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Is Intent Relevant?

Maurice Stucke

IS INTENT RELEVANT?

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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] Morissette 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 practitioners[9] recognize that in-

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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]

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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]

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[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 Treaties*, 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 heads 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 toeholds 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

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[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.

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[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]

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[22] Morissette 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 reckless[30] 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

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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]

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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]

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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 anticompetitive 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

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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

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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]

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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 criminally[69] 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

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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

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[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

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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

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[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-

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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

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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. Steinhaus, 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]

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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]

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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, unsocial, 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

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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

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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 Gaechter, *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

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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

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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-

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[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

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"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

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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 project[161] 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 prosecutors[165] and judges[166] decry greed.

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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 Kidde 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, procompetitive 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

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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

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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 403[181] 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

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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]

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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 behavior[196] or group boycotts.[197] For example, Fields Medal winner

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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

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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

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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. Vandebrake, 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

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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 Gnau 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 Gnau, 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.

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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 hyperfair 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

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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 integration[224] and in practicing a world reli-

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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,

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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

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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-

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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 Ezrachi & 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

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

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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 defendants' "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,

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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.

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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

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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-

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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.*

restimate 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

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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-

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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

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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

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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,

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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 proffered 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 ambigu-

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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.

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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.