule.



CONGRESSIONAL UNDERLAY:¹ THE WEAKNESSES OF PROPOSED
ONLINE GAMBLING REGULATIONS

*Laura A. Lieberman**

INTRODUCTION

There is often little consensus on the effects of regulation, even amongst colleagues in the same field.² Morality-backed regulation in particular is a popular subject of public criticism. Attempts to ban purportedly immoral behavior often only encourage said illegal behaviors³ and can even damage the economy.⁴ For example, Prohibition did not stop drinking, but instead “destroyed America’s once-robust brewing industry, [and] made smugglers rich.”⁵ Alcohol is not the only “vice” Congress has tried to regulate. Congress has also tried to regulate gambling through regulations such as the Wire Act,⁶ the Travel Act,⁷ the Illegal Gambling Business Act,⁸ and most recently, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).⁹ The UIGEA prohibits third-party organizations from providing monetary transfer services for online gambling companies.¹⁰ When passing this statute, Congress said placing sanctions on these third parties was ne-

¹ Casino-Info.com, Glossary of Gambling Terms, http://www.casino-info.com/gambling_tips/glossary_t_w.html (last visited Sept. 12, 2011) (“[U]nderlay: A bad bet; an event that has more money bet on its happening than can be justified by the probability of it happening.”).

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² See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (explaining the difference in the economist Arthur Pigou’s view of regulation as necessary to offset pollution and his own more critical view).

³ Gerd Alexander, iBrief, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 2008 DUKE L. & TECH. REV. 006, ¶ 45 (2008).

⁴ *Online Gambling: You Bet*, ECONOMIST, Jul. 8, 2010, available at http://www.economist.com/node/16539402?story_id=16539402.

⁵ *Id.* at 14.

⁶ Wire Act, Pub. L. No. 87-216, § 2, 75 Stat. 491(1961) (codified as amended at 18 U.S.C. § 1084 (2006)).

⁷ Travel Act, Pub. L. No. 87-228, § 1(a), 75 Stat. 498 (1961) (codified as amended at 18 U.S.C. § 1952 (2006)).

⁸ Illegal Gambling Business Act, Pub. L. No. 91-452, Title VIII, § 803(a), 84 Stat. 937 (1970) (codified as amended at 18 U.S.C. § 1955 (2006)).

⁹ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–67 (2006)).

¹⁰ *Id.* §§ 5363–5364, 5367.

cessary to enforce preexisting gambling prohibitions.¹¹ The statute's vagueness, different evasion tactics employed by gamblers and website owners, and limited federal and state enforcement capabilities have allowed online gambling to flourish, however.¹² The UIGEA has also strained relations with other countries,¹³ and online gambling activities have become intertwined with other illegal activities, particularly money laundering.¹⁴ Since Congress passed the UIGEA, different proposed bills have sought to correct these problems.¹⁵ In 2009, the House Financial Services Committee introduced the Internet Gambling Regulation, Consumer Protection, and Enforcement Act (IGRCPEA), and on July 28, 2010, it approved the bill.¹⁶ Senator Jim McDermott also reintroduced the Internet Gambling Regulation and Tax Enforcement Act (IGRTEA) to serve as a companion bill for the IGRCPEA.¹⁷ McDermott originally introduced this bill in 2009 to complement to IGRCPEA, and it taxed online gambling.¹⁸ The reintroduced version would hand over 6% on the taxes to state governments.¹⁹ Certain gambling associations praise these bills, including the Poker Players Alliance²⁰ and some gambling websites.²¹ There is reason, however, to doubt the effectiveness of these bills. Many gamblers have evaded the UIGEA

¹¹ *Id.* § 5361(a)(4) ("New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.").

¹² Sewell Chan, *Online Betting Barred by U.S. Gets 2nd Look*, N.Y. TIMES, July 29, 2010, at A1; Mark Aubuchon, Comment, *The Unlawful Internet Gambling Enforcement Act of 2006: A Parlay of Ambiguities and Uncertainties Surrounding the Laws of the Internet Gambling Industry*, 7 APPALACHIAN J.L. 305, 306 (2008).

¹³ Alben Peters, *Latest Developments in the WTO Internet Gambling Dispute and Challenges Ahead*, J. INTERNET L., May 2010, at 3, 3-5; Bernhard Maier, *How Has the Law Attempted to Tackle the Borderless Nature of the Internet?*, 18 INT'L J.L. & INFO. TECH. 142, 168-69 (2010).

¹⁴ Alexander, *supra* note 3, ¶ 35; Anne Von Lehman, Note, *American Entrepreneurs and Internet Gambling: Are the Odds Stacked Against Them?*, 3 ENTREPRENEURIAL BUS. L.J. 135, 145-46 (2008).

¹⁵ See Internet Gambling Regulation and Enforcement Act of 2007, H.R. 2046, 110th Cong. (2007); Internet Gambling Regulation and Tax Enforcement Act of 2007, H.R. 2607, 110th Cong. (2007).

¹⁶ Chan, *supra* note 12; Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009).

¹⁷ Kevin Bogardus, *McDermott Bill Would Use Revenue from New Online Gaming Tax for Foster Kids*, THE HILL, Mar. 25, 2010, available at <http://thehill.com/business-a-lobbying/88949-mcdermott-bill-would-use-gaming-tax-for-foster-kids>; Internet Gambling Regulation and Tax Enforcement Act of 2010, H.R. 4976, 111th Cong. (2010).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Press Release, Poker Players Alliance, PPA Praises Passage of H.R. 2267, Internet Gambling Regulation Bill (July 28, 2010), available at <http://theppa.org/press-releases/2010/07/28/press-release-ppa-praises-passage-of-h-r-2267-internet-gambling-regulation-bill-072810/> (supporting the IGRCPEA).

²¹ Bogardus, *supra* note 17 ("The new bill has the backing of online gambling companies that want their business to be legalized. They believe this could help create new jobs and bring in new government revenue . . .").

successfully,²² and the provisions of the new bills do not offer gamblers many significant incentives to comply. A cost–benefit analysis of these incentives suggests that many gamblers will find it cost-efficient to evade the new legislation’s provisions as well.²³ Gamblers’ incentives are important because, in markets, the law of demand rules.²⁴ If the increased costs of legislation reduce consumers’ demand, then there will be less incentive for entrepreneurs to enter the legal online gambling industry. The IGRCP EA, then, will have a net negative impact on the United States’ economy.

Part I of this comment explains the existing gambling regulations and the ease with which gamblers evade the legislative efforts to eliminate online gambling. Part II examines the IGRCP EA’s contents. Part III conducts a cost–benefit analysis that accounts for factors such as the new legislation, technology, and gamblers’ mentalities. Part IV describes the IGRTEA and discusses similar concerns about incentives and compliance. Because the IGRTEA is a companion bill and has yet to go through a congressional hearing,²⁵ it is not the main focus of this comment, but is a relevant bill to consider in determining the IGRCP EA’s merits. Finally, Part V suggests solutions to offset the disincentives to complying with the IGRCP EA.

I. CURRENT REGULATION

Congress passed the UIGEA in 2006 as part of the SAFE Port Act, which Congress enacted partly to “improve maritime and cargo security through enhanced layered defenses.”²⁶ Congress received support for the UIGEA from sports organizations and religious groups that are morally opposed to gambling.²⁷ Casinos also supported banning online gambling in an attempt to protect their revenues.²⁸ The UIGEA seeks to stop online gambling by prohibiting owners of gambling websites from accepting payments from patrons.²⁹ The UIGEA specifically bans electronically-transferred payments to these sites, such as payments made with credit

²² Chan, *supra* note 12.

²³ *Infra* Part III.

²⁴ JAMES D. GWARTNEY ET AL., *ECONOMICS: PRIVATE & PUBLIC CHOICE* 58 (11th ed. 2006) (defining the law of demand as “a principle that states there is an inverse relationship between the price of a good and the quantity of it buyers are willing to purchase.”).

²⁵ Bogardus, *supra* note 17.

²⁶ Security and Accountability for Every Port Act of 2006, Pub. L. No. 109–347, 120 Stat. 1884 (codified as amended in scattered portions of 6 U.S.C.).

²⁷ Bogardus, *supra* note 17.

²⁸ See *Online Gambling: You Bet*, *supra* note 4 (“A desire to protect existing businesses from such disruption is one motive for banning online betting: Vegas knows how to protect its turf.”).

²⁹ 31 U.S.C. § 5363(1)-(4) (2006).

cards or through transferal services.³⁰ Additionally, owners and employees of gambling websites are liable for their knowledge of illegal monetary transfers.³¹

Despite certain successes, the UIGEA has not been a panacea. Since the ban took place, governmental authorities have arrested individuals and entities involved in the online gambling industry³² and frozen some online payment services' accounts.³³ Many major financial intermediaries complied with federal and state governments.³⁴ Regardless of the ban, however, many gamblers have found ways to evade detection, gambling more than \$6 billion over the Internet every year.³⁵ Gamblers themselves even testified to the proliferation of illegal online gambling; in her lobbying efforts for the IGRCPEA, one professional poker player stated that, “[t]oday, any American with a broadband connection and a checking account can engage in any form of Internet gambling from any state.”³⁶

There are several commonly used online evasion strategies.³⁷ One particular online payment processor is an “offshore e-wallet.”³⁸ These offshore financial intermediaries make it difficult for American financial businesses to determine whether transactions are related to gambling—thus online gambling websites recommend the private wallets to their customers in the absence of publicly traded ones.³⁹ The UIGEA has facilitated the flourishing of the private e-wallets.⁴⁰ Specifically, when several publicly-traded gambling websites interpreted the UIGEA to mean that online gambling is expressly prohibited and left the United States,⁴¹ new private e-wallets, subject to less governmental inspection, entered the market to fill this gap.⁴²

³⁰ *Id.* § 5363(1)-(2).

³¹ *Id.* § 5367(1)-(2).

³² Alexander, *supra* note 3, ¶ 35 (explaining how the Department of Justice arrested two founders of NETeller, the “most widely-used publicly traded e-wallet” in the U.S. Virgin Islands); Maier, *supra* note 13, at 167; Chan, *supra* note 12 (describing the arrest of a British businessman for racketeering).

³³ Chan, *supra* note 12.

³⁴ JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 82 (2006) (describing how Paypal and credit card companies complied with New York Attorney General Eliot Spitzer’s attempts to prevent online gambling after he threatened them with prosecution).

³⁵ Chan, *supra* note 12; *cf.* Jeff Hwang, *The State of Online Gambling*, THE MOTLEY FOOL, (Nov. 18, 2010), <http://www.fool.com/investing/general/2010/11/18/the-state-of-online-gambling.aspx> (noting that the president of the American Gaming Association reported the American online gaming industry was at \$5.4 billion as of Nov. 2010).

³⁶ Chan, *supra* note 12.

³⁷ *Id.* (identifying online payment processors, phone-based deposits, and prepaid credit cards as some of the strategies); *see also* GOLDSMITH & WU, *supra* note 34 (explaining that many gamblers have also used offshore bank accounts for gambling).

³⁸ Alexander, *supra* note 3, ¶ 33.

³⁹ *Id.* ¶ 35.

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 34.

⁴² *Id.* ¶¶ 34, 35.

Another evasion tactic involves the merchant codes used for gambling services.⁴³ Every type of business has its own merchant code that credit card companies distribute. The companies in turn, block the code used for online gambling.⁴⁴ Even though many gambling sites, such as NETeller, the “most widely-used publicly-traded e-wallet,”⁴⁵ have left the U.S., remaining American gambling websites have absorbed the fleeing websites’ customers.⁴⁶ These gambling websites simply use a different merchant code so that credit card companies will still allow customers to deposit money in the websites.⁴⁷

Even though the government has arrested prominent figures in the illegal gambling industry,⁴⁸ there are still concerns that existing legal loopholes can challenge the legitimacy of illegal gambling convictions.⁴⁹ For example, many of those involved in the industry are foreigners, for whose prosecution there is only limited legal precedent.⁵⁰ The UIGEA also gives the Secretary of the Treasury the discretion to exempt payment systems from compliance if enforcement seems impractical.⁵¹ Another example of legal vagueness is found within the UIGEA’s own provisions. Specifically, it does not define “unlawful internet gambling,” but rather says that the term “means to place, receive, or otherwise knowingly transmit a bet or wager . . . where such bet or wager is unlawful under any applicable Federal or State Law.”⁵² Consequently, these loopholes and vague definitions result in differences in interpretation and application.⁵³

These unclear definitions also helped undermine the UIGEA’s own effectiveness. It targets only the third-party entities that enable the monetary transactions necessary for online gambling.⁵⁴ In fact, the Department of Justice explicitly clarified that it would not prosecute actual gamblers.⁵⁵ As

⁴³ See Aubuchon, *supra* note 12, at 310.

⁴⁴ *Id.*

⁴⁵ Alexander, *supra* note 3, ¶ 35.

⁴⁶ See Aubuchon, *supra* note 12, at 311.

⁴⁷ See *id.* at 310.

⁴⁸ See Alexander, *supra* note 3, ¶ 35 (discussing the arrests of NETeller’s founders); Maier, *supra* note 13, at 167 (“[T]here have been numerous high profile arrests of individuals related to the provision of offshore gambling services”); Chan, *supra* note 12 (describing the arrest of David Carruthers, a British businessman, for racketeering).

⁴⁹ Brandon P. Rainey, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. LEGIS. 147, 151-52 (2009).

⁵⁰ Maier, *supra* note 13, at 167.

⁵¹ Rainey, *supra* note 49, at 152 (referencing 31 U.S.C. § 5364(b)(3) (2006)).

⁵² Aubuchon, *supra* note 12, at 306 (quoting 31 U.S.C. § 5362(10)(A) (2006)).

⁵³ *Id.*

⁵⁴ 31 U.S.C. §§ 5361–5367 (2006).

⁵⁵ Michael Grunfeld, Survey, *Don’t Bet on the United States’s Internet Gambling Laws: The Tension Between Internet Gambling Legislation and World Trade Organization Commitments*, 2007 COLUM. BUS. L. REV. 439, 459 (2007) (quoting I. NELSON ROSE & MARTIN D. OWENS, INTERNET GAMING LAW 147-48 (2005) “[The Department of Justice] stated publicly that it did not want to go after

a result, there are few reasons for gamblers to stop making bets online. For example, some people may not want to be affiliated with illegal activities. They may also think that it is not safe to give these illegal websites their financial information. However, gamblers who do participate in online gambling have the chance to make a profit without being detected, and even if they get caught, it is unlikely that they will endure negative consequences.

II. THE PROPOSED LEGISLATION⁵⁶

Congress has not been blind to the widespread disregard for federal law and the legal problems surrounding the UIGEA. However, Congress started reconsidering the UIGEA for another reason—the government needs more money.⁵⁷ Under the proposed legislation, the IGRCPA offers licenses to online gambling organizations on certain conditions.⁵⁸ Among these are mandates that the licensees ensure that no minors are gambling, that gamblers are not from jurisdictions that prohibit online gambling, and that the licensees collect taxes when the players place their bets.⁵⁹ The licensees must also protect against fraud and money laundering and implement “appropriate safeguards to combat compulsive spending.”⁶⁰ The projected tax revenue from this bill is \$42 billion over ten years.⁶¹ Legalizing online gambling would also allow states to profit from the gambling industry as a whole.⁶² Because of the recent recession’s impact on consumer behavior, the gambling industry’s profits have declined.⁶³ States have already begun creating incentives for gamblers to frequent casinos more often—such as Colorado raising maximum-bet limits—and the UIGEA is

\$5 bettors. So, today, no one is even proposing making it a federal crime to merely place a bet on the Internet.”).

⁵⁶ The IGRCPA and IGRTEA were not enacted. See *H.R. 2267 (111th): Internet Gambling Regulation, Consumer Protection, and Enforcement Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/hr2267>; *H.R. 4976 (111th): Internet Gambling Regulation and Tax Enforcement Act of 2010*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/hr4976>. Both bills have been reintroduced, as H.R. 1174 and H.R. 2230, respectively and can be accessed at <http://www.govtrack.us/congress/bills/112/hr1174/text> and <http://www.govtrack.us/congress/bills/112/hr2230/text>.

⁵⁷ Chan, *supra* note 12 (“With pressure mounting on the federal government to find new revenues, Congress is considering legalizing, and taxing, an activity it banned just four years ago: Internet gambling.”).

⁵⁸ H.R. 2267, 111th Cong. § 2(a) (2009).

⁵⁹ *Id.* §§ 2(g)(1)-(3).

⁶⁰ *Id.* §§ 2(g)(5), (6).

⁶¹ Chan, *supra* note 12.

⁶² *Id.*

⁶³ *Id.*

seen as another incentive for gamblers to provide states with tax revenue.⁶⁴ Absent from the IGRCP EA, however, is a discussion of exactly what law enforcement mechanisms the government will use and the level of taxes Congress and the states will levy. Ultimately, these omissions will be important because enforceability and the level of taxes affect peoples' behavior.

III. COST-BENEFIT ANALYSIS

Because the UIGEA allows the government to levy taxes on gamblers and gambling websites, it is important to look at the net economic effect the proposed regulations will have on gamblers themselves. Deciding whether economic improvements⁶⁵ exist under the IGRCP EA and whether net gains to gamblers and the government accrue because of changes in regulation⁶⁶ will help determine whether gamblers have incentives to comply with the law. If gamblers do not comply, the licensed websites will not receive the business that the government wishes to profit from—thereby frustrating the goal of raising revenue.

A cost-benefit analysis is a procedure often used by government agencies in determining a policy's effectiveness.⁶⁷ The goal is to determine an activity's (usually a government policy) net benefits and costs on "society as a whole."⁶⁸ This procedure is useful because it helps determine which policies "achieve a particular social objective at a lower overall social cost."⁶⁹ Depending on what is being analyzed and who is conducting the analysis, the procedure can be very formal by using equations and graphs to illustrate the different factors, or merely balancing different hypothetical situations and concerns.⁷⁰ A cost-benefit analysis measures the benefits that individuals would gain, contrasted with the costs that they would bear.⁷¹ Such costs reduce the incentives for engaging in certain activities.

⁶⁴ *Id.*

⁶⁵ DAVID FRIEDMAN, *HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE* 218 (1996). Friedman explains that when the "sum" of all gains and losses people stand to experience is "a net gain, we would say that the change was an economic improvement."

⁶⁶ *Id.*

⁶⁷ Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 *J. LEGAL STUD.* 1037, 1053 (2000).

⁶⁸ N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS* 23 (5th ed. 2009).

⁶⁹ DAVID FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 4 (2000) ("The economic approach . . . provides a way of evaluating legal rules, of deciding how well they achieve that objective."); Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 *U. CHI. L. REV.* 1021, 1043 (2004).

⁷⁰ See Kornhauser, *supra* note 67, at 1039-45 (giving examples of how to express different elements of a cost-benefit analysis as equations).

⁷¹ *Id.* at 1039.

Because incentives determine economic actors' behavior in the market, incentives are extremely important in determining the probable reactions of actors to the IGRCPEA.⁷² No single analysis can consider all possible conditions and relevant factors. For example, another, recent article conducted a cost-benefit analysis that examined the conditions for the supply side of the gambling market, and concluded that businesses and the United States Treasury stood benefit more under the IGRCPEA and IGRTEA than the UIGEA.⁷³ This article instead examines the demand side of the market, the gamblers themselves.

A. *Assumptions, Relevant Situations, and Factors to Consider*

When conducting a cost-benefit analysis, one must make certain assumptions and take note of different situations and influences that will affect people's behavior.⁷⁴ One must first assume that people (i.e. economic actors) have "well-defined preferences over policy outcomes."⁷⁵ Without this assumption, it is impossible to proceed with a meaningful analysis because one cannot predict people's behavior if those people do not have ordered preferences over potential outcomes. The second necessary assumption is that people make rational choices.⁷⁶ Rationality does not imply that everyone will make the same choices.⁷⁷ Instead, rationality means that people will weigh certain benefits and costs, according to their preferences, when making decisions, even if their decision-making processes do not appear to be very formal.⁷⁸ Without assuming people are rational, a cost-benefit analysis becomes pointless because one must instead assume that people will act without regard to incentives.

Uncertainty, when the existence of a future determinant is not known, is a particularly relevant situation for gamblers.⁷⁹ For example, though many people are able to gamble online, they cannot predict whether the government will detect their activity and force a financial institution to shut

⁷² MANKIW, *supra* note 68, at 7.

⁷³ Nicholas Bamman, Notes and Comments, *Is the Deck Stacked Against Internet Gambling? A Cost-Benefit Analysis of Proposed Regulation*, 19 J.L. & POL'Y 231 (2010).

⁷⁴ See Kornhauser, *supra* note 67, at 1039.

⁷⁵ *Id.*

⁷⁶ LAW'S ORDER, *supra* note 69, at 6.

⁷⁷ See RICHARD B. MCKENZIE, WHY POPCORN COSTS SO MUCH AT THE MOVIES AND OTHER PRICING PUZZLES 136 (2008) (discussing the findings in Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675-700 (1988), which held that addicts may not appear rational, but that their reasons for indulging in self-destructive behavior can be rational based on their circumstances and position in life).

⁷⁸ LAW'S ORDER, *supra* note 69, at 6.

⁷⁹ See Kornhauser, *supra* note 67, at 1043 (explaining that "uncertainty exists if the probability of [an event] is unknown.").

down their accounts or even whether their Internet Service Providers (ISPs) will allow them access to the websites.⁸⁰ One can use the gamblers' preferences (or "valuations of certain outcomes")⁸¹ and the gamblers' own predictions about being caught to determine the adjusted value of the policy.⁸² If the heightened risk of being detected causes compliance with the IGRCPEA to have a greater value to gamblers, then gamblers will view not adhering to the IGRCPEA as less desirable and of less value. A noted problem, however, is that the economic actors' and policy makers' conceptions of likelihood are not always "identical," meaning their assigned values will not be the same.⁸³

Uncertainty about enforcement under the IGRCPEA will likely influence the gamblers' decisions. There is not one simple issue of enforceability, but rather, there are many different concerns. First, as previously discussed, law enforcement authorities have not effectively prevented third-party financial entities and gamblers from their transactions.⁸⁴ Though full compliance is not always necessary for laws to be effective,⁸⁵ monitoring these financial institutions and gamblers is costly both in terms of resources and in opportunity costs.⁸⁶ Second, the IGRCPEA focuses primarily on licensing the websites. It does not discuss enforcement, except to say that the Secretary of the Treasury will order "such regulations as may be necessary to administer and enforce the requirements" and will be in charge of hiring competent enforcement officials.⁸⁷ This sort of language is commonplace in legislation, but the fact that UIGEA provides more information about enforcement may restrict the Secretary's discretion. The UIGEA discusses prison sentences⁸⁸ and also creates policies about preventing illegal financial transactions by violators.⁸⁹ The IGRCPEA does not.

Technology also has an influence on the uncertainty of enforcement. The IGRCPEA regulates legalizes online gambling, but only for states that choose to do so.⁹⁰ There are opt-out options for states and Indian tribes, which allow them to prohibit licensed gambling websites from operating residing within their jurisdictions.⁹¹ Similarly, licensees cannot accept bids

⁸⁰ See GOLDSMITH & WU, *supra* note 34, at 68-71.

⁸¹ See Kornhauser, *supra* note 67, at 1043.

⁸² See *id.* at 1043-44.

⁸³ *Id.* at 1044.

⁸⁴ See *supra* Part I.

⁸⁵ See GOLDSMITH & WU, *supra* note 34, at 67.

⁸⁶ *Id.* at 82 (noting that because many gamblers use different offshore banks to finance their gambling, government officials "must go after thousands of intermediaries rather than just a dozen or so."); see also Aubuchon, *supra* note 12, at 306-07.

⁸⁷ H.R. 2267, 111th Cong. § 2(a) (2009).

⁸⁸ 31 U.S.C. § 5366(a) (2006).

⁸⁹ *Id.* § 5364(a)-(b).

⁹⁰ H.R. 2267 § 2(a).

⁹¹ *Id.*

from gamblers residing within jurisdictions that ban online gambling.⁹² There are two primary methods of determining the physical location of where particular computer activity takes place. “Client-side geolocation tools” determine a person’s location through GPS chips and wireless network towers, “operat[ing] and content providers can obtain this information by request; this location method is not used as frequently, however.”⁹³ “Server-side” tools operate by comparing multiple sets of data.⁹⁴ One server-side technique is to first identify the computer’s Internet Protocol (IP) address.⁹⁵ IP addresses do not necessarily indicate a computer’s physical location.⁹⁶ However, tracing a computer’s general location is possible by looking at “tracing packets,” which “report the list of computers through which a communication travels.”⁹⁷ The tracing packets make it possible to find the computer node that is closest to the computer in question.⁹⁸ By then comparing this information with databases that have records of IP addresses and physical locations, one can find clues about the computer’s physical location.⁹⁹ Another similar method is to use databases that have linked users’ IP addresses with the names of certain wireless networks that reference specific locations.¹⁰⁰ There are European gambling websites that already employ geolocation tools to block American users,¹⁰¹ and Major League Baseball teams have already used this method when showing games online.¹⁰² Local television stations have the exclusive rights to broadcast their cities’ games, so the Major League teams must prohibit those local viewers from accessing the online broadcasts.¹⁰³ This approach, however, is not perfect. Because it relies on first using IP addresses to determine the ISP locations,¹⁰⁴ there is some discrepancy, especially at the state and local levels.¹⁰⁵

Technology may prove to be a double-edged sword, however. The time and monetary costs involved in monitoring gamblers’ physical loca-

⁹² *Id.*

⁹³ Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 66-67 (2011).

⁹⁴ *Id.* at 67.

⁹⁵ GOLDSMITH & WU, *supra* note 34, at 60-61.

⁹⁶ *Id.* at 60.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ GOLDSMITH & WU, *supra* note 34, at 60; King, *supra* note 93, at 67.

¹⁰⁰ King, *supra* note 93, at 68.

¹⁰¹ King, *supra* note 93, at 76, 114-15.

¹⁰² GOLDSMITH & WU, *supra* note 34, at 62.

¹⁰³ *Id.* at 61-62.

¹⁰⁴ Larry Barrett, *Major League Baseball Struggles to Reach Fans Online*, BASELINE (Mar. 7, 2005), <http://www.baselinemag.com/c/a/Projects-Data-Analysis/Major-League-Baseball-Struggles-to-Reach-Fans-Online/> (explaining how the software finds the ISP through the IP address, and then determines how the ISP “routes” the IP address).

¹⁰⁵ GOLDSMITH & WU, *supra* note 34, at 62.

tions already make enforcing the UIGEA difficult.¹⁰⁶ Gamblers' use of Internet technology to evade the law has also caused problems for gambling businesses. For example, in *Interactive Media Entertainment and Gaming Association, Inc. v. Attorney General of the United States*, the appellant argued that it is difficult for businesses to track gamblers' specific locations.¹⁰⁷ Technology has advanced significantly since then. Less than ten years ago, while tracking physical locations was almost 100% accurate for identifying countries,¹⁰⁸ it was considered less reliable for identification at the state and local levels.¹⁰⁹ Now, the server-side technology is capable of "pinpoint[ing] a user's location within a twenty to thirty mile radius."¹¹⁰ However, there are ways to get around such tracking methods. Tracking an IP address's physical location can also be difficult because there are devices and programs that allow Internet users to hide their actual IP addresses. One of these instruments is an anonymizer.¹¹¹ When a person uses an anonymizer, the anonymizer service provides him with an IP address that will register only with websites that the person visits.¹¹² Another is the proxy server.¹¹³ The proxy server is "a server that forwards Internet traffic for you using the proxy's IP address and not yours. Thus the Web pages you reach know only the address of the proxy—not yours."¹¹⁴ Proxy servers are similar to anonymizers, but "while the anonymizers are Web applications, the use of proxy servers is determined by the settings in the Web browser."¹¹⁵ When using a proxy server, one must first change his browser settings to the proxy's port number.¹¹⁶ Many proxy servers are free to use.¹¹⁷ One can also easily find instructions online about proxy servers used specifically for online gambling; there are websites that explain how easy it is to find and use a proxy server.¹¹⁸ Though this does not automatically mean that every-one participating in online gambling uses a proxy server or an anonymizer,

¹⁰⁶ Aubuchon, *supra* note 12, at 306-07.

¹⁰⁷ 580 F.3d 113, 116 (3d Cir. 2009).

¹⁰⁸ GOLDSMITH & WU, *supra* note 34, at 60.

¹⁰⁹ *Id.* at 62.

¹¹⁰ King, *supra* note 93, at 70-71.

¹¹¹ Dan Jerker B. Svantesson, "Imagine There's No Countries": *Geo-Identification, the Law, and the Not-So-Borderless Internet*, J. INTERNET L., Mar. 2007 1, 18 (2007) (describing anonymizers).

¹¹² *Id.*

¹¹³ Royal Van Horn, *Cookies, Web Profilers, Social Network Cartography, and Proxy Servers*, 86 PHI DELTA KAPPAN 183, 249 (2004) (defining proxy servers and how they work).

¹¹⁴ *Id.*

¹¹⁵ Svantesson, *supra* note 111, at 2.

¹¹⁶ *Id.*

¹¹⁷ A Google search for "free proxy server" returns over 12 million results.

¹¹⁸ Edward Curtis, *How to Use a Proxy Server to Avoid Online Casino Prohibitions*, <http://www.articleinspector.com/articles/1408/1/How-to-Use-a-Proxy-Server-to-Avoid-Online-Casino-Prohibitions/Page1.html> (last visited Sept. 21, 2011).

it demonstrates that there is enough demand online to merit such websites.¹¹⁹

While it costs money to use proxy servers and anonymizers that offer different security settings and features,¹²⁰ this cost may be worth it for those living in areas that ban online gambling, especially as one can pay a lump sum for a one-year subscription.¹²¹ Other proxy servers offer different subscription lengths and amounts of services.¹²² The District Court for the Eastern District of Pennsylvania has already recognized the effectiveness of proxy servers and anonymizers.¹²³ In *Center for Democracy & Technology v. Pappert*, the court noted that attempts to block access to child pornography can be foiled by proxy servers and anonymizers that circumvent filters that target IP addresses.¹²⁴ In considering whether to pay for circumvention, one would weigh the monetary and non-monetary costs and benefits of anonymous proxy servers. These include the proxy server's actual cost, including taxes; the gambling profits the server allows the gambler to gain through use; and the opportunity costs, such as the time delay and difficulty that some proxy servers cause in Internet access.¹²⁵ If the monetary costs of buying access to an anonymizer or a proxy server are less than the monetary costs incurred by using the licensed websites, such as taxes or even user fees, gamblers will have a strong incentive to use unlicensed websites.

The presence of taxes also impacts the incentives IGRCPEA creates for gamblers. The IGRCPEA states that licensed websites must collect all taxes "relating to Internet gambling."¹²⁶ The bill, however, does not state whether online gambling taxes will be greater than those for regular casinos. Either way, the mere presence of taxes is a disincentive for people to frequent the licensed websites.¹²⁷ Because lawmakers have already shown that they want the IGRCPEA to be an abundant source of tax revenue,¹²⁸ it seems inconsistent with their goal to create legislation that will likely decrease traffic on the licensed websites.

¹¹⁹ As technology keeps advancing, combating proxy servers may very well become easier, and thus my arguments may weaken.

¹²⁰ Van Horn, *supra* note 113, at 249 (describing the multiple settings that the NetShade proxy server provides, including different security levels and response time).

¹²¹ See www.anonymizer.com, which offers subscriptions for \$79.99.

¹²² See www.guardster.com, which offers different subscriptions, such as \$7.99 for each month and an enhanced program for \$19.99 each month. It also offers a free basic proxy server.

¹²³ See *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 655 (E.D. Pa. 2004).

¹²⁴ *Id.* at 606, 634.

¹²⁵ Van Horn, *supra* note 113, at 249.

¹²⁶ H.R. 2267, 111th Cong. § 2(a) (2009).

¹²⁷ See *GWARTNEY ET AL.*, *supra* note 24, at 92 (stating that people will resort to alternative measures to evade taxes).

¹²⁸ Chan, *supra* note 12 (quoting a Democratic representative as saying that "[w]e will pass a bill to do something very important, funded by Internet gambling.").

Additionally, case law does not provide much incentive for gamblers to comply with the new rules. Based on both established precedent and recent cases, bettors using gambling websites are not likely to face punishment under the UIGEA even when brought to court.¹²⁹ *In re Baum* concerned a woman who amassed debt because of her addiction to online gambling.¹³⁰ Though the court discussed her illegal activities in connection with the UIGEA, it did not hold her liable for her debts.¹³¹ The court instead determined that her debts were unenforceable under state law and the UIGEA.¹³² States were also able to intervene in certain cases before the UIGEA took effect.¹³³ In *Zarin v. Commissioner*, the court held that a compulsive gambler was free from his debts because the state had issued an emergency order against casinos, prohibiting them from offering him more gambling credit.¹³⁴ In *United States v. Mirza*, the defendant, who had gambled online, was convicted because she misappropriated funds from her job, not because she frequented online gambling websites.¹³⁵ The legal precedent derived from these cases implies that gamblers would have little incentive to use websites licensed under the IGRCPEA instead of the unlicensed alternatives. Debts incurred from using licensed websites would most likely be enforceable, whereas debts from illegal websites would not.

B. *Human Variables*

As previously discussed, however, one must assume that all individuals act rationally,¹³⁶ even though each person has a different set of preferences and hence, a different utility function. In order to determine how sensitive classes of people are to the IRGCPEA, one must take into account that people have different levels of respect for the law and different levels of desire to gamble. The average person may assume that following the law would be the “rational” thing to do, but defining rationality is not always easy. People have different values and utility functions, which leads to different behaviors and actions.¹³⁷ These differences can help determine whether certain groups of people are likely to comply with the IGRCPEA.

Online gambling’s illegal status attracts those with a criminal mindset. Online gambling shares connections with money laundering,¹³⁸ which is

¹²⁹ See cases cited *infra* notes 130-35.

¹³⁰ *In re Baum*, 386 B.R. 649, 651 (Bankr. N.D. Ohio 2008).

¹³¹ *Id.* at 659.

¹³² *Id.*

¹³³ See *Zarin v. Comm’r*, 916 F.2d 110 (3d Cir. 1990).

¹³⁴ *Id.* at 113.

¹³⁵ 755 F. Supp. 2d 329, 331 (D. Mass 2010).

¹³⁶ LAW’S ORDER, *supra* note 69, at 8.

¹³⁷ See MCKENZIE, *supra* note 77, at 135-37.

¹³⁸ Von Lehman, *supra* note 14, at 145.

“the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced.”¹³⁹ Money laundering is also a federal crime.¹⁴⁰ The two activities are connected because “Internet gambling transactions are international, characterized by speed and anonymity, and typically involve transfers of large sums of money.”¹⁴¹ While the IGRCEPA seeks to suppress these activities, the proposed legislation may not do anything to stop them—or worse, it may encourage them. Online gambling is currently a black market because it “operate[s] outside the legal system.”¹⁴² Many “\$5 bettors”¹⁴³ might shy away from illegal websites in favor of legal gambling websites because black markets are more prone to fraud and violence.¹⁴⁴ The unlicensed websites, however, will attract criminals for the very same reason.¹⁴⁵ Studies have noted the unintended consequences of legislation in the business world, in particular, the fact that targeted behavior can actually flourish instead of stopping.¹⁴⁶ In business, “when the risk entails compliance with the criminal law . . . the ideal entrepreneur is risk-averse.”¹⁴⁷

This economic principle has proven true in the gambling industry. Many American gambling websites went overseas because of the UIGEA, but some that were more willing to ignore the laws stayed and prospered by taking over the other companies’ clientele.¹⁴⁸ Similarly, there is a possibility that under the IGRCEPA, gamblers who are more inclined to follow the rules will not engage in illegal gambling behavior, but websites that do not care about breaking the laws will stay and grow, and gamblers will contribute to their illegal activity. The costs and benefits for these “swashbucklers” should be considered because part of the IGRCEPA’s purpose is to prevent their illegal behaviors.¹⁴⁹

Another reason that the IGRCEPA will likely encourage illegal gambling is because it creates a barrier to entry for the legal online gambling

¹³⁹ BLACK’S LAW DICTIONARY 1097 (9th ed. 2009).

¹⁴⁰ *Id.*

¹⁴¹ Katherine A. Valasek, Comment, *Winning the Jackpot: A Framework for Successful International Regulation of Online Gambling and the Value of the Self-Regulating Entities*, 2007 MICH. ST. L. REV. 753, 765 (2007).

¹⁴² GWARTNEY ET AL., *supra* note 24, at 92.

¹⁴³ Grunfeld, *supra* note 55.

¹⁴⁴ GWARTNEY ET AL., *supra* note 24, at 93.

¹⁴⁵ *Id.* (“Crime statistics in urban areas show that a high percentage of the violent crimes, including murder, are associated with illegal trades gone bad and competition among dealers in the illegal drug market.”).

¹⁴⁶ *E.g.*, Craig S. Lerner & Moin A. Yahya, ‘Left Behind’ After Sarbanes-Oxley, REG., Fall 2007, at 44.

¹⁴⁷ *Id.* at 46.

¹⁴⁸ Aubuchon, *supra* note 12, at 311.

¹⁴⁹ Lerner & Yahya, *supra* note 146, at 44 (defining corporate swashbucklers as “men and women [who] have no special regard for the strictures of the criminal law and [who] may thrive in the post-Sarbanes-Oxley world.”).

industry. The bill states that only applicants without prior engagement in illegal activities can receive licenses.¹⁵⁰ This means that none of the individuals operating illegal gambling websites, if their occupation is public knowledge, can apply for licenses. Website operators are unlikely to walk away from a lucrative income, so they will probably continue running their illegal websites. While those who were never caught participating in the online gambling industry may be able to obtain licenses, former convicts and their known associates may resort to running illegal websites because the IGRCP EA bans those whose “reputation, habits, and associations . . . pose a threat to the public interest.”¹⁵¹

Addiction can also influence a gambler’s preference for the IGRCP EA. Addicts may not seem like rational actors whose preferences should be included when considering policy issues that apply to “normal” people, but according to economists Gary Becker and Kevin Murphy, addicts make rational decisions based on their values.¹⁵² Even addiction is “a choice that consumers can make quite rationally by considering and discounting the stream of future benefits and costs from consumption of the addictive good.”¹⁵³ Basically, addicts engage in a less formalized version of a cost–benefit analysis, and “if the expected, discounted future benefits exceed the expected, discounted costs,”¹⁵⁴ then they are likely to indulge their addictions.¹⁵⁵ Some addicts might believe that their living conditions are so unpleasant that their habits cannot do any worse damage.¹⁵⁶ Such people may consider detection by the authorities a small cost of fulfilling their urges and thus may gamble online regardless of whether their state opts out of the IGRCP EA.

The IGRCP EA requires licensees to prevent gambling addicts from acting on their compulsive urges.¹⁵⁷ This rule, however, will likely not stop addicts from online gambling. As Becker and Murphy’s research found, addicts may have rational choices for continuing their habits.¹⁵⁸ Because legal gambling websites under the IGRCP EA must “combat compulsive Internet gambling,”¹⁵⁹ there will be fewer incentives for those licensed website operators to continue allowing addicts to place bets. The IGRCP EA gives the Secretary of the Treasury power to create an exclusion program for problem gamblers and underage gamblers which allows license holders to “disclose the identities of persons on the self-excluded list to any affi-

¹⁵⁰ H.R. 2267, 111th Cong. § 2(a) (2009).

¹⁵¹ *Id.*

¹⁵² MCKENZIE, *supra* note 77, at 135-37.

¹⁵³ *Id.* at 136.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ H.R. 2267, 111th Cong. § 2(a) (2009).

¹⁵⁸ MCKENZIE, *supra* note 77, at 135-137.

¹⁵⁹ H.R. 2267 § 2(a).

liated company . . . to the extent that the licensee ensures that any affiliated company or service provider maintains such information under confidentiality provisions.”¹⁶⁰ Additionally, states can already prevent casinos from further profiting off of addicted gamblers by issuing emergency orders.¹⁶¹ Therefore, the IGRCEA will likely have the ironic unintended consequence of encouraging compulsive gambling instead of restricting it because of such provisions. The licensed websites are supposed to do their best to stop addictive gambling behavior, so gambling addicts will likely forgo these sites in favor of illegal websites. Moreover, because some states do not hold individuals liable for debts accrued through illegal activities, as evidenced by *In re Baum*, the addicts in those jurisdictions receive rational incentives for gambling illegally because they will not be contractually obligated to pay their debts.¹⁶²

C. Predictions

By looking at the costs and benefits of compliance and noncompliance, one can make predictions about the behavior of those whom the proposed legislation would affect. There are several costs incurred by complying with the IGRCEA. Taxes and user fees can deter gamblers from frequenting licensed websites. Gambling addicts may find that the licensed websites’ preventative measures against compulsive gambling are too restrictive. And for gamblers who are also using websites for other illegal purposes, compliance with the IGRCEA cramps their other illegal pursuits. The benefits, however, of using only the licensed websites include not being affiliated with crime and experiencing safer gambling and financial transactions.

On the other hand, the costs of noncompliance include risking an affiliation with criminal entities and opportunity costs incurred when proxy servers take longer to connect to the gambling sites. To be clear, the IGRCEA does not penalize gamblers who access illegal websites, so getting punished is not a potential cost. However, if a gambler’s activity on a non-licensed website is detected, his relationship with his financial service provider may become strained. But, by frequenting the non-licensed websites, gamblers avoid paying taxes, addicts can gamble more, and criminals can participate in shady dealings and other illegal activities.

As gamblers themselves will not be punished for using unlicensed gambling sites, it appears that the main determining factor for gamblers’ compliance is whether the licensed websites are more expensive to use than

¹⁶⁰ H.R. 2267 § c(4)(B).

¹⁶¹ In *Zarin v. Commissioner*, 916 F.2d 110, 112 (3d Cir. 1990), a government official issued an emergency order to stop casinos from extending credit to the appellant.

¹⁶² *In re Baum*, 386 B.R. 649, 659 (Bankr. N.D. Ohio 2008).

the unlicensed ones. If the licensed websites are more expensive, many gamblers are likely to either abstain from online gambling altogether or use the unlicensed websites.

IV. THE IGRTEA

Under the companion bill, the Internet Gambling Regulation and Tax Enforcement Act of 2009 (IGRTEA), website license holders must pay a fee each month.¹⁶³ This fee is set at 2% of the amount of money deposited by patrons in the websites' accounts during the previous month.¹⁶⁴ Recent updates to the IGRTEA allocate another 6% of taxes to state and tribal governments.¹⁶⁵ Jim McDermott, the congressman who introduced the bill, added these provisions because he felt that the tax revenue would benefit certain state-sponsored social programs that are suffering from cuts in state government budgets.¹⁶⁶ If gamblers and website owners comply with the IGRTEA, it could provide \$30 billion in state tax revenue over the span of ten years.¹⁶⁷ The text of the IGRTEA does not state specific enforcement methods, but because it amends Chapter 36 of the Internal Revenue Code of 1986, which governs excise taxes, one can assume that the Code's existing methods of excise tax enforcement apply.¹⁶⁸

Other provisions of the IGRTEA may give gamblers reasons not to comply with it. The IGRTEA requires the licensees to provide certain information, such as each gambler's name, address, tax identification number (the bill shortens this to "TIN"), and all information regarding the gambler's winnings, bets placed, and losses incurred.¹⁶⁹ While illegal websites have access to some similar information, such as the record of gamblers' activities on the websites and their names, gamblers may balk at website companies having access to their tax identification numbers.

The IGRTEA seems to predict noncompliance; it also places fees on "unauthorized bets or wagers."¹⁷⁰ The IGRTEA defines these taxed bets as being those that are placed with a person who is not authorized to accept them.¹⁷¹ People who accept bets even though they are not authorized to do so must pay a fee that is equivalent to 50% of all the funds these people receive from gamblers.¹⁷² These rules appear problematic.¹⁷³ Given that the

¹⁶³ H.R. 4796, 111th Cong. § 2(a) (2010).

¹⁶⁴ *Id.*

¹⁶⁵ Bogardus, *supra* note 17.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ H.R. 4796 §§ 1(b)-2(a).

¹⁶⁹ *Id.* § 3(a).

¹⁷⁰ *Id.* § 2(a).

¹⁷¹ *Id.*

¹⁷² *Id.*

government already has a difficult time enforcing the UIGEA, it is not clear how the government will be able to enforce the rules in the IGRTEA. While under the IGRTEA licensees would have to file information regarding gamblers' identification and winnings,¹⁷⁴ people running unlicensed websites will not pay fees of their own accord, so unless government officials regularly patrol the Internet for websites that do not have licenses, it does not seem likely that this provision will prove effective. If there is enough consumer demand for unauthorized websites and website owners can evade tax enforcement officials, then illegal gambling will continue.

V. SUGGESTIONS FOR IMPROVING THE IGRCPPEA

The IGRCPPEA is still only a bill. Because bills usually go through several revisions and compromises, one can assume that Congress will edit and refine the IGRCPPEA should it become an actual law. Congress, however, would do well to remember that incentives matter in the market, and that this bill could drastically alter incentives in the gambling market.¹⁷⁵ The legislature has a few options if it wishes to improve the bill and offset the economic disincentives for compliance that the bill currently creates for gamblers.

Because rapidly changing technology limits the government's ability to regulate online activities, the first option is to explicitly grant federal and state law enforcement officials and licensed website owners the power to access proxy server users' real locations. Although this would probably be a controversial action, it would be an effective method of determining whether people in non-gambling jurisdictions are frequenting the licensed websites. This capability would be particularly useful because the IGRCPPEA does not go after gamblers themselves. Rather, the IGRCPPEA places responsibility on the licensed websites to comply with the law.¹⁷⁶ In fact, keeping people located in jurisdictions that ban online gambling from frequenting the websites is crucial for gambling website owners to keep their licenses.¹⁷⁷ One way to prevent illegal gambling would be forcing the proxy server providers to monitor their customers' IP address locations. It is possible to tell whether an IP address comes from a proxy server, but public policy may frown on regulation allowing law enforcement agencies

¹⁷³ One minor problem is that the IGRTEA says fees are levied on bids placed with "any person that is not authorized pursuant to section 5382 of that title [Title 31 of the United States Code]." *Id.* However, after researching via Westlaw, there is no evidence that 31 U.S.C. § 5382 exists. This is probably a mere typographical error, and the bill's writers most likely mean 31 U.S.C. § 5362 (2006), as that part of the United States Code is mentioned in the same sentence as the typo.

¹⁷⁴ H.R. 4796 § 3(a).

¹⁷⁵ MANKIW, *supra* note 68, at 7.

¹⁷⁶ H.R. 2267, 111th Cong. § 2(a).

¹⁷⁷ *Id.*

and website owners to demand proxy server companies hand over their customers' real locations when proxy servers are not just used for illegal practices. Some legitimate proxy server and anonymizer consumers may simply feel safer hiding their computer identification when using the Internet, and releasing this information to other parties frustrates the proxy servers' and anonymizers' purpose. Another reason turning over IP address locations could prove unpopular is because anonymous open proxy servers are associated with political dissidents' efforts to communicate news and their opinions, especially in countries that practice Internet censorship.¹⁷⁸ There is some precedent for forcing companies to turn over their customers' IP addresses. In 2011, the United States District Court for the Eastern District of Virginia ruled that Twitter had to give the government the IP addresses and other information of three users who had been accused of collaborating with Wikileaks.¹⁷⁹ However, this court order was made after a federal investigation had begun; it was not a pre-emptive measure as might be the case in this situation. These concerns make it unlikely that forcing proxy servers and anonymizers to expose IP address locations would be appealing or legally sustainable for the government.

In light of the high costs necessary to monitor the Internet effectively, the second option is to remove the IGRCEA's barriers to entry. When the UIGEA became law, not all established gambling websites left the United States.¹⁸⁰ These sites have the potential to bring in significant tax revenue, as some websites have reported large profit increases.¹⁸¹ These website owners are competent at running gambling websites, as evidenced by the profits that they have amassed.¹⁸² It is counterproductive for the industry to cut an individual off entirely from conducting legal business in a market because of past actions. By denying licenses to these website operators because they have not complied with the UIGEA, the government effectively shuts itself off from that source of tax revenue and reduces incentives for

¹⁷⁸ See Clothilde Le Coz, *Bloggers: A New Source of News*, in REPORTERS WITHOUT BORDERS FOR PRESS FREEDOM, HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS 5-6 (2008), http://en.rsfsf.org/IMG/pdf/guide_gb_md-2.pdf (discussing political oppression and the need for anonymous blogging); Ethan Zuckerman, *How to Blog Anonymously: Practice with Tor and Wordpress*, in REPORTERS WITHOUT BORDERS FOR PRESS FREEDOM, *supra*, at 48-51 (giving detailed instructions on how to set up an advanced proxy server system to evade censorship and persecution).

¹⁷⁹ Somini Sengupta, *Twitter Ordered to Yield Data in Wikileaks Case*, N.Y. TIMES (Nov. 10, 2011), <http://www.nytimes.com/2011/11/11/technology/twitter-ordered-to-yield-data-in-wikileaks-case.html>.

¹⁸⁰ Jonathan Conon, Comment, *Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in "Dead Man's" Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization is Preferable to Legislation*, 99 J. CRIM. L. & CRIMINOLOGY 1157, 1166-67 (2009).

¹⁸¹ *Id.*

¹⁸² See Chan, *supra* note 12. If gambling website operators were incompetent, it seems unlikely that Americans would be gambling over \$6 billion on these websites each year.

compliance with federal law. Instead of automatically banning those website operators, another option is to simply monitor them with greater scrutiny.

Another reason to eliminate the barriers to entry is that those barriers do not promote consumer welfare. Some of the IGRCPEA's requirements for license applicants are subjective, such as the one requiring the applicant to be "a person of good character, honesty, and integrity."¹⁸³ The license application process is already costly,¹⁸⁴ and there is no way to discern how long it might take or how much it may cost to have the Secretary of the Treasury determine the moral fiber of applicants. Doing away with bureaucratic methods for distributing licenses is not a novel idea. The economist Ronald Coase argued that issuing radio licenses by comparative hearings hindered consumer welfare and that auctions should be used to distribute property rights to radio stations instead.¹⁸⁵ When the Federal Communications Commission started using auctions to give out non-broadcast licenses in 1994, the Department of the Treasury received over \$20 billion from the auctioning process.¹⁸⁶ This is not to say that auctions are necessarily the best method of solving the problems that the IGRCPEA presents, but subjective, bureaucratic standards and methods to determine who gets to work in the online gambling industry are arguably not the most efficient.

In the meantime, consumers may not be satisfied with the first gambling websites to receive licenses. When businesses pay taxes, they generally make up for the amount of money lost by passing the costs on to the customers.¹⁸⁷ Licensed gambling websites will likely follow this practice and place extra charges on their customers. The customers may not like the higher prices, but the barriers to entry also create a situation with the potential for government-sponsored monopolies.¹⁸⁸ Price-insensitive gamblers will pay the monopoly prices, which are higher than prices would be in a competitive market.¹⁸⁹ Price-sensitive gamblers will abstain from using the licensed websites. As a result of the monopoly prices, there will be a loss in consumer welfare. Because the federal government is the entity issuing the licenses, rent-seeking associated with licensing at the local government

¹⁸³ H.R. 2267, 111th Cong. § 2(a) (2009).

¹⁸⁴ GWARTNEY ET AL., *supra* note 24, at 508.

¹⁸⁵ See generally Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

¹⁸⁶ Thomas W. Hazlett, *Assigning Property Rights to Radio Spectrum Users: Why Did FCC License Auctions Take 67 Years?*, 41 J.L. & ECON. 529, 530 (1998).

¹⁸⁷ See GWARTNEY ET AL., *supra* note 24, at 98 (explaining that sellers of goods with relatively inelastic demand [such as gambling for addicts or those who enjoy gambling but do not want to partake in illegal activities] will pass the tax burdens on to the consumers).

¹⁸⁸ *Id.* at 508 ("Legal barriers are the oldest and most effective method of protecting a business firm from potential competitors.").

¹⁸⁹ *Id.* at 510 (explaining that competitors would drive down costs).

level will be less likely.¹⁹⁰ The IGRCEA's standards are worrying, however, because of their subjectivity.

Of these three solutions—granting the government access to proxy server user information, ISP blocks for illegal websites and non-gambling jurisdictions, and removing barriers to entry—the latter seems more feasible and less likely to trigger privacy and First and Fourth Amendment concerns. Preventing monopolies from emerging is also more in keeping with America's capitalist financial system. It is also more in keeping with the purpose of the IGRCEA. Lawmakers proposing the IGRCEA appear to see the legislation as a prime source of tax revenue.¹⁹¹ Removing the barriers to entry would mean more companies could receive licenses and thus, make money for the federal government to tax.

CONCLUSION

By offering licenses to gamblers, the IGRCEA unofficially acknowledges that it is more efficient for the government to officially accept a “vice” when it has a comparative disadvantage in enforcing prohibition. Congressman Barney Frank, the former head of the Financial Services Committee, has even said that “[s]ome adults will spend their money foolishly, but it is not the purpose of the federal government to prevent them legally from doing that.”¹⁹² Such sentiments mean little if the policy and legislation they support is flawed. The IGRCEA may appear to be a signal that the government does not wish to impose morality on American citizens, but it effectively does little to counteract the UIGEA. The IGRCEA depends on business owners complying with its rules, and Congress seems to assume that gamblers will automatically flock to licensed websites. Much of the legal literature also supports the belief that regulation is an effective alternative to prohibiting online gambling.¹⁹³ Other financial commentary, such as *The Economist*, supports legalization and regulation.¹⁹⁴ While some of the literature analyzes regulatory choices, there are some authors who express a blind faith in the effectiveness of regulation.¹⁹⁵ However, one should not accept regulation at face value, but rather, one should analyze it critically. Even Ronald Coase, whose academic

¹⁹⁰ See Thomas W. Hazlett, *Cable Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 2, 9 (2007) (labeling local level franchises as “significant impediments to cable entry.”).

¹⁹¹ Chan, *supra* note 12.

¹⁹² *Id.*

¹⁹³ See, e.g., Alexander, *supra* note 3, ¶¶ 37-46; Lisa Boikess, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 151, 198-209 (2008); Valasek, *supra* note 141, at 753.

¹⁹⁴ *Online Gambling: You Bet*, *supra* note 4.

¹⁹⁵ Alexander, *supra* note 3, ¶ 46 (after criticizing the UIGEA, the author briefly looks at a few regulatory improvements and concludes that “regulation is the better option.”).

works tend to be critical of regulation, had said that he does not “reject any policy without considering what its results are.”¹⁹⁶

By conducting cost–benefit analyses for gamblers under this proposed regulation, one can more readily determine whether the IGRCPEA will provide incentives for gamblers to comply with the law. Thus, conducting a cost–benefit analysis for gamblers will help predict whether gamblers will comply with the IGRCPEA. However, given the lack of enforceability and the advances in technology that allow gamblers to stay ahead of the government, it does not appear that the IGRCPEA’s licenses will provide many incentives for gamblers to stop using illegal websites and evasion tactics. Legalizing online gambling, as legal literature and studies of foreign countries’ gambling rules imply, would provide the U.S. with a valuable source of tax revenue,¹⁹⁷ bring back businesses,¹⁹⁸ and thus job opportunities. These beneficial outcomes, however, depend on effective regulation.

Congress did not vote on the IGRCPEA during its lame duck session, and now its future is uncertain.¹⁹⁹ Because the Republican Party won control of the House of Representatives in the 2010 midterm elections, Congress may decide not to consider the bill.²⁰⁰ Considering that the Financial Services Committee’s most prominent Republican member, Representative Spencer Bachus, expressed concerns over the bill encouraging people to lose money,²⁰¹ the House may use regulation of online gambling as a way to discourage it.²⁰² Moreover, the new Speaker of the House, John Boehner, has a history of voting against online gambling.²⁰³ Boehner also asserted after the UIGEA passed that it “uphold[s] strong values that puts the inter-

¹⁹⁶ Thomas W. Hazlett, *Looking for Results: Nobel Laureate Ronald Coase on Rights, Resources, and Regulation*, REASON MAGAZINE, Jan. 1997, available at <http://reason.com/archives/1997/01/01/looking-for-results>.

¹⁹⁷ Aubuchon, *supra* note 12, at 314 (asserting that regulated online gambling could produce over \$4 billion for the federal and state governments each year).

¹⁹⁸ *Id.* at 311.

¹⁹⁹ Hwang, *supra* note 35.

²⁰⁰ *Id.* (suggesting the 112th Congress will not decide on anything about online gambling on a federal level because a different party will be in control).

²⁰¹ Chan, *supra* note 12 (quoting Bachus as describing the discrepancy in recent efforts in “shutting down casinos on Wall Street” and “open[ing] casinos in every home and every bedroom and every dorm room, and on every iPhone, every BlackBerry, every laptop.”).

²⁰² See *Online Gambling: You Bet*, *supra* note 4 (explaining that if regulators want to discourage online gambling, they can use similar methods that regulators do with smoking: “legalise [sic] it but make the casinos display the often-dismal odds of success . . . the same way that cigarette packets warn you about cancer.”).

²⁰³ Andrew Goldberg, *Harry Reid Fails in Bid to Legalize Online Poker*, BUS. INSIDER (Dec. 17, 2010, 10:05 AM), <http://www.businessinsider.com/harry-reid-fails-in-bid-to-legalize-online-poker-2010-12>.

ests of our families and children first.”²⁰⁴ It is thus likely that the Boehner will do his best to quash the IGRCEA, the IGRTEA, and any other legislation seeking to legalize online gambling. But in the event that the IGRCEA passes in its present form, it will likely prove to be ineffective regulation because it does not provide more defined rules than its predecessor or give consumers many incentives to comply. Unless it takes certain measures, either by forcing proxy servers to reveal their customers’ locations to gambling websites and the government, or by removing the artificial barriers to entry, the IGRCEA, as it stands, will likely inspire many negative expectations.²⁰⁵

²⁰⁴ Press Release, Rep. John Boehner, House Passes 2nd American Values Agenda Bill, Cracks Down on Internet Gambling (Jul. 11, 2006), *available at* <http://johnboehner.house.gov/news/DocumentSingle.aspx?DocumentID=71887>.

²⁰⁵ IL DADO CASINO GAMBLING GLOSSARY, http://www.ildado.com/casino_glossary02.html (last visited Nov. 21, 2010) (“Negative Expectation – The long run disadvantage or loss of a given situation without reference to any particular outcome; that is, what you figure to lose on average after a considerable time of play, or after a large number of repetitions of the same situation.”).





