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Spring 2013

# Fairness and Antitrust Reconsidered: An Evolutionary Perspective

Thomas J. Horton, *University of South Dakota School of Law*



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# Fairness and Antitrust Reconsidered: An Evolutionary Perspective

Thomas J. Horton\*

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## I. INTRODUCTION

"Fairness" seems to be a dirty word today in American antitrust circles.<sup>1</sup> For many American jurists and scholars, the notion that antitrust and competition law

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1. See, e.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 651h (3d ed. 2008) ("The concern of [Sherman Act] § 2 is with monopoly, not unfairness or deception."); ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 145–46 (1989) (discussing efforts of "some jurists and scholars. . .to excise fairness from the antitrust lexicon.").

should incorporate moral norms of fairness is anathema.<sup>2</sup> They believe that “fairness and competition are like oil and water; they do not mix.”<sup>3</sup> In the words of Seventh Circuit jurist and former academic Frank Easterbrook: “Who says that competition is supposed to be fair. . . ?”<sup>4</sup>

Jurists’ and scholars’ efforts to “excise fairness from the antitrust lexicon” have been steady and unremitting since the 1960s.<sup>5</sup> For example, in 1980, iconic and revered antitrust scholars like Professors Phillip Areeda and Donald Turner described fairness “as a vagrant claim applied to any value that one happens to favor.”<sup>6</sup> Some influential scholars have even posited that when “notions of fairness” are considered in legal analyses, “individuals tend to be made worse off.”<sup>7</sup>

Such attacks are somewhat surprising given the importance of fairness norms to the framers of the Sherman Act<sup>8</sup>—not to mention America’s founding fathers and religious leaders.<sup>9</sup> In the Sherman Act’s legislative history, “[r]epeated

2. See Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 105 (2007) (“It has been a long time since anyone has thought about antitrust in explicitly moral terms. . . .”); Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003) (“[A]ntitrust has no moral content.”); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 10, 54 (2005) (stating that antitrust is not concerned with the moral implications of conduct—only the economic implications).

3. FOX & SULLIVAN, *supra* note 1, at 146.

4. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., concurring in part and dissenting in part).

5. FOX & SULLIVAN, *supra* note 1, at 146; see also Jesse W. Markham, Jr., *Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the “Too-Big-To-Fail” Phenomenon*, 16 FORDHAM J. CORP. & FIN. L. 278–81 (2011) (discussing the continued Post-Chicago “adherence to the limited objective of economic efficiency”); Michael Ruse, *Evolutionary Ethics Past and Present*, in *EVOLUTION AND ETHICS: HUMAN MORALITY IN BIOLOGICAL AND RELIGIOUS PERSPECTIVE* 27 (P. Clayton & J. Sachs eds., 2004) (“[F]orty years ago, evolutionary ethics was the philosophical equivalent of a bad smell.”).

6. 4 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* 21 (1980).

7. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966 (2001).; see also *infra* Section II.A.; FOX & SULLIVAN, *supra* note 1, at 146 (noting that jurists and scholars attacking fairness “define competition solely as a means to produce efficiency—primarily allocative efficiency—and contend that any competition policy that does not single-mindedly aim at efficiency will therefore produce inefficiency and will therefore make all of us (counted by our aggregate wealth) worse off.”).

8. Act of July 2, 1890, ch. 647, 26 Stat. 209. 15 U.S.C. §§ 1–7. Section 1 prohibits contracts, combinations in the form of trust or otherwise, or conspiracies in trade or commerce. Section 2 prohibits monopolization and attempts or conspiracies to monopolize.

9. See 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 20 (Earl W. Kintner ed. 1978); see also, e.g., Richard Hofstadter, *What Happened to the Antitrust Movement*, THE BUSINESS ESTABLISHMENT 113, 149 (Earl Frank Cheit ed., 1964) (arguing that America’s antitrust laws and enforcement are based on “political and moral judgment” and not on “outcome of economic measurement”); Larry Arnhart, *The Darwinian Moral Sense and Biblical Religion*, in *BIOLOGICAL & RELIGIOUS PERSPECTIVE* 204, 205–20; FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 35 (1995) (“The most important habits that make up cultures have little to do with how one eats one’s food or combs one’s hair but with the ethical codes by which societies regulate behavior . . . . Despite their variety, all cultures seek to constrain the raw selfishness of human nature in some fashion through the establishment of unwritten moral rules.”). As stated in a website on fairness:

One of the earliest laws that we are taught is the need for fairness. It is universal to every culture,

reference was also made throughout the proceedings to the policy favoring 'freedom and fairness' in commercial intercourse. . . ."<sup>10</sup> In the Senate debates, Alabama Senator James L. Pugh, for example, frequently asserted that trusts go against public policy, and stated that trusts and combinations "hinder, interrupt, and impair the freedom and fairness of commerce. . . ."<sup>11</sup>

Economics rules antitrust today. Jurists and scholars favoring economic "consumer welfare"<sup>12</sup> considerations and disfavoring fairness considerations in antitrust analyses are ascendant.<sup>13</sup> Allocative efficiency is positively equated with

creed and era. All of our fairy stories, our most popular works of fiction and our blockbuster movies are based on the innate fairness of nature. Our moral, political and spiritual leaders all stress the need for fairness.

Out of this core belief our religious, social systems and conventions have been based. *The Law of Fairness*, COACHING TO HAPPINESS, <http://coachingtohappiness.com/stress-management/law-fairness> (last visited Nov. 16, 2012) (on file with the *McGeorge Law Review*).

10. 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 20 (Earl W. Kintner ed. 1978).

11. 21 CONG. REC. 2256 (Mar. 24, 1890), reprinted in LEGISLATIVE HISTORY, *supra* note 10 at 154–57; see also RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW 14 (1996) ("Senator Sherman began the debate about his bill to secure 'full and fair competition' with the familiar themes of industrial liberty and consumerism. . . ."); AREEDA & HOVENKAMP, *supra* note 1, at ¶ 103, ("A substantial history from sources other than the legislative debates suggests that the proponents of the Sherman Act were significantly more concerned about injury to competitors than injury to consumers.").

12. See Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach* 78 ANTITRUST L.J. 2, 4 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2039337](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039337) (on file with the *McGeorge Law Review*).

It is important to note that "[t]he goal of antitrust, as understood by economic analysis, involves a choice of either total welfare or consumer welfare. Total welfare reflects the overall economic surplus from both producers and consumers. In contrast, consumer welfare refers to the surplus that goes only to consumers and does not include producer surplus." *Id.*

A serious problem, however, is that scholars, commentators, and judges, including the Supreme Court, frequently have confused the two concepts. *Id.* Blair and Sokol believe that this problem arose because Professor Bork "[used] the term consumer welfare when he meant total welfare." *Id.*; see also John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 200 n.30 (2008) (observing that "[m]any commentators have pointed out that Bork's terminology was confusing . . . The more accurate synonym for economic efficiency is total welfare. . . ."). Kirkwood and Lande add: "Bork used 'consumer welfare' as an Orwellian term of art that has little or nothing to do with the welfare of true consumers . . . If he had been honest, Bork would have used 'total welfare' as the synonym for economic efficiency, the term employed by the economics profession for this purpose." *Id.* at 199–200.

A full analysis of the differences between economic consumer welfare and total welfare standards is beyond the scope of this Article. However, the differences ultimately are not dispositive of or even critical to the analysis in this paper. See Herbert Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust* 9 (2011), available at <http://ssrn.com/abstract=1873463> (on file with the *McGeorge Law Review*) ("The volume and complexity of the academic debate on the general welfare vs. consumer welfare question creates an impression of policy significance that is completely belied by the case law, and largely by government enforcement policy. Few if any decisions have turned on the difference. In fact, antitrust policy generally applies both tests . . .").

13. See, e.g., Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 563–66 (2012) (discussing ascendance of Chicago School's neoclassical economic theories in American antitrust jurisprudence since the late 1970s); Markham, *supra* note 5, at 278 ("The current state of antitrust law is often referred to as embracing 'Post-Chicago School' economic theory. Post-Chicago School antitrust is the stepchild of Chicago

consumer welfare. Arguably, consumers are better positioned in markets that produce economically efficient transactions.<sup>14</sup> Contemporary U.S. antitrust analysis focuses almost solely on economic goals.<sup>15</sup>

American antitrust's deference to economics leaves little room for supposedly non-economic goals such as fairness.<sup>16</sup> For example, recent Supreme Court decisions have "acknowledged antitrust's economic goals, but not its political, social, and moral goals."<sup>17</sup> The Court even has gone so far as to say that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"<sup>18</sup>

This Article reconsiders the antitrust fairness-versus-welfare debate from an evolutionary perspective. Section II.A. discusses the various arguments against applying fairness norms in antitrust cases. Section II.B. then sets forth the arguments for reincorporating fairness norms into antitrust analyses. Building upon the evolutionary analyses in previous papers,<sup>19</sup> and the growing "enthusiasm

School antitrust. . ."); *id.* at 281 ("'Post-Chicago' antitrust theory departs from the Chicago School views mostly around the margins."); Lynn A. Stout, *Taking Conscience Seriously*, MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY 157, 158 (Paul J. Zak ed., 2008). Stout argues that "modern professors teach their students in economics, law, and business courses . . . to assume that people are 'rational maximizers' who behave like members of the mythical species *Homo economicus*. Economic Man does not worry about morality, ethics, or other people. Instead, Economic Man is cold and calculating, worries only about himself, and pursues whatever course brings him the greatest material advantage."

14. See Markham, *supra* note 5, at 280. Allocative efficiency refers to "the avoidance of economically inefficient transactions . . ." *Id.* at 278.

15. See ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 39 (2d ed. 2008).

16. *Id.* As noted by Professors Gavil, Kovacic, and Baker:

Although . . . courts sometimes have articulated non-economic goals for U.S. antitrust law, their reliance on such goals as a source of useful guidance for deciding particular cases has consistently waned since the early 1970s. Non-economic goals frequently conflict with economic aims, provide too little guidance for antitrust decision makers, and arguably are ill-suited to decision-making processes that rely on adjudication and the adversary system.

*Id.* at 39–40; see also Markham, *supra* note 5, at 264–65 ("[T]he antitrust laws in the United States began a steady process of judicial erosion to eliminate multiple and possibly conflicting policy objectives, distilling in their place the exclusive purpose of promoting consumer welfare through allocative and dynamic efficiency."); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 81 (2007) (observing that it is "generally assumed today" that "allocative efficiency is the goal.").

17. Stucke, *supra* note 13, at 566. Similarly, competition officials during the Bush administration urged that the "promotion of consumer welfare and the organization of the free market economy are the only goals of [the] antitrust laws. . .with other economic or social objectives better pursued by other instruments." INT'L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES 31 (2007) [hereinafter 2007 ICN REPORT], available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf> (on file with the *McGeorge Law Review*).

18. *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)); see also *Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (noting "antitrust laws' traditional concern for consumer welfare and price competition").

19. 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. 615 (2012) [hereinafter Horton, *Antitrust Double Helix*]; 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*

for approaches that try to link our morality to our evolutionary biology,”<sup>20</sup> this Article recommends that courts and antitrust regulators apply an evolutionary analysis instead of the static economic consumer and total welfare norms in vogue today. The new focus would be on fairness norms, intent, and competitive harm. Section II.C. discusses developing a workable antitrust fairness standard built around considerations of fairness, anticompetitive intent, and competitive harm.

Section III addresses four contemporary Supreme Court antitrust decisions that likely would have been decided differently if they applied an evolutionary analysis and fairness norms. Section III.A. addresses a series of “false negatives” in three predatory pricing cases that were decided under an economic consumer welfare approach. Next, it proposes that each case should have been decided by a citizen jury that focused on fairness, intent, and competitive harm. Had that happened, each likely would have been decided in the plaintiffs’ favor. Section III.B. then discusses how the economic consumer welfare approach ironically has led to “false positives” and an overly aggressive application of the Sherman Act in cases such as *FTC v. Superior Court Trial Lawyers Assn.*<sup>21</sup>

This Article concludes that from an evolutionary perspective, basic notions of fairness are critical to the efficient functioning of competitive markets.<sup>22</sup> It is therefore time to begin reincorporating evolutionary norms of fairness into antitrust analyses. By paying more attention to fairness, intent, and competitive harm, American antitrust jurisprudence and practice can again become a positive force in building and sustaining “free and fair” competitive 21st century markets.<sup>23</sup>

## II. THE ANTITRUST AND FAIRNESS DEBATE

Should considerations of fairness play any role in substantive antitrust analyses? Should judges or antitrust juries consider fairness norms in deciding antitrust cases? As discussed above, many American judges, commentators, and academics active in the antitrust arena believe that the simple answers to such

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*Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469 (2011) [hereinafter Horton, *Coming Extinction*]; Thomas J. Horton, *Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary Biology for Antitrust and Competition Policy*, 51 ANTITRUST BULL. 195 (2006) [hereinafter Horton, *Competition or Monopoly?*].

20. Ruse, *supra* note 5, at 27.

21. 493 U.S. 411, 424 (1990).

22. See MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY xi (P. Zak ed. 2008). (“[M]odern market exchange is inconceivable without moral values.”).

23. See Stucke, *supra* note 13, at 554–55 (discussing how the significance of antitrust has diminished substantially in the United States while its international importance is steadily growing); see also Marc D. Whitener, *Editor’s Note: The End of Antitrust?*, ANTITRUST, Fall 2007, at 5 (“The rhetoric and arguably, the enforcement records of the agencies—outside the cartel arena—are less activist now than at any time in recent years.”).

questions are no.<sup>24</sup> Following their logic, many jurists and scholars limit their antitrust focus primarily to neoclassical economic considerations of consumer welfare and allocative efficiency. Section II.A. sets forth the arguments and considerations against applying fairness norms in antitrust analyses.

In the last few years, a growing number of commentators and academics, including this author, have disagreed with the popular neo-classical approaches to antitrust analyses.<sup>25</sup> Approaching antitrust from an interdisciplinary perspective, these critics seek a consilience<sup>26</sup> between antitrust and such burgeoning fields as evolutionary biology and behavioral economics. They believe that consideration of fairness norms is crucial if antitrust is to remain relevant and vigorous in the coming decades. Their positions are set forth in Section II.B. below.<sup>27</sup>

Based on these discussions, Section II.C. concludes that it makes evolutionary and competitive sense to reincorporate norms of fairness into modern antitrust analyses. Such considerations can be combined with a sharper focus on intent and competitive harm to create an effective antitrust regulatory scheme that is consistent with our evolutionary and behavioral heritages. Citizen jurors are evolutionarily hard-wired to understand and assess competitive fairness and intent.<sup>28</sup> Conversely, the ever-changing and biased neoclassical norms of consumer welfare and allocative efficiency make sense only in an anti-democratic context. Under the prevailing system, antitrust cases are kept away

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24. See *supra* notes 13–18.

25. See, e.g., KENNETH M. DAVIDSON, *REALITY IGNORED: HOW MILTON FRIEDMAN AND CHICAGO ECONOMICS UNDERMINED AMERICAN INSTITUTIONS AND ENDANGERED THE GLOBAL ECONOMY* (2011); *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U. S. ANTITRUST* (Robert Pitofsky ed., 2008); WALTER ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR AND GOVERNMENT IN THE AMERICAN ECONOMY* 9 (2d ed. 2004); Kirkwood & Lande, *supra* note 12, at 626; Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917, 917 (1987).

26. EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 8–14 (1998) (describing consilience—the “unity of knowledge” derived from a synthesis of difference sciences—as an interdisciplinary tool that can increase diversity and depth of knowledge through an underlying cohesion).

27. It is important to point out that fairness, as it is discussed in this Article, does not mean an equality of competitive outcomes. Thus, this Article does not attempt to survey or discuss the rich economics literature assessing the classic “efficiency versus equity” argument, as it relates to how resources are distributed throughout society. See, e.g., Jules Le Grand, *Equity Versus Efficiency: The Elusive Trade-Off*, 100 ETHICS 554, 554 (1990); Robin Broadway, *Integrating Equity and Efficiency in Applied Welfare Economics*, 90 Q. J. ECON. 541, 541 (1976). Instead, it is understood that the goal of competition is “to facilitate production of the best products and services and an optimal product/service mix for consumers.” FOX & SULLIVAN, *supra* note 1, at 145. For Professors Fox and Sullivan, “fairness in the antitrust context has three different components, none of which is incompatible with consumer interests: (1) Is the defendant using power and position rather than merit to block the path of a less well-situated competitor? (2) Is the defendant using power to exploit a buyer or seller? (3) Does the defendant have such control over access to the process of competition itself that it can and does set arbitrary rules about who can participate and who is excluded?” *Id.*

28. See, e.g., Horton, *Antitrust Double Helix*, *supra* note 19, at 661, 654; Horton, *Coming Extinction*, *supra* note 19, at 505, 510.

from juries and dominant firms maintain the ability to engage in predatory behavior.<sup>29</sup>

### A. *The Case Against Fairness*

A primary economic attack against considerations of fairness in antitrust analyses is that such notions allegedly “perversely reduce welfare, indeed sometimes everyone’s well-being . . . .”<sup>30</sup> In their seminal 2001 *Harvard Law Review* article *Fairness Versus Welfare*, Harvard Law Professors Louis Kaplow and Steven Shavell posit that “no independent weight should be accorded to conceptions of fairness” because “when the choice of legal rules is based even in part on notions of fairness, individuals tend to be made worse off.”<sup>31</sup> Instead of fairness, a “welfare-based normative approach should be exclusively employed in evaluating legal rules.”<sup>32</sup> Kaplow and Shavell argue that:

[A]dvancing notions of fairness reduces individuals’ well-being. . . . By definition, welfare economic analysis is concerned with individuals’ well-being, whereas fairness-based analysis (to the extent that it differs from welfare economic analysis) is concerned with adherence to certain stipulated principles that do not depend on individuals’ well-being. Thus, promoting notions of fairness may well involve a reduction in individuals’ well-being.<sup>33</sup>

Kaplow and Shavell attempt to demonstrate “a number of paradigmatic situations in which . . . promoting notions of fairness would make *everyone* worse off.”<sup>34</sup>

Kaplow’s and Shavell’s criticisms of fairness as a viable and meaningful legal concept meshed perfectly with the ascendant Chicago School of antitrust thinking that antitrust analysis could be unified around a single economic goal: the improvement of allocative efficiency “without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”<sup>35</sup> As noted by antitrust scholar and Seventh Circuit Judge Richard A. Posner, “The allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field.”<sup>36</sup> The

29. 2007 ICN REPORT, *supra* note 17, at 31.

30. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331 (2003).

31. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966 (2001).

32. *Id.* at 967.

33. *Id.* at 971.

34. *Id.*

35. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 91 (1978); *see also* RICHARD A. POSNER, *ANTITRUST LAW*, at viii–ix (2d ed. 2001).

36. *Chesapeake & Ohio Ry. Co. v. United States*, 704 F.2d 373, 376 (7th Cir. 1983); *see also* POSNER,



Chicagoans' economic goal was based upon "their largely static conception of competition, strong belief in the rationality of market participants, skepticism over the likelihood and extent of market failures, and doubts about the government's institutional capacities."<sup>37</sup> The Chicagoans believed that absent government interference and the injection of political, moral, and social goals into antitrust analyses, markets would naturally lead to increased efficiency and consumer welfare.<sup>38</sup> Political, moral, and social goals and values, such as fairness, simply had no role to play in rigorous antitrust economic analyses.<sup>39</sup>

A second attack against considerations of fairness is that they could potentially sweep too much conduct that is not harmful to the overall competitive process within the ambit of the Sherman and Clayton Acts.<sup>40</sup> A major concern is that generating "false positives" in antitrust analyses could chill aggressive competition and harm consumer welfare.<sup>41</sup> For example, Professors Areeda and Hovenkamp argue that "[e]ven if one defines 'exclusionary' conduct with an eye only toward injunction, most conduct that is 'unfair' under state tort law or FTC Act § 5 fails to be 'exclusionary' under Sherman Act § 2. . . . The concern of § 2 is with monopoly, not unfairness or deception."<sup>42</sup> Importantly, however, they went on to concede that "in the presence of substantial market power, some kinds of tortious behavior could anticompetitively create or sustain a monopoly, and it would then warrant condemnation under § 2."<sup>43</sup>

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*supra* note 35, at ix.

37. Stucke, *supra* note 13, at 563.

38. See, e.g., HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 71-73 (4th ed. 2011) (summarizing the Chicago School's theories); Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 282-93 (1995); Horton, *Coming Extinction*, *supra* note 18, at 506-07; Stucke, *supra* note 13, at 563-64; Edwin J. Hughes, *The Left Side of Antitrust: What Fairness Means and Why It Matters*, 77 MARQ. L. REV. 265, 269-273 (1994).

39. See Markham, Jr., *supra* note 5, at 280; Stucke, *supra* note 13, at 563-64.

40. See, e.g., *Northwest Power Products, Inc. v. Omark Indus.*, 576 F.2d 83, 88 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) ("[T]he purposes of antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition."); 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 737b (1978) (The authors "doubt that . . . torts . . . would very often seriously impair the competitive activities of rivals in any significant or permanent way. . . . [Plaintiffs must show] significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer).").

41. See, e.g., *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (2004). Professor Hovenkamp has characterized Chicagoans' concerns about "false positives" as "The Fake Problem of False Positives in Competitor Lawsuits." Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 33 (1989).

42. AREEDA & HOVENKAMP, *supra* note 1, at ¶ 651h.

43. *Id.* at 126. Areeda and Hovenkamp further point out that "it is not enough under § 2 to find that a firm has engaged in 'unfair' conduct; the antitrust tribunal must also decide that the conduct has had, or is likely to have, the effect of significantly impairing the ability of rivals to compete." *Id.* at 125-26.

Seventh Circuit Judge Frank Easterbrook went even further in condemning “fairness” as a way to dilute pro-competitive competition. He argued:

My brethren want rivalry to be “fair”. . . . Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom . . . . When economic pressure must give way to fair conduct, as the court today holds it must, rivals will trim their sails. Fair competition is tempered competition.<sup>44</sup>

Judge Easterbrook believes that competition is akin to “warfare,”<sup>45</sup> and finds “[m]uch competition unfair, or at least ungentlemanly; it is designed to take sales away from one’s rivals.”<sup>46</sup>

The Supreme Court has followed the reasoning of Professors Areeda and Hovenkamp and Judge Easterbrook. For example, in 1993, in *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*,<sup>47</sup> the Court went out of its way to dismiss fairness as a relevant concept in antitrust analyses.<sup>48</sup> Lauding the so-called consumer welfare benefits of below-cost pricing by a dominant firm, the Court stated that the antitrust laws “do not create a federal law of unfair competition. . . .”<sup>49</sup> The Supreme Court added that absent strong proof of recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”<sup>50</sup> That predatory pricing caused a competitor targeted by a dominant firm to suffer “painful losses” was of “no moment to the antitrust laws” because “[i]t is axiomatic that the antitrust laws were passed for ‘the protection of *competition*, not *competitors*.’ ”<sup>51</sup>

The Supreme Court cited *Brook Group* approvingly and followed a similar tack in 1998 in *Nynex Corp. v. Discon, Inc.*<sup>52</sup> Discon had been driven out of the market for the removal of obsolete telephone equipment through a fraudulent deal between NYNEX and AT&T Technologies.<sup>53</sup> Nevertheless, the Court refused to apply the *per se* rule, and held that “the plaintiff here must allege and

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44. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting in part).

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

46. *Sanderson v. Culligan Int’l Co.*, 415 F.2d 620, 623 (7th Cir. 2005); see also R. Hewitt Pate, Assistant Att’y Gen., DOJ, *Remarks at the International Conference on Competition: Competition and Politics 2* (June 6, 2005), available at <http://www.justice.gov/atr/public/speeches/210522.pdf> (on file with the *McGeorge Law Review*) (arguing that in antitrust analyses, “the inclusion of other, non-competition values is very dangerous, and we need to be very careful with it.”).

47. 509 U.S. 209 (1993).

48. *Id.* at 243.

49. *Id.* at 225.

50. *Id.* at 224.

51. *Id.* (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). For a detailed discussion of why “the protection of competition, not competitors” language is not “axiomatic” at all, see Horton, *Antitrust Double Helix*, *supra* note 19, at 623–32.

52. 525 U.S. 128, 136–37 (1998).

53. *Id.* at 131.

prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself.”<sup>54</sup> The Court reasoned that “other laws, for example, ‘unfair competition’ laws, business tort laws, or regulatory laws, provide remedies for various ‘competitive practices thought to be offensive to proper standards of antitrust morality.’”<sup>55</sup> The Court then cited *Brooke Group* to justify its lenient treatment of the fraudulent and successful exclusionary conduct, and quoted the portion of the *Brook Group* opinion where the court noted that “[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.”<sup>56</sup>

A third attack against considerations of fairness is that fairness is a subjective concept that lacks any meaningful economic guidance. For example, Professors Areeda and Turner argued that “[a]s a goal of antitrust policy, ‘fairness’ is a vagrant claim applied to any value that one happens to favor.”<sup>57</sup> More than fifty years ago, in 1959, Professors Kaysen and Turner similarly “could not find any criterion of ‘fairness’ in conduct that would enable them to distinguish competitive from noncompetitive situations. They condemned as ‘superficial’ any attempt to use antitrust laws to [forbid] the use of unfair tactics as a means of acquiring monopoly power.”<sup>58</sup>

Similarly, Professors Kaplow and Shavell contended that “claims that one or another outcome is unfair are often unhelpful because they convey little information beyond the fact of the author’s condemnation.”<sup>59</sup> Economist George Stigler went even further, characterizing fairness as “a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice.”<sup>60</sup>

Even for such an aggressive progressive antitrust thinker as the late Alfred E. Kahn, who believed in “fair competition [as] an ‘end in itself,’”<sup>61</sup> the concept of fairness in antitrust was somewhat problematic because “business size and integration almost inevitably confer certain ‘unfair’ competitive advantages and give rise to corresponding possibilities of the extension of monopoly.”<sup>62</sup> Kahn explained: “If all competitors were equally able to integrate, no unfairness or danger of an extension of monopoly would enter. But inequity may be introduced

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54. *Id.* at 135.

55. *Id.* at 137 (quoting 3 P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 651 (1996)).

56. *Nynex*, 525 U.S. at 137 (quoting *Brooke Group*, 509 U.S. at 225).

57. 4 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 21 (1980).

58. Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 80 (2012) (discussing and citing CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 15–18 (1959)).

59. Kaplow & Shavell, *supra* note 31, at 335.

60. George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 4 (1972).

61. Alfred E. Kahn, *Standards for Antitrust Performance*, MONOPOLY POWER AND ECONOMIC PERFORMANCE: THE PROBLEM OF INDUSTRIAL CONCENTRATION 169, 177 (Edwin Mansfield ed., 1968).

62. *Id.* at 180.

by mere inequality in the ability of these companies to attract capital—an inequality which tends to be cumulative.”<sup>63</sup>

Similarly, Professors Areeda and Hovenkamp discussed at length the Sherman Act legislative history’s substantial concern with “injuries to competitors rather than injuries to consumers.”<sup>64</sup> They conceded that “[p]erhaps we might separate out for condemnation those policies of firms that burden rivals ‘unfairly.’”<sup>65</sup> But they added, “. . . nothing in the [Sherman] Act or its history tells us how big such a firm must be or what the criteria of unfairness are.”<sup>66</sup> Professors Kaplow and Shavell likewise were concerned by what they viewed as a lack of precision in defining fairness. They argued that “[t]he notion of fairness must be stated with some precision and in a manner that is complete (unlike virtually all the leading notions of fairness that we consider).”<sup>67</sup>

A related concern is that the lack of any objective standard for considerations of fairness could lead to the application of widely divergent standards and result in markedly inconsistent and unpredictable outcomes. In defining objective standards of fairness, courts theoretically could be forced to consult divergent state tort laws. Professors Areeda and Hovenkamp, for example, noted that state business tort laws “var[y], sometimes widely, from state to state.”<sup>68</sup> They posited that “it makes no sense to treat two monopolists differently under § 2 because of fortuitous differences in state tort law. In short, antitrust courts would at the least have to formulate a ‘federal’ law of business torts.”<sup>69</sup> Professors Areeda and Hovenkamp concluded that from a purely practical perspective, “it seems far more sensible to deal with the question of what is ‘exclusionary’ in light of the purposes of § 2.”<sup>70</sup>

Many economists and antitrust practitioners go even further. They believe that considerations of fairness and unfairness should play no role in antitrust analyses because “business competition may simply be amoral.”<sup>71</sup> Indeed, some scholars have gone so far as to suggest that “antitrust has no ethical component” and “no moral content.”<sup>72</sup> Judge Bork, for example, argues that “[c]onsumer

63. *Id.* at 181.

64. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 103b (3d ed. 2006).

65. *Id.* at ¶ 103d.

66. *Id.*

67. Louis Kaplow & Steven Shavell, *supra* note 31, at 361.

68. AREEDA & HOVENKAMP, *supra* note 1, ¶ 651h at 127, n. 89.

69. *Id.*

70. *Id.*

71. James H. Michelman, *Some Ethical Consequences of Economic Competition*, in BUSINESS ETHICS: A PHILOSOPHICAL READER 30, 32 (Thomas I. White ed., 1993); *see also* MILTON H. FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th anniversary ed. 2002) (“Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible.”); Horton, *Coming Extinction*, *supra* note 19, at 505.

72. Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. 951, 989 (2008); *Id.* at n. 140 (quoting Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003)

welfare, as that term is used in antitrust, has no sumptuary or ethical component . . . .”<sup>73</sup> Economist Oliver Williamson similarly opined that trust is an empty category when one subtracts out apparently trustworthy behavior that can be explained on the basis of rational self-interest.<sup>74</sup> As summarized cogently by Francis Fukuyama:

Many people would not accept the fact that something done by a corporation in its own self-interest can have any moral content. . . . This is all the more true of economists, who want to keep their science free of any kind of dependence on moral motivation.<sup>75</sup>

Taking a seemingly practical perspective, numerous Chicago School scholars and disciples have further argued that fairness should play no role in antitrust analyses because most monopolies, dominant firms, and so-called predatory conduct actually are highly pro-competitive, and ultimately increase overall consumer welfare.<sup>76</sup> These scholars and their adherents long have sought to “make ‘survival of the fittest’ in economic markets a [close] analogy to the struggle for survival in the biological world.”<sup>77</sup> Ultimately, they have leveraged the views of Joseph Schumpeter and Milton Friedman that monopolies and unfairness are economically natural and acceptable.<sup>78</sup> As previously noted, Chicagoans like Judge Frank Easterbrook believe that attempts to address competitive unfairness through the antitrust laws will result in an unacceptably high rate of antitrust “false positives.”<sup>79</sup>

Finally, “[h]owever many articles there have been on fairness, and however important economists may consider fairness, it has been continually pushed into a back channel in economic thinking.”<sup>80</sup> Economists George Akerlof and Robert Shiller argue that economists tend to diminish the importance of fairness in economic analyses because “[e]conomics textbooks are supposed to be about

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(“[A]ntitrust has no moral content. . . .”)); see also Horton, *Coming Extinction*, *supra* note 19, at 506.

73. BORK, *supra* note 35, at 90.

74. Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J.L. & ECON. 453, 454 (1993).

75. FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* 259 (1999).

76. See, e.g., Markham, *supra* note 5, at 264 (“Whatever animated their enactment, antitrust laws no longer concern themselves with preventing bigness, and indeed tend instead to encourage large-scale enterprise for efficiency’s sake.”).

77. Horton, *Coming Extinction*, *supra* note 19 at 479 (citing Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 683 (1985)).

78. See, e.g., Horton, *Coming Extinction*, *supra* note 19, at 479–82.

79. Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 357–58 (arguing that predation and exclusion should be “governed by a wait-and-see attitude” because the economic costs of false positives are so high).

80. GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* 20 (2009).

*economics*, not psychology, anthropology, sociology, philosophy, or whatever branch of knowledge teaches us about fairness.”<sup>81</sup> The economics of rational markets, consumer welfare, and allocative efficiency simply leave no room or place for fairness considerations.

Taken together, such diverse and multi-directional attacks have succeeded in rendering considerations of fairness more or less irrelevant to current antitrust analyses. A simple test will confirm this. Simply pick up any major antitrust textbook or treatise and look for the word “Fairness” in the Index. One either will not find the word or it will have only a trivial number of citations. As a primary example, the American Bar Association’s 1085-page *ANTITRUST LAW DEVELOPMENTS (SEVENTH)*<sup>82</sup> does not list the term in its detailed and lengthy index.<sup>83</sup> Nor will one find the term listed in the index of outstanding textbooks by distinguished antitrust scholars like Herbert Hovenkamp,<sup>84</sup> Andrew Gavil, William E. Kovacic, and Jonathon B. Baker.<sup>85</sup> A 2004 textbook by Professors Areeda, Kaplow, and Edlin includes “Fairness” in its index, and the brief discussion of “Fairness in economic behavior” initially concedes that “[s]ome kinds of unfair practices threaten to eliminate competition. . . . The control or elimination of this kind of unfairness is an essential part of any policy that would preserve competition.”<sup>86</sup> Despite this seemingly important concession, the authors immediately added: “But fairness is a vagrant claim. . . . Competition itself is sometimes called unfair.”<sup>87</sup> “Fairness” also is missing from the indices of cutting-edge global competition textbooks by scholars like Einer Elhauge and Damien Geradin.<sup>88</sup>

For the most part, the diverse critics of fairness as a relevant antitrust concept are ascendant today. Nevertheless, findings from the fields of evolutionary biology and behavioral economics are reopening the debate.

### *B. The Case for Fairness as a Core Antitrust Principle*

Economists long have struggled over whether and how morality should be incorporated into economic analyses.<sup>89</sup> Many economic theorists today try to

81. *Id.* at 21.

82. ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* (7th ed. 2012).

83. *Id.*

84. HOVENKAMP, *supra* note 38.

85. GAVIL, ET AL, *supra* note 15.

86. P. AREEDA, L. KAPLOW & A. EDLIN, *ANTITRUST ANALYSIS: PROBLEMS, TEXTS, AND CASES* 22 (6th ed. 2004).

87. *Id.* ¶ 117(d) at 22. Furthermore, the brief discussion of “Fairness in economic behavior” appears almost as an afterthought in a short section titled “Other values of competition.” *Id.* ¶ 117 at 20.

88. E. ELHAUGE & D. GERADIN, *GLOBAL ANTITRUST LAW & ECONOMICS* (2d ed. 2011). These simple observations are not meant to in any way criticize the textbooks’ authors or place them in the camp of scholars disfavoring the use of “non-economic values” in antitrust analyses.

89. FUKUYAMA, *supra* note 75, at 250.

portray economics as an objective values-free science that is “more like physics than sociology.”<sup>90</sup> In presenting their economic theories as hard science, many neoclassical economists claim total independence from normative moral judgments such as fairness.<sup>91</sup> Like the ancient Greek architect Hippodamus, these economists seek “to rise above the messy particulars of the city to suggest a unity founded on mathematical principles accessible only to the mind and not to eyes.”<sup>92</sup> In so doing, however, they unsuccessfully seek to circumvent human nature.<sup>93</sup>

Economics never has been and never will be free from or immune to normative values judgments.<sup>94</sup> “Economic theorists have generally underestimated values as critical elements in human choice and behavior.”<sup>95</sup> Whether or not economists are willing to admit it, economics “is grounded in social life and cannot be understood separately from the larger question of how modern societies organize themselves.”<sup>96</sup> “Economists like to refer to *their standard* model of human behavior as *Homo economicus* (‘economic man’).”<sup>97</sup> Unfortunately, “in scholarly rhetoric and public conception [the] imaginary *Homo economicus* has morphed into a cartoon version of himself, a heartless sociopath dominated by the ‘anti-value’ of selfishness.”<sup>98</sup>

90. Hughes, *supra* note 34, at 280 (citing Whitney Cunningham, Note, *Testing Posner's Strong Theory of Wealth Maximization*, 81 GEO. L.J. 141, 158 (1992). See also BORK, *supra* note 35, at 8 (“Basic microeconomic theory is of course a science, though like many other sciences it is by no means complete in all its branches. Were it not a science, rational antitrust policy would be impossible.”)).

91. See, e.g., Stucke, *supra* note 13, at 603 (quoting Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 388) (“Antitrust finally regarded enhancing consumer welfare as the *single* unifying goal of competition policy, and it used a framework that was based on sound economics, both theoretical and empirical.”) See also R. Hewitt Pate, Assistant Att’y Gen., Dep’t of Justice, *Remarks at the International Conference on Competition: Competition and Politics 7* (June 6, 2005), available at <http://www.justice.gov/atr/public/speeches/210522.pdf> (on file with the *McGeorge Law Review*) (warning that if competition authorities “incorporate extraneous social and political values into [their] decisionmaking,” then their “competition-based analysis will be polluted by values that, while important, just do not belong in sound competition analysis.”).

92. ARLENE W. SAXONHOUSE, *FEAR OF DIVERSITY: THE BIRTH OF POLITICAL SCIENCE IN ANCIENT GREEK THOUGHT* 209 (1992).

93. EDWARD O. WILSON, *THE SOCIAL CONQUEST OF EARTH* 191 (2012); see also PAUL J. ZAK, *THE MORAL MOLECULE: THE SOURCE OF LOVE AND PROSPERITY* 209 (2012) (“In the nineteenth and twentieth centuries, economics tried to achieve scientific rigor by cutting off recognition of the human element of motives, expectations, and psychological uncertainties.”).

94. See Horton, *Competition or Monopoly?*, *supra* note 19, at 201–205. “The history of the continuing debates as to antitrust legislation and regulation reveals that how people think about antitrust issues is generally tied to their underlying assumptions and premises, as well as their implied values.” *Id.* at 201. Stucke, *supra* note 13, at 604 (“Even if antitrust technocrats, for normative reasons, limit antitrust to economic goals, they cannot avoid noneconomic values.”).

95. Oliver R. Goodenough, *Values, Mechanism Design, and Fairness*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 228 (Paul J. Zak ed., 2008).

96. FUKUYAMA, *supra* note 9, at xiii.

97. ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS* 116 (2006).

98. Goodenough, *supra* note 95, at 228; see also Horton, *Coming Extinction*, *supra* note 19, at 519

Nor is there anything objective, scientific, or even consistent about the concept of consumer welfare, as applied by theorists. As Professors Sokol and Blair note, “[t]he Supreme Court has left ambiguous whether consumer or total welfare should be used as the appropriate standard [in antitrust analysis].”<sup>99</sup> And, as further observed by Professor Hovenkamp, “antitrust does not use welfare tests of any kind very consistently.”<sup>100</sup> Although it sounds economically meaningful and impressive, consumer welfare may be “the most abused term in modern antitrust analysis.”<sup>101</sup> At the very least, “no consensus exists on what consumer welfare actually means.”<sup>102</sup> A series of International Competition Network (ICN) surveys “suggest that the phrase ‘promoting consumer welfare,’ provides little guidance as an antitrust goal.”<sup>103</sup>

The concept of consumer welfare has been intricately tied to the concept of “‘rational self-interest,’ which assumes that each individual consumer makes decisions on the basis of personal advantage, and also on the basis of rational calculation as to exactly where that advantage lies.”<sup>104</sup> But in seeking to completely divorce economics from societal norms and values, economists are in danger of turning into “moral zombies.”<sup>105</sup> Economists’ consequentialism leaves no room for independent considerations of fairness.<sup>106</sup> Indeed, studies have shown

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(quoting Lynn A. Stout, *supra* note 13, at 157, 158–59) (“In the end, ‘*Homo economicus* is a sociopath.”).

99. Blair & Sokol, *supra* note 12, at 476. The authors further argue that “the Supreme Court still does not quite understand the difference between welfare standards.” *Id.* at 479. As a result, “in surveying the Supreme Court’s modern opinions, a crystal clear identification of antitrust’s goal is as elusive as ever . . . It is difficult to say just what the Court really means due to its misuse of terms that have precise meaning in economics.” *Id.* at 480.

100. Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 81 (2012).

101. Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1032 (1987); see also Maurice E. Stucke, *Looking at Monopsony in the Mirror* 35 (2012), available at <http://ssrn.com/abstract=2094553> (on file with the *McGeorge Law Review*) (“No consensus exists in the United States or globally on what *consumer welfare* actually means, who the consumers are, how to measure consumer welfare. . . or how to design legal standards to further this goal.”); Stucke, *supra* note 13, at 571–73.

102. Stucke, *supra* note 13, at 571 (capitalizations omitted). See also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 85 (4th ed. 2011) (noting the term’s ambiguity); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 134 (2010) (“[A]cademic confusion and thoughtless judicial borrowing led to the rise of a label [consumer welfare] that 30 years later has no clear meaning.”).

103. Stucke, *supra* note 101, at 34 (citing 2007 ICN REPORT, at 3). The International Competition Network “provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.” The ICN’s “mission statement is to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.” *About Page*, INTERNATIONAL COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org/about.aspx> (last visited June 23, 2013) (on file with the *McGeorge Law Review*).

104. ZAK, *supra* note 22, at 7.

105. *Id.* at 123.

106. Lawrence B. Solum, *The Aretaic Turn in American Philosophy of Law*, in ON PHILOSOPHY IN



that undergraduates majoring in economics—unlike in any other academic major—“become less trusting and generous in experiments as they move from freshman to senior year.”<sup>107</sup>

Worse yet, “consumer welfare” economics have failed field-testing in the antitrust arena over the last four decades.<sup>108</sup> Extensive field-testing resulted from a “heavily funded effort, over two decades of private interest exaltation, to displace the founders’ republican arena of civic virtue and political engagement with the marketplace of economic self-interest.”<sup>109</sup> Consumer welfare economics have “failed in [their] promise to provide the greatest good for the greatest number.”<sup>110</sup> Dramatic increases in concentration<sup>111</sup> have been accompanied by “a diminished sense of community and commonweal. . . .”<sup>112</sup> It is fair to ask whether we have “lost touch with the notion of fair play.”<sup>113</sup>

To establish and pursue effective antitrust policies in the coming decades, we must return to a deeper understanding of human nature. In so doing, we must pay close attention and deference to our evolutionary heritage.<sup>114</sup> As explained by the great evolutionary biologist Edward O. Wilson, “[h]uman nature is the inherited regularities of mental development common to our species. They are the ‘epigenetic rules,’ which evolved by the interaction of genetic and cultural evolution that occurred over a long period in deep prehistory.”<sup>115</sup>

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AMERICAN LAW 122, 124 (Francis J. Mootz III ed., 2009).

107. ZAK, *supra* note 12, at 127.

108. See, e.g., GAVIL, ET AL., *supra* note 15, at 38 (“contemporary U.S. antitrust analysis focuses almost exclusively on economic goals. . . .”); Markham, *supra* note 5, at 278 (“In the last two decades of the Twentieth Century, antitrust law embraced this narrow, Chicago School, doctrinal approach to antitrust law and accepted the optimization of allocative efficiency of firms and markets as the dominant antitrust policy.”).

109. KEVIN PHILLIPS, WEALTH AND DEMOCRACY 419 (2002).

110. PETER CORNING, THE FAIR SOCIETY AND THE PURSUIT OF SOCIAL JUSTICE 169–70 (2011); see also JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 260–61 (2010) (attacking Chicago School economics); YVES SMITH, ECONNED: HOW ENLIGHTENED SELF INTEREST UNDERMINED DEMOCRACY AND CORRUPTED CAPITALISM 93–4 (2010) (condemning market assumptions of neoclassical economics); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION xiv (2009) (discussing the economic crisis of 2008–09 and its origins and roots).

111. See, e.g., KENNETH M. DAVIDSON, *supra* note 25; BARRY C. LYNN, THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION 5 (2010); ADAMS & BROCK, *supra* note 25, at 6–7.

112. KEVIN PHILLIPS, WEALTH AND DEMOCRACY xiv (2002); see also Horton, *Coming Extinction*, *supra* note 19, at 517 (quoting FUKUYAMA, *supra* note 75, at 91) (“The rise of *Homo economicus* is synonymous with and symptomatic of the insidious increase of ‘moral minimalism,’ which has led to a dangerous ‘miniaturization of community.’”); *id.* (“The essence of the shift of values that is at the center of the Great Disruption is, then, the rise of moral individualism and the consequent miniaturization of community.”).

113. CORNING, *supra* note 110, at 164 (discussing Stevens’ dissenting opinion in *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 929 (2010)).

114. ALBERT BORGMANN, REAL AMERICAN ETHICS: TAKING RESPONSIBILITY FOR OUR COUNTRY 77 (2006) (“[E]volutionary theory reveals background conditions of the good life that we ignore to our detriment.”).

115. WILSON, *supra* note 93, at 193; see also Ruse, *supra* note 5, at 47 (“Given a shared evolution, we humans have a shared insight—or rather, sense of insight—into the norms of right and wrong . . . . Ethics works and that is no small thing.”).

Fortunately, more and more economists and lawyers have begun recognizing and understanding how important it is to integrate and incorporate the various sciences into antitrust analyses, and started working to develop meaningful analogies between biological and economic systems.<sup>116</sup> Economists have begun working towards a “consilience”<sup>117</sup> with evolutionary biology, and are absorbing the learnings from a diverse array of fields, including psychology, neuroscience, and sociology.<sup>118</sup> Many economists increasingly are realizing that evolutionary biology has a great deal to offer in understanding the complexity<sup>119</sup> of human institutions and economies.<sup>120</sup> Economists even have christened names like “evolutionary economics”<sup>121</sup> and “complexity economics” for this emerging and burgeoning field.<sup>122</sup>

Economist Michael Shermer defines evolutionary economics as “the study of the economy as an evolving complex adaptive system grounded in a human nature that evolved functional adaptations to survival as a social primate species in the Paleolithic epoch in which we evolved.”<sup>123</sup> Evolutionary economics incorporates research and studies from the emerging fields of evolutionary psychology and evolutionary ethics. Philosophy professor Albert Borgmann notes: “. . . social science without ethics is aimless; ethics without social science is hollow.”<sup>124</sup>

More and more often, evolutionary biologists, behavioral economists, and legal and business scholars are coming to appreciate how fundamental and critical humans’ innate sense of fairness has been to our long-term evolutionary

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116. See Horton, *Coming Extinction*, *supra* note 19, at 477. In fairness, some biologists began calling for such a consilience between different branches of the sciences many decades ago. DANIEL R. BROOKS & DEBORAH A. MCLENNAN, *THE NATURE OF DIVERSITY: AN EVOLUTIONARY VOYAGE OF DISCOVERY* 7 (2002) (quoting B. Moore, *The Scope of Ecology*, *ECOLOGY* 1 (1920), at 3–5). For example, ecologist B. Moore in 1920 observed that “[m]any sciences have developed to the point where. . . contact and cooperation with related sciences are essential to full development.” *Id.*

117. EDWARD O. WILSON, *supra* note 26, at 8–14 (calling for the synthesis of different sciences).

118. See Horton, *Coming Extinction*, *supra* note 19, at 477.

119. MARC GOERGEN, ET AL., *CORPORATE GOVERNANCE AND COMPLEXITY THEORY* 4 (2010). “All human systems and institutions are complex in the sense that they are multidimensional with social, cultural, political, physical, technical, economic and other dimensions which interact and influence each other.” *Id.*

120. See Horton, *Antitrust Double Helix*, *supra* note 19, at 635, 652 (2012); Bart Du Laing, *Gene-Culture, Co-Evolutionary Theory and the Evolution of Legal Behavior and Institutions*, in *LAW, ECONOMICS, AND EVOLUTIONARY THEORY* 248, 264 (Peer Zumbansen & Graft-Peter Calliess eds., 2011) (“[T]he time has come for evolutionary minded legal scholars to replenish from the original source, being *biological* evolutionary theory, as currently applied in a variety of ways to our own species.”).

121. MICHAEL SHERMER, *THE MIND OF THE MARKET: COMPASSIONATE APES, COMPETITIVE HUMANS, AND OTHER TALES FROM EVOLUTIONARY ECONOMICS* 3 (2008).

122. ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS* 19 (2006).

123. SHERMER, *supra* note 121, at 3.

124. BORGMANN, *supra* note 114, at 15. Borgmann adds that within the field of ethics, “[t]heoretical ethics, practical ethics, and real ethics should be thought of not as rivals but as complements of one another.” *Id.* at 30.

and economic success. In the simple words of evolutionary biologist Edward O. Wilson: “we are learning the fundamental principle that ethics is everything.”<sup>125</sup> “The moral sense of fairness is hardwired into our brains and is an emotion shared by all people and primates tested for it.”<sup>126</sup> Overwhelming evidence from numerous fields shows that our innate sense of fairness has evolved as part of an evolutionary stable strategy (ESS), which helped ensure and maintain “social harmony in our ancestors’ small bands, where cooperation was reinforced and became the rule while freeloading was punished and became the exception.”<sup>127</sup> We have evolved to care deeply about the fairness of any exchange relationships and outcomes.<sup>128</sup>

Throughout our evolutionary history, our long-term success has hinged upon our ability to work cooperatively and effectively in social groups.<sup>129</sup> Sociobiologist Edward O. Wilson observes that “selection between groups of humans typically promotes altruism among members of the community . . . colonies of cheaters lose to colonies of cooperators.”<sup>130</sup> Consequently, “social intelligence,” which includes an innate sense of fairness, has been crucial to our

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125. WILSON, *supra* note 26, at 325; see also KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 23 (1974) (“Trust is an important lubricant of a social system. It is extremely efficient; it saves a lot of trouble to have a fair degree of reliance on other people’s word.”); FUKUYAMA, *supra* note 9, at 152 (“We often take a minimal level of trust and honesty for granted and forget that they pervade everyday economic life and are crucial to its smooth functioning.”); MICHAEL PORTER, *COMPETITIVE STRATEGY* 9 (1980) (arguing that shared value is a new way to achieve economic success and that in providing societal benefits, companies do not need to temper their economic success).

126. SHERMER, *supra* note 121, at 11; see also MARK BEKOFF & JESSICA PIERCE, *WILD JUSTICE, THE MORAL LIVES OF ANIMALS* xii (2009) (“Cooperation, fairness, and justice have to be factored into the evolutionary equation in order to understand the evolution of social behavior in diverse species.”). “We believe that a sense of fairness or justice may function in chimpanzee society, and in a broad range of other animal societies as well.” *Id.* at 113. Sarah F. Brosnan, *Fairness and Other-Regarding Preferences in Nonhuman Primates*, in *MORAL MARKETS*, *supra* note 13, at 77, 79–80 (“Few would disagree that humans have a sense of fairness. We respond badly when treated unfairly; we give more than the minimum required in experimental games. . . . and we frequently punish in situations in which another individual behaves non-cooperatively. . . . To varying degrees, these inequity aversive responses are seen across a vast array of cultures and differ significantly depending on the quality of the relationship between the individuals involved. . . . They have recently been linked to emotional, as well as rational processes. . . .”).

127. SHERMER, *supra* note 121, at 11. See also BEKOFF & PIERCE, *supra* note 126, at 134 (“Our informed guess would be that justice and a sense of fairness have evolved out of the more basic repertoire of cooperative and altruistic behavior.”).

128. SHERMER, *supra* note 121, at 176.

129. ZAK, *supra* note 22, at 69 (“During the millions of years of our development as social mammals, our individual survival depended on how well we fit in with the group, and group survival depended on how well each member cooperated.”); WILSON, *SOCIAL CONQUEST*, *supra* note 93, at 53 (“If we assume that groups [were] approximately equal to one another in weaponry and other technology, which has been the case for most of the time among primitive societies over hundreds of thousands of years, we can expect that the outcome of between-group competition [was] determined largely by the details of social behavior within each group in turn.”); MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* 141 (1996) (“[M]orality and other emotional habits pay. The more you behave in selfless and generous ways the more you can reap the benefits of cooperative endeavour from society.”).

130. WILSON, *supra* note 93, at 162–63.

evolutionary success.<sup>131</sup> Behaving fairly helped us fit within a group, and being part of a strong group had a “high fitness payoff.”<sup>132</sup>

Our innate senses of justice and fairness evolved as part of our ability to thrive and succeed in social groups.<sup>133</sup> Multidisciplinary studies confirm “that most of us do have a bias toward cooperation and a readiness to reciprocate—a sense of fairness.”<sup>134</sup> Economists Ernst Fehr and Simon Gächter have found that “humans get inordinately upset about unfairness, and will even forego immediate personal gain in order to punish a perceived injustice. . . .”<sup>135</sup> In the words of primate biologist Sarah Brosnan: “. . . fairness counts. Both human and nonhuman primates dislike being treated inequitably, whether as a result of unequal distribution or an unfair partner.”<sup>136</sup> Fairness serves as “a ‘golden thread’ that binds together a harmonious society.”<sup>137</sup>

Philosophers have echoed biologists’ findings concerning our innate morality and sense of fairness. Philosopher John Rawls, for example, has argued that “everyone is a moral agent. . . .”<sup>138</sup> Rawls presciently has warned that “American society has moved farther away from the idea of justice as fairness.”<sup>139</sup> Evolutionary biologist Edward O. Wilson similarly has described moral reasoning as “the vital glue of society.”<sup>140</sup> Conservatives such as social scientist

131. See WILSON, *supra* note 93, at 43–44 (“Carnivores at campsites are forced to behave in ways not needed by wanderers in the field. They must divide labor: some forage and hunt, others guard the campsite and the young. They must share food, both vegetable and animal, in ways that are acceptable to all. Otherwise, the bonds that bind them will weaken. . . . All of these pressures confer an advantage on those able to read the intention of others, grow in the ability to gain trust and alliance, and manage rivals. Social intelligence was therefore always at a high premium. A sharp sense of empathy can make a huge difference. . . .”).

132. See, e.g., CHRISTOPHER BOEHM, MORAL ORIGINS: THE EVOLUTION OF VIRTUE, ALTRUISM, AND SHAME 114 (2012) (“For a number of reasons, individuals who better internalize their groups’ rules are more likely to succeed socially in life and thus be more successful in propagating their genes. . . . For humans, fitting in with your moral community has a high fitness payoff because being punished is costly to fitness, whereas having a good reputation can help fitness.”); SAXONHOUSE, *supra* note 92, at 211 (“[T]he Cretans understand the importance of sharing so that none feel excluded from involvement in the city.”).

133. *Id.*

134. CORNING, *supra* note 110, at 196.

135. BEKOFF & PIERCE, *supra* note 126, at 114 (discussing E. Fehr & S. Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159–81 (2000)).

136. Brosnan, *supra* note 13, at 99.

137. CORNING, *supra* note 110, at 165.

138. BORGMANN, *supra* note 114, at 142 (attributing the idea to John Rawls).

139. JOHN RAWLS, JUSTICE AS FAIRNESS 57 (2001). For an interesting analysis of Rawls’ discussions of fairness in the context of current political issues, see Benjamin Hale, *The Veil of Opulence*, N.Y. TIMES (Aug. 12, 2012, 5:30 PM), <http://opinionator.blogs.nytimes.com/2012/08/12/the-veil-of-opulence> (on file with the McGeorge Law Review) (“[T]he question of fairness has widespread application throughout our political discourse.”).

140. EDWARD O. WILSON, THE FUTURE OF LIFE 151 (2002). Wilson explained:

Moral reasoning is not a cultural artifact invented for convenience. It is and always has been the vital glue of society, the means by which transactions are made and honored to ensure survival. Every society is guided by ethical precepts, and every one of its members is expected to follow moral leadership and ethics-based tribal law. The propensity does not have to be beaten into us. Evidence exists instead of an instinct to behave ethically, or at least to insist on ethical behavior in others.

Francis Fukuyama<sup>141</sup> and political scientist James Q. Wilson<sup>142</sup> concur. Meanwhile, linguistics professor George Lakoff argues that American democratic institutions are based on essential moral norms such as fairness.<sup>143</sup>

Economist Adam Smith recognized our senses of morality and fairness, and discussed them at length in his *The Theory of Moral Sentiments*. Smith “suggested that conscience and good behavior are inherent parts of our psychological makeup, and that they are elicited quite naturally from our social relationships.”<sup>144</sup> Philosophy professor Robert C. Solomon argued that Smith’s discussion of natural sympathy “includes both the ability to feel *with* as well as *for* others, and it lies at the very foundation of our emotional lives and is the basis (though not the sole basis) of ethics.”<sup>145</sup>

Charles Darwin was struck by the universality of humans’ sense of morals and conscience. “What his far-flung anthropological research project told him was that indigenous people everywhere did seem to blush with shame. And on this basis he could assume that, as an important aspect of our conscientious moral sense, human shame reactions surely had to have an innate basis.”<sup>146</sup> Similarly, primate zoologists have observed how capuchin monkeys “carefully monitor equity and fair treatment among peers.”<sup>147</sup> Similarly, “[a]mong chimpanzees, a

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*Id.* See also Horton, *Coming Extinction*, *supra* note 19, at 511 (“[M]orality provides the communal glue that holds our societies together.”).

141. FUKUYAMA, *GREAT DISRUPTION*, *supra* note 75, at 231 (“[H]uman beings are by nature social creatures with certain built-in, natural capabilities for solving problems of social cooperation and inventing moral rules to constrain individual choice.”).

142. JAMES Q. WILSON, *ON CHARACTER: ESSAYS 192* (expanded ed. 1995) (“[P]eople everywhere have a natural moral sense that is not entirely the product of utility or convention.”); see also JAMES Q. WILSON, *THE MORAL SENSE 2* (1993) (identifying the natural moral sense that is shared by humans and describing the origins of that moral sense).

143. GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 323 (2002). Professor Lakoff further argues that moral self-interest presupposes moral fairness in the form of fairness of competition. *Id.*

144. ZAK, *supra* note 22, at 17; see also *id.* at 170; ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 86 (1853) (“Society. . . cannot subsist among those who are at all times ready to hurt and injure one another. . . . Justice. . . is the main pillar that upholds. . .”).

145. See ROBERT C. SOLOMON, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* 86–87 (1992) (arguing that the “central thesis” of *The Theory of Moral Sentiments* was that “people are naturally cooperative and sympathetic, and that their self-interest naturally includes concern for others and their opinions.”); Larry Arnhart, *Darwinian Conservatism*, in *PHILOSOPHY AFTER DARWIN: CLASSIC AND CONTEMPORARY READINGS* 349–50 (Michael Ruse ed., 2009) (arguing that Adam Smith believed that we derived general rules of justice and injustice from our natural moral sentiments).

146. BOEHM, *supra* note 132, at 14. Boehm added:

“This research project stands today as a true landmark in the anthropological science of human nature, and what it suggested more generally was that conscience and morality had to have *evolved*, in the biological sense of the word . . . . [I]t evolved for specific reasons having to do with the Pleistocene environments humans had to cope with prehistorically and, more specifically, with their growing ability to use group punishment to better their own social and subsistence lives and create more socially equalized societies.”

*Id.* at 14–15.

147. BEKOFF & PIERCE, *supra* note 126, at 6. They add: “Individuals who are shortchanged during a

rudimentary sense of right and wrong, related to what serves their group's common good, plays a crucial role in maintaining a chimpanzee group's integrity. . . ."<sup>148</sup>

As part of our innate instinct for fairness, humans have evolved sophisticated behavioral mechanisms for encouraging others to cooperate, and to punish or retaliate against those who cheat or try to free-ride.<sup>149</sup> Anthropological biologist Christopher Boehm asserts that human cooperation is buttressed and strengthened through "the application of positive social pressure on adults to behave with generosity, and by the discouragement (or elimination) of selfish bullies and cheaters, who hamper cooperation and also create conflict."<sup>150</sup> Both primates and humans have shown a strong willingness to incur costs in order to punish those who act unfairly or seek to free ride.<sup>151</sup> Furthermore, humans are willing to engage not only in direct reciprocation, but in indirect reciprocation as well through a willingness to retaliate on behalf of third parties.<sup>152</sup> Such punishment can help reform non-cooperators, and turn them into fair cooperators.<sup>153</sup> "Indeed, men even seem to get a burst of pleasure—or at least reward activation—when they punish a norm violator. . . ."<sup>154</sup>

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bartering transaction by being offered a less preferred treat refuse to cooperate with researchers. In a nutshell, the capuchins expect to be treated fairly." *Id.*

148. Egbert Giles Leigh, Jr., *Adaptation, Adaptationism, and Optimality*, in ADAPTATIONISM AND OPTIMALITY 358, 381 (S. H. Orzack & E. Sober eds. 2001). See generally FRANS DEWAAL, GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS (1996).

149. See M. DALY & M. WILSON, HOMICIDE 256 (1988). Daly and Wilson argue:

From the perspective of evolutionary psychology, this almost mystical and seemingly irreducible sort of moral imperative is the output of a mental mechanism with a straightforward adaptive function: to reckon justice and administer punishment by a calculus which ensures that violators reap no advantage from their misdeeds. The enormous volume of mystico-religious bafflebag about atonement and penance and divine justice and the like is the attribution to higher, detached authority of what is actually a mundane, pragmatic matter: discouraging self-interested competitive acts by reducing their profitability to nil.

*Id.*

150. BOEHM, *supra* note 132, at 11; see also PAUL SEABRIGHT, THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE 33 (2010) ("Two kinds of disposition have proved important to our evolution: a capacity for rational calculation of costs and benefits of cooperation, and a tendency for what has been called *strong reciprocity*—the willingness to repay kindness with kindness and betrayal with revenge, even when this is not what rational calculation would recommend.").

151. See, e.g., BEKOFF & PIERCE, *supra* note 126, at 114 (arguing that "humans get inordinately upset about fairness, and will even forego an immediate personal gain in order to punish a perceived injustice"); KARL SIGMUND, THE CALCULUS OF SELFISHNESS 15-17 (2010).

152. SIGMUND, *supra* note 151, at 15.

153. *Id.*; see also *id.* at 22 ("[T]he instinct of revenge, frowned upon as base, can play a useful economic role by deterring defectors. . . ."); MARTIN A. NOWAK, SUPER COOPERATORS: ALTRUISM, EVOLUTION, AND WHY WE NEED EACH OTHER TO SUCCEED 59 (2011) ("If our players see each other again and again, cooperation can emerge because "rational players must weigh the benefit of exploiting the other player in the first round against the cost of forfeiting collaboration in future rounds.").

154. SHERMER, *supra* note 121, at 186. Shermer adds that "brain scans have shown high activity in the NAcc reward center[,] . . . which is fueled by dopamine." *Id.*; see also ZAK, *supra* note 93, at 38 (discussing importance of "feel-good neurotransmitters: dopamine and serotonin"); SEABRIGHT, *supra* note 150, at 68

In light of our fairness calculus, we are “exquisitely tuned into the body language, facial expressions, and tone of voice of those around us. . . .”<sup>155</sup> This has given us a strong hereditary tendency to detect cheaters.<sup>156</sup> Sociobiologist Edward O. Wilson has noted how the forces of evolutionary group selection placed an “enormous advantage” upon a “group with members who could read intentions and cooperate among themselves while predicting the actions of competing groups.”<sup>157</sup>

Our minds have developed a “special cheater-detection module, which makes us highly sensitive to norms regulating reciprocal exchanges” and the need to punish cheating.<sup>158</sup> When we detect cheating or free riding, we instinctively react with anger and “intense moral outrage.”<sup>159</sup> A group’s “shared moral outrage” can become so potent and powerful “that simply by its threat could deter many a potential deviant.”<sup>160</sup> Firmly grounded in our hereditary neurobiology, our sense of shared moral outrage helps ensure that cooperation will outcompete cheating

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(“[S]ubjects given an opportunity to punish others for what they perceive as ‘unfair’ behavior tend to have particularly strong activation in an area of the brain known as the caudate nucleus, which is associated with pleasurable rewards (and is known to be activated by substances such as cocaine and nicotine.”)); Ming Hsu, Cedric Anen & Steven R. Quartz, *The Right and the Good: Distributive Justice and Neural Encoding of Equity and Efficiency*, 23 SCIENCE 1092 (2008) (discussing the importance of fairness in emotional processing).

155. BEKOFF & PIERCE, *supra* note 126, at 90. The authors further note how “[a]nimals living in social groups can benefit from being sensitive to the emotional states of other group members. Emotional contagion might, for example, facilitate defensive action in light of threat. . . . But joy, excitement, curiosity, and intense interest can spread quickly as well.” *Id.* at 91.

156. WILSON, *supra* note 140, at 151; *see also* EDWARD O. WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* 186–87 (1999) (observing that in humans, “one capacity, the detection of cheating, is developed to exceptional levels of sharpness and rapid calculation. . . . More than error, more than good deeds, and more even than the margin of profit, the possibility of cheating by others attracts attention”).

157. WILSON, *supra* note 93, at 224. Wilson adds that as part of our “ability to collaborate for the purpose of achieving shared goals and intentions. . . . We have become the experts at mind reading . . . . We express our intentions as appropriate to the moment and read those of others brilliantly. . . .” *Id.* at 226.

158. *See* WOJCIECH ZALUSKI, *EVOLUTIONARY THEORY AND LEGAL PHILOSOPHY* xiv (2009).

159. WILSON, *supra* note 140, at 151; *see also* WILSON, *supra* note 26, at 186–87 (observing that detection of cheating “excites emotion and serves as the principal source of hostile gossip and moralistic aggression by which the integrity of the political economy is maintained.”).

160. BOEHM, *supra* note 132, at 177. It is interesting to note that moral outrage originates in the left side of our brain while our thoughts about rational rules originate in the right side. Consequently, the concepts of fairness and legality reveal a deep dualism. Fairness is thus in many ways considered more of a sacred than a rational belief. Gregory S. Berns, Director, Center for Neuropolicy, Emory Univ., Address at the 13th Soc’y Evolutionary Analysis in Law Scholarship Conference: *Neuroimaging of Sacred Values* (April 20, 2012); *see also* Gregory S. Berns et al., *The Price of Your Soul: Neural Evidence for the Non-Utilitarian Representation of Sacred Values*, 367 PHIL. TRANS. R. SOC. B 754, 755 (2012) (“Functional resonance imaging (fMRI) has emerged as a viable tool to measure brain regions associated with different aspects of decision-making, and the growing literature on the neural correlates of moral judgment has demonstrated that deontic and utilitarian processing are associated with different brain regions. . . .”); Jorge Moll & Ricardo de Oliveira-Souza, *Moral Judgments, Emotions and the Utilitarian Brain*, 11(8) TRENDS IN COGNITIVE SCIENCES 319, 321 (2007) (“[E]motion and cognition (or reason) have mutually competing roles in moral judgment. Utilitarian choices in difficult moral dilemmas arise from cognitive control mechanisms based in the DLPFC, whereas non-utilitarian choices emerge from emotional responses relying on the medial PFC.”).

within our social groups and maximize our groups' evolutionary fitness.<sup>161</sup> Biologist and mathematician Roger A. Nowak posits that: "if conscience and empathy were impediments to the advancement of self-interest, then we would have evolved to be amoral sociopaths. But we have not."<sup>162</sup>

Our potential for intense shared moral outrage can encourage better behavior and fairness in social dealings. More than anything else, people fear public ridicule.<sup>163</sup> "Studies have shown that any sort of priming with the sense of being watched can induce better behavior."<sup>164</sup> Martin Nowak sees reputation as a powerful force that can be effectively exploited to ensure good behavior and fairness in reciprocal dealings.<sup>165</sup> Similarly, Jane Jacobs has documented that the most effective way to keep "the public peace" in cities is not primarily through the police, but "by an intricate, almost unconscious, network of voluntary controls and standards among the people themselves, and enforced by the people themselves."<sup>166</sup> Indeed, in the animal kingdoms of social animals, "rule breakers are the outliers, the exceptions to the norm."<sup>167</sup>

Experiments and findings from the burgeoning field of behavioral economics buttress the teachings of evolutionary biology. A growing body of behavioral economics literature "has increasingly recognized and measured how . . . people will incur costs to punish unfair behavior, and care about treating others, and being treated fairly. . . ."<sup>168</sup> Behavioral economists also point to examples

161. See BORGSMANN, *supra* note 114, at 142 ("[T]he good society will not come about through the forceful imposition of a sly engineering elite. It needs the conversation and sanction of ordinary people.").

162. NOWAK, *supra* note 153, at 89–90; *see also* SEABRIGHT, *supra* note 150, at 68 ("Strong reciprocity has now been convincingly documented in a wide array of groups of experimental subjects and across a wide range of human societies.").

163. See ZAK, *supra* note 22, at 184–85.

164. *Id.* at 150; *see also* NOWAK, *supra* note 153, at 216 ("Just the thought that we are being observed is very persuasive. One can even think of conscience, our inner sense of right and wrong, as a gauge of how we will be viewed by others."); SIGMUND, *supra* note 151, at 13 ("Psychologists have devised ingenious experiments to document that our concern of being observed is easily aroused. . . . Incidentally, it seems that test persons react the same, whether one or several persons are watching. This shows that they believe, at least subconsciously, that news will spread through gossip. One witness is enough.").

165. NOWAK, *supra* note 153, at 219 ("Whenever individual behavior is relevant to the public good, it should itself be made public to help avert tragedy.").

166. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 32–40 (1992); *see also* SEABRIGHT, *supra* note 150, at 8 (discussing how "[e]ffective institutions rely on a minimum of outside supervision, knowing that a little outside supervision can make natural incentives go a long ways").

167. BEKOFF & PIERCE, *supra* note 126, at 58; *see also id.* at 5 ("[P]articular patterns of behavior seem to constitute a kind of animal morality. Mammals living in tight social groups appear to live according to codes of conduct, including both prohibitions against certain kinds of behavior and expectations for other kinds of behavior. . . . Some animals seem to have a sense of fairness in that they understand and behave according to implicit rules about who deserves what and when. Individuals who breach rules of fairness are often punished either through physical retaliation or social ostracism.").

168. Maurice E. Stucke, *The Implications of Behavioral Antitrust* 1, available at <http://ssrn.com/abstract=2109713> (on file with the *McGeorge Law Review*); *see also* Maurice E. Stucke, *Morality and Antitrust*, 2006 COL. BUS. L. REV. 444, 515–16 (2006) (quoting Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281, 1283 (1993)) ("[M]uch anecdotal evidence suggests that



documenting “the fear of informal sanctions from peers and social disapproval generally.”<sup>169</sup> Game theory has “shown unequivocally that mutual benefits are an essential requisite for a viable social contract.”<sup>170</sup> In addition, cheating in economic experiments is sharply reduced by plausible threats of revenge.<sup>171</sup>

What does the evolutionary importance of fairness mean for antitrust? It demonstrates that for antitrust to ultimately be meaningful and effective, it must be grounded in moral norms of fairness, and not eschew or seek to eliminate fairness as “a vagrant claim.”<sup>172</sup> Morality and fairness are the essential glues that hold our society together.<sup>173</sup> Therefore, they must be the essential glue holding the antitrust laws together. We simply cannot continue pretending that we can make economic decisions in a moral vacuum.

In honoring fairness, however, do we not create an antitrust policy “at war with itself,” as alleged by Robert Bork?<sup>174</sup> The simple answer is no. Bork’s *Antitrust Paradox* has missed the most basic of biological tenets.<sup>175</sup> Human evolution has always involved a delicate balancing of our group norms of fairness and cooperation with our selfish instincts.<sup>176</sup> Primate biologist Frans DeWaal, for example, concedes that on the one hand evolution has produced a selfish psychology, but that it is balanced by “an unselfish psychology that in the long run has served us and these other social primates because they live in groups and they survive by mutual aid and cooperation.”<sup>177</sup> Fairness and morality help humans negotiate and reconcile our conflicting evolutionary traits. As further described by Edward O. Wilson:

[A]n iron rule exists in genetic social evolution. It is that selfish individuals beat altruistic individuals, while groups of altruists beat groups of selfish individuals. The victory can never be complete; the

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people sacrifice substantial amounts of money to reward or punish kind or unkind behavior.”).

169. Stucke, *supra* note 168, at 515.

170. CORNING, *supra* note 110, at 164.

171. Horton, *Antitrust Double Helix*, *supra* note 19, at 656; *see also* SEABRIGHT, *supra* note 150, at 68.

172. *See* AREEDA & TURNER, *supra* note 6, at 21.

173. *See supra* notes 125–128.

174. BORK, *supra* note 35.

175. *Id.*

176. *See, e.g.,* Horton, *Coming Extinction*, *supra* note 19, at 519–20 (“[T]hroughout our history, we always have had to balance our innate aggressive tendencies with our social morals and senses of fairness and reciprocity.”); *see also* BOEHM, *supra* note 132, at 114–15 (“I’ve already suggested that group rules should not be internalized so strongly that you’d be free of any temptation to break them, for many of the prohibitions that human groups arrive at are designed to curtail the same selfish behaviors— that—in smaller doses—can help individuals to advance their reproductive success.”).

177. SHERMER, *supra* note 121, at 173 (quoting a personal interview with Frans DeWaal). Economist Paul J. Zak argues that in humans, “oxytocin maintains the balance between self and other, trust and distrust, approach and withdrawal.” ZAK, *supra* note 22, at 66; *see also* SEABRIGHT, *supra* note 150, at 288 (“[H]uman propensity to ‘truck, barter and exchange’ has always coexisted uneasily with a rival temptation to take, bully, and extort.”).

balance of selection pressures cannot move to either extreme. If individual selection were to dominate, societies would dissolve. If group selection were to dominate, human groups would come to resemble ant colonies.<sup>178</sup>

Wilson further observes:

[W]e can expect a continuing conflict between components of behavior favored by individual selection and those favored by group selection. Selection at the individual level tends to create competitiveness and selfish behavior among group members—in status, mating, and the securing of resources. In opposition, selection between groups tends to create selfless behavior, expressed in greater generosity and altruism, which in turn promote stronger cohesion and strength of the group of the whole.<sup>179</sup>

The goal is not to eliminate rational self-interested economic behavior.<sup>180</sup> It is understood that such behavior can promote the interests of the group through invention and entrepreneurship. The problem today, however, is that we have moved so far towards the path of *laissez-faire* free markets that we are in danger of social disintegration.<sup>181</sup> We need to rediscover and celebrate our moral bearings.<sup>182</sup>

178. WILSON, *supra* note 93, at 243.

179. *Id.* at 273–74. Wilson further observes that “[a]n inevitable result of the mutually offsetting forces of multilevel selection is permanent ambiguity in the individual human mind, leading to countless scenarios in the way they bond, love, affiliate, betray, share, sacrifice, steal, deceive, redeem, punish, appeal, and adjudicate. The struggle endemic to each person’s brain, mirrored in the vast superstructure of cultural evolution, is the fountainhead of the humanities.” *Id.* at 274; *see also* BORGMANN, *supra* note 114, at 78 (“[W]e can be a violent tribe and need to curb that inclination through friendship and justice . . .”).

180. It is important to note that unfettered greed is not only unnecessary, but ultimately destructive to a healthy economic ecosystem. As previously observed by this author, “Chicagoans fundamentally overlook that societal trust is corrosively eroded by the selfishness that *Homo economicus* wears as a badge of honor.” Horton, *Antitrust Double Helix*, *supra* note 19, at 517. Indeed, economist Michael Shermer notes that “our dual propensities for good and evil can be dramatically tweaked one way or the other depending on the situation and the system.” SHERMER, *supra* note 121, at 210. Shermer adds this chilling note:

Because we evolved to be such social beings, we are hypersensitive to what others think about us, and we are strongly motivated to conform to the social norms of the group. . . . When order breaks down, when the rules are no longer enforced, when the normal institutional brakes on evil are lifted, evil is facilitated through the contagious excitement of the group’s actions, through the unchecked momentum of the smaller bad steps that came before, and ultimately permission for evil is granted by the system at large. . . . Here we find an example of moral path dependency, in which moral systems and behavior become dependent on the rules of the corporate environment, or become locked into the channels of moral patterns exhibited by others in the environment. Thus, an environment of moral corporate philosophy and leaders establishes a situation that can either accentuate the good disposition of employees or bring out the bad.

*Id.* at 212–15.

181. *See, e.g.*, FUKUYAMA, *supra* note 75, at 91 (“The essence of the shift in values that is at the center of the Great Disruption is, then, the rise of moral individualism and the consequent miniaturization of

Antitrust professor Daniel Sokol, troubled by the “few moral penalties that cartelists at either [the] individual or firm level internalize in their risk/reward calculation,” has called for an increase in our shared moral outrage.<sup>183</sup> Similarly, Michael Porter and Mark R. Kramer desire “a more sophisticated form of capitalism, one imbued with a social purpose.”<sup>184</sup> Antitrust professor Maurice E. Stucke likewise has argued forcefully and with clarion urgency for the implementation of a progressive antitrust policy that better “balance[s] multiple political, social, moral, and economic objectives.”<sup>185</sup>

Rather than leaving the market to itself to inevitably correct its shortcomings, we need a system of laws, norms, and markets that are integrated and work together to promote economic welfare for all.<sup>186</sup> Antitrust scholars and jurists need to reconnect with the deep evolutionary human instinct and longing for basic fairness.<sup>187</sup> Fairness is not inconsistent with economic utility or consumer welfare. Indeed, one can argue that fairness may be one of the most important aspects of economic utility, especially given the expansive natures of utility and welfare.<sup>188</sup> Professor Maurice E. Stucke has argued that “[a]ntitrust law is at its strongest when it focuses on preserving an effective competitive process and

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community.”); Horton, *Antitrust Double Helix*, *supra* note 19, at 517 (“The rise of *Homo economicus* is synonymous with and symptomatic of the insidious increase in America of ‘moral minimalism,’ which has led to a dangerous ‘miniaturization of community.’”).

182. See, e.g., BEKOFF & PIERCE, *supra* note 126, at 106 (“When human societies disintegrate and the social fabric becomes damaged, people often lose their moral bearings.”).

183. D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Antitrust*, 78 ANTITRUST L.J. 201, 216–19 (2012). Sokol explains: “Culture can be used as a tool to improve compliance as a law-abiding culture creates norms that push for more effective compliance. Moral outrage and shame have a place in cartel enforcement as it creates its own form of deterrence. The greater society’s moral outrage at cartel behavior, the costlier undertaking such actions will be for individuals.” *Id.* at 26.

184. 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.–Feb. 2011, at 77.

185. Stucke, *supra* note 13, at 624; see also Horton, *Coming Extinction*, *supra* note 19, at 522 (“In order to best protect the economy, policy-makers should increasingly look to the evolutionary moral values of fairness and reciprocity in analyzing and punishing predatory and exclusionary acts by dominant firms and monopolists, and stop unsuccessfully trying to rely upon inflexible quantitative models to justify dangerous predatory economic behavior.”).

186. See, e.g., PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 454–55 (2000). Schuck states: “Norms are essential to both effective law and efficient markets. . . . Norms support markets by reducing transaction costs such as information and enforcement, by encouraging traders to deal fairly with one another, and by providing an alternative to inefficient and unfair legal regulation.” *Id.* at 435.

187. See LAKOFF, *supra* note 143, at 323 (arguing that moral self-interest presupposes moral fairness “in the form of fairness of competition.”).

188. See, e.g., James W. Brock & Norman P. Obst, *Market Concentration, Economic Welfare, and Antitrust Policy*, 2007 J. IND. COMPET. TRADE, Vol. 9, No. 1 69 (“[E]conomists have long construed ‘consumer welfare’ and ‘consumer utility’ in broad terms encompassing what individuals value, rather than narrowly limiting the concept to the production of goods and services alone.”); Gary S. Becker, Nobel Lecture, in *THE ESSENCE OF BECKER* 649 (R. Febrero & P. S. Schwartz eds., 1995) (arguing that microeconomic theory must incorporate “a much richer class of attitudes, preferences, and calculations.”); GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 5 (1976) (asserting that individual preferences must be construed in broader terms encompassing “fundamental aspects of life”).

enforcing norms of free, fair, and open competition.”<sup>189</sup> Some competition enforcement officials outside the United States agree. A recent ICN survey covering the objectives of countries prohibiting monopolistic behavior found that a key emerging objective was promoting fairness.<sup>190</sup> Similarly, behavioral economist Colin Camerer and his co-authors have found that people throughout the world have a set of consistent social preferences that include “fairness and reciprocity.”<sup>191</sup>

Trustworthiness is crucial to effective economic outcomes. By increasing the sense that our competitive economy operates openly and fairly, we will increase our level of societal trust.<sup>192</sup> Indeed, strong reciprocity, fairness, and the trust they create can help make our third-party enforcement mechanisms such as the Federal Trade Commission, the Antitrust Division, and our courts more credible.<sup>193</sup> Instead of so-called “consumer welfare” and “allocative efficiency” economics, we should look increasingly to what economist Michael Shermer calls “virtue economics.”<sup>194</sup> Virtue economics incorporates the overwhelming evidence from evolutionary biology and economics that “shows that fairness evolved as a stable strategy for maintaining social harmony in our ancestors’ small bands. . . .”<sup>195</sup> Rather than ask reason and logic to replace and substitute for

189. Stucke, *supra* note 168, at 36.

190. INT’L COMPETITION NETWORK, REPORT ON THE OBJECTIVES OF UNILATERAL CONDUCT LAWS, ASSESSMENT OF DOMINANCE/SUBSTANTIAL MARKET POWER, AND STATE-CREATED MONOPOLIES ANNEX A (2007); *see also* Stucke, *supra* note 13, at 567.

191. JOSEPH HENRICH, ET AL., FOUNDATIONS OF HUMAN SOCIALITY 8 (2004). The authors add that people “are willing to change the distribution of material outcomes among others at a personal cost to themselves, and reward those who act in a pro-social manner while punishing those who do not, even when those actions are costly.” *Id.*; *see also* SHERMER, *supra* note 121, at 189.

192. *See, e.g.*, ZAK, *supra* note 22, at xix (“What matters most in determining economic outcomes is actually trustworthiness—a moral consideration.”); HAIM OFEK, SECOND NATURE: ECONOMIC ORIGINS OF HUMAN EVOLUTION I (2001) (“[E]xchange relies on mutual trust: predictable codes of conduct agreeable to the human sense of morality.”).

193. *See* SEABRIGHT, *supra* note 150, at 69 (“Even when third-party enforcement mechanisms (such as the courts) do play a role in strengthening the web of trust, strong reciprocity is the glue that makes these mechanisms credible.”); ZALUSKI, *supra* note 158, at xii (“[A]ll types of law—both primitive and modern law—can be viewed as an expression of our natural cooperative dispositions and as a mechanism supporting them and extending their scope. . . .evolutionary theory can or may help define the goals of law, that is, to select the principal values to be realized by law.”).

194. SHERMER, *supra* note 121, at 12.

195. *Id.* at 11; *see also* DEIDRE MCCLOSKEY, BOURGEOIS DIGNITY: WHY ECONOMICS CAN’T EXPLAIN THE MODERN WORLD 450 (2010) (recognizing the need for “a new science of history and the economy” that values “all the virtues”); *see also* ZAK, *supra* note 22, at 209. Zak observes:

In the nineteenth and twentieth centuries, economics tried to achieve scientific rigor by cutting off recognition of the human element of motives, expectations, and psychological uncertainties. Fortunately, behavioral economics, and now neuroeconomics, has put us back on what I consider the right track, which is a path that combines both rigor and moral perspective.

*Id.*

human emotion, which they cannot do, they can help us harness our deep-seated evolutionary instincts such as fairness.<sup>196</sup>

Critics will argue that incorporating norms of fairness into antitrust analyses will introduce a level of complexity and uncertainty that will chill and stifle businesses' aggressiveness and competitiveness.<sup>197</sup> After all, business people crave "'simple rules,' i.e., objectives or policies that frame self-organizing at the business level."<sup>198</sup> But what could be simpler than asking businesspersons to tap into their instinctive evolutionary norms of fairness in conducting competitive economic activities?<sup>199</sup> Indeed, there is a strong moral imperative for businesses to understand their social and economic impact.<sup>200</sup>

Furthermore, as this author previously has argued, jurors and juries are ideally equipped from an evolutionary standpoint to apply their strongly ingrained norms of fairness in evaluating businesses' conduct.<sup>201</sup> The primary reason that distinguishing predatory from pro-competitive conduct is currently an allegedly "difficult business"<sup>202</sup> is that poorly defined economic concepts like "consumer welfare" and "allocative efficiency" are instinctively and intuitively meaningless to the average human (including this author) and their anti-democratic abuse has helped generate repugnant norms of selfishness and unfairness. But every American citizen can call upon his fairness instincts in evaluating business conduct.<sup>203</sup>

Reviving antitrust jury trials also will reignite some of the "moral outrage" missing today in American antitrust, and "help restore and revitalize a valuable and necessary community-based investment in our antitrust laws and their

196. See SEABRIGHT, *supra* note 150, at 72 ("An alternative view has taken shape in recent years, in which reason orders human social life not by replacing human emotion but by *harnessing* it.").

197. See e.g. M. GOERGEN, ET AL., CORPORATE GOVERNANCE AND COMPLEXITY THEORY 96 (2010).

198. M. GOERGEN, ET AL., CORPORATE GOVERNANCE AND COMPLEXITY THEORY 96 (2010).

199. See *supra* notes 167–68.

200. See, e.g., Christopher Meyer & Julia Kirby, *Runaway Capitalism*, HARV. BUS. REV. 67, 75 (Jan.–Feb. 2012) ("Those of us who believe capitalism can adapt and should not succumb to the excesses that are crippling it will keep looking for the new markers of fitness and sharing the new rules."); GOERGEN, ET AL., *supra* note 198, at 104 ("[T]here is a moral imperative for organizations to understand their social and environmental impact."); Robert C. Solomon, *Business Ethics*, in A COMPANION TO ETHICS 354, 358 (Peter Singer ed., 1991) ("However competitive a particular industry may be, it always rests on a foundation of shared interests and mutually agreed-upon rules of conduct, and the competition takes place not in a jungle but in a community which it presumably both serves and depends upon.").

201. See Horton, *Antitrust Double Helix*, *supra* note 19, at 650–68; Horton, *Coming Extinction*, *supra* note 19, at 522.

202. *A. A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1400 (7th Cir. 1989) (Easterbrook, J.).

203. See STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* 71 (2002) (arguing that economic forces cannot be understood "without taking into account the thought processes of flesh-and-blood people"); Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AMER. ECON. REV. 728, 737, 740 (1986) (discussing consumers' fundamental perceptions of fairness and "unfair exploitations of market power" and how they should impact business firms' "incentive[s] to frame the terms of exchanges so as to make them appear 'fair.'").

enforcement.”<sup>204</sup> Antitrust juries applying collective evolutionary norms of fairness will help us “exert collective self-control over the innate impulses that support injustice and make changes in what are considered acceptable norms.”<sup>205</sup> And the flexibility of their potential responses will enhance, rather than diminish, the health of our economic system.<sup>206</sup> In the prescient words of Alfred E. Kahn: “The essential task of public policy in a free enterprise system should be to preserve the framework of a fair field and no favors,”<sup>207</sup> letting the results take care of themselves.”<sup>208</sup>

### C. Developing a Workable Fairness Standard

Antitrust jurists, scholars, and enforcers should pay increased attention and deference not only to evolutionary norms of fairness, but to anticompetitive intent and competitive harm, including harm to competitors. Turning first to intent, this author and others have argued that “[a]s a function of our robust moral capacities, we are well-equipped, from an evolutionary and social perspective, to fairly evaluate the predatory intent of dominant firms and monopolists.”<sup>209</sup> We should therefore allow juries to fully assess evidence of anticompetitive intent in judging predatory and anticompetitive behavior.<sup>210</sup>

204. See Horton, *Antitrust Double Helix*, *supra* note 19, at 651; LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 238–40 (2011) (discussing how societal norms of fairness and prosocial behavior are both common in, and necessary for, an efficient market economy).

205. CORNING, *supra* note 110, at 187.

206. See, e.g., GOERGEN, ET AL., *supra* note 198, at 79 (“In the corporate governance and the finance fields, a diversity of local response is a sign of health. . . .”); FUKUYAMA, *supra* note 9, at 502 (“There is no necessary trade-off...between community and efficiency; those who pay the most attention to community may indeed become the most efficient of all.”).

207. Economists have increasingly become aware that business “success depends far more on the vagaries of chance than most people once imagined. And so does failure.” ROBERT H. FRANK, THE DARWIN ECONOMY: LIBERTY, COMPETITION AND THE COMMON GOOD 143 (2011); see also MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 32–33 (2008). Gladwell writes:

We prematurely write off people as failures. We are too much in awe of those who succeed and far too dismissive of those who fail. . . . And why? Because we cling to the idea that success is a simple function of individual merit and that the world in which we all grow up and the rules we choose to write as a society don’t matter at all.

*Id.* By ensuring that economic competition is fair, and by not allowing dominant firms to unfairly crush rivals, we will maximize the opportunities for long-term success catalyzed by economic diversity and opportunity.

208. Alfred E. Kahn, *Standards for Antitrust Performance*, in MONOPOLY POWER AND ECONOMIC PERFORMANCE, *supra* note 61, at 177; see also STEPHEN JAY GOULD, FULL HOUSE: THE SPREAD OF EXCELLENCE FROM PLATO TO DARWIN 112 (1996) (arguing that consistent and reasonable rules of fairness have pushed excellence in baseball closer and closer to humans’ innate limitations).

209. See Horton, *Antitrust Double Helix*, *supra* note 19, at 654–55. This author explains: Humans have developed keen abilities to quickly figure out who can be trusted in ongoing economic interactions. “Brain imaging seems to support the view that part of our cortex is specialized to deal with the ceaseless computations required to keep count of what we give and what we receive, and to respond emotionally to perceived imbalance.” In other words, humans are evolutionarily hard-wired to quickly judge others’ intentions.

Addressing next the issue of harm to competition, “the destruction of competitors by dominant-firm predatory conduct and aggressive mergers are harmful external constraints on the natural growth of economic variation, diversity, and complexity.”<sup>211</sup> The glib knee-jerk reaction of neoclassical economics is that the antitrust laws allegedly “protect competition, and not competitors.”<sup>212</sup> As previously documented by this author, however, this normative cliché is unsupported by history, judicial precedent, and evolutionary theory.<sup>213</sup> Guarding competitors against unfair and predatory competition by cartels, dominant firms, and monopolies is crucial to protecting the competitive diversity and variety necessary for a stable, thriving, and innovation-oriented economic ecosystem.

It is therefore recommended that antitrust tribunals and regulators begin applying an evolutionary based analysis, which focuses on fairness, intent, and competitive harm. The potential application of such a series of considerations is discussed in Section III below.

### III. POTENTIAL APPLICATION OF FAIRNESS NORMS IN ANTITRUST CASES

This section discusses the potential application of an evolutionary-based fairness/intent/competitive harm paradigm, and how it would differ from a “consumer welfare” economic approach in key cases. Part A examines false negatives in recent Supreme Court predatory pricing cases and analyzes them

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Humans have to be good at reading others’ intentions because our evolutionary development of languages has dramatically increased the opportunities for manipulation and deception when we seek to cooperate with others. We understand “that a mix of cooperators (law-abiding citizens) and defectors (criminals) will always persist in human societies.” Consequently, we have developed acute sensitivities towards others’ intentions. We are therefore evolutionarily well-equipped to meaningfully evaluate and react to others’ maxims and intentions.

The reason that juries have been “impressed” by evidence of predatory intent is that such evidence strikes deep evolutionary chords. On the other hand, the so-called rational Chicago/Harvard economic models that eschew fairness and intent lack meaningful biological, evolutionary, or historical foundations. Consequently, we should welcome evidence and information about the motivations and intentions that lie behind the actions of dominant firms and monopolists.

*Id.* (citations omitted); see also Maurice E. Stucke, *Is Intent Relevant?* 2006 COLUM. BUS. L. REV. 452, 857 (2006) available at <http://ssrn.com/abstract=1992761> (on file with the *McGeorge Law Review*) (“Contrary to some jurists’ arguments, premised on neo-classical economic theory, intent matters. People rely on intent in assessing the conduct’s reasonableness.”).

210. See Horton, *Antitrust Double Helix*, *supra* note 18, at 655; PRASANTA K. PATTANAIK, *ESSAYS ON INDIVIDUAL DECISION-MAKING AND SOCIAL WELFARE* 14 (2009) (“While the game form approach provides a flexible framework for the analysis of rights, I now believe that it needs to be supplemented by information about the motivations that lie behind people’s actions.”); Alfred E. Kahn, *supra* note 61, at 186 (“The inescapable conclusion is that, from a practical standpoint, the criterion of intent alone ‘fills the bill’ for a sensible antitrust policy in such cases.”).

211. See Horton, *Antitrust Double Helix*, *supra* note 19, at 643.

212. *Id.* at 623 (“The simple normative mantra supporting the first strand of the Chicago/Harvard antitrust double helix is that the antitrust laws protect ‘competition, not competitors.’”).

213. *Id.* at 623–34.

under the proposed evolutionary paradigm. In each case, under an evolutionary approach, a jury would have made the final determination and antitrust liability likely would have been imposed. Part B examines “false positives” under a consumer welfare economic standard, and again, in each case, the examination shows that a dramatically different result would have issued—in these cases, no antitrust liability.

#### A. Applying Evolutionary Standards to Consumer Welfare False Negatives

Could a fairness standard be meaningfully applied by juries in antitrust cases? This section examines the question in the context of predatory pricing cases. It is axiomatic that predatory pricing cases are highly disfavored in antitrust today.<sup>214</sup> Under a line of three key Supreme Court cases, *Matsushita*, *Brooke Group*, and *Weyerhaeuser*, it has become virtually impossible for a plaintiff to win a predatory pricing case.<sup>215</sup>

An analysis of predatory pricing since *Matsushita* and *Brooke Group* is beyond the scope of this article.<sup>216</sup> What can safely be stated, however, is that:

Together, *Matsushita* and *Brooke Group* have proven to be formidable hurdles to the successful prosecution of predatory pricing cases. Since *Matsushita* was decided in 1986, no plaintiff, including the Department of Justice, has succeeded in satisfying the two prong “below cost + recoupment” standard.<sup>217</sup>

Furthermore, “after *Brooke Group*, it is easier to make the case that the legal standard for proof of monopolization through price predation has chilled predatory price complaints than to make the case that the law chills aggressive price-cutting.”<sup>218</sup>

Chicago School adherents would claim, as the Supreme Court seemed to accept in *Matsushita*, that no plaintiffs have prevailed in recent predatory pricing cases because “predatory pricing schemes are rarely tried, and even more rarely

214. See, e.g., GAVIL ET AL., *supra* note 15, at 672.

215. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 589 (1986); *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220–225 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 318–20 (2007).

216. An extensive array of impressive scholarly literature on the topic exists. For an excellent and extensive discussion of the history of “economic debate about predatory pricing,” see GAVIL ET AL., *supra* note 15, at 675–80 and citations therein; see also Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3 (2004); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003); Gregory J. Werden, *The “No Economic Sense” Test for Exclusionary Conduct*, 31 IOWA J. CORP. LAW 293 (2006).

217. GAVIL, ET AL., *supra* note 15, at 672.

218. *Id.* at 678.



successful.”<sup>219</sup> On the other hand, it seems equally plausible that either the Court’s current standards are too demanding from an evidentiary standpoint, or are not economically sound or complete.<sup>220</sup>

There is little question that an overly aggressive predatory pricing law could deter some legitimate conduct.<sup>221</sup> As Professors Areeda and Hovenkamp properly recognize: “Antitrust would be acting foolishly if it forbade price cuts any time a firm knew that its cut would impose hardship on any competitor or even force its exit from the market.”<sup>222</sup>

On the other hand, as Professors Areeda and Hovenkamp observe: “complete non-enforcement encourages anticompetitive conduct.”<sup>223</sup> They believe that “[t]he goal should be to identify most cases of actual predation, while exonerating all those who have engaged in only competitive behavior or where the predation claims are doubtful.”<sup>224</sup> Professors Gavil, Kovacic, and Baker observe: “Beginning in the late 1970s and early 1980s, economists developed new theories that challenged the Chicago School view that price predation was never rational.”<sup>225</sup> But these “modern economic theories of predatory pricing have as yet had little influence in the courts.”<sup>226</sup>

Impossibly high burdens in predatory pricing cases are neither sound nor complete from an evolutionary perspective.<sup>227</sup> As discussed below, from an evolutionary perspective, each of the Supreme Court’s three seminal cases, *Matsushita*, *Brooke Group*, and *Weyerhaeuser* was wrongly decided.<sup>228</sup> The result in each of the cases was that meritorious antitrust cases were taken away from

219. *Matsushita*, 574 U.S. at 589 (citing *BORK*, *supra* note 35, at 149–155); P. Areeda & D. Turner, *Predatory Pricing Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975); Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981).

220. See GAVIL, ET AL., *supra* note 15, at 672; *id.* at 700 (“Standards that demand greater economic certainty can reduce the incidence of false positives, but they almost invariably do so by increasing processing costs and possibly the incidence of false negatives, as some of the demanded information proves to be unavailable or too costly to secure.”).

221. AREEDA & HOVENKAMP, *supra* note 1, § 723, at 24–25 (2008).

222. *Id.* ¶ 722, at 21. Professors Areeda and Hovenkamp add that “[i]ll-conceived or ill-defined rules impose heavy social costs by deterring legitimate pricing and by both increasing and complicating legislation.” *Id.* ¶ 723, at 25.

223. *Id.* ¶ 723, at 24–25.

224. *Id.* at 25.

225. GAVIL, ET AL., ANTITRUST LAW IN PERSPECTIVE, *supra* note 15, at 678 (citing Paul Milgrom & John Roberts, *New Theories of Predatory Pricing*, in INDUSTRIAL STRUCTURE IN THE NEW INDUSTRIAL ECONOMICS 112–37 (Giacomo Bonnano & Dario Brandolini, eds. 1990); Janusz Ordover & Garth Saloner, *Predation, Monopolization & Antitrust*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 537–96 (Richard Schmalensee & Robert Willig eds., 1989); Joseph F. Brodley, et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2259–62 (2000).

226. GAVIL, ET AL., *supra* note 15, at 679 (citing Brodley, *Strategic Theory*, *supra* note 208, at 2258–60).

227. See *supra* Section II.B.

228. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 589 (1986); *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220–25 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, 549 U.S. 312, 318–20 (2007).

citizen jurors and placed in the hands of judges applying biased, normative, and unsound economic theories. The answer to the “Antitrust Paradox” in such cases is to allow jurors to apply their instinctive and community-based norms of fairness, and to carefully assess the true competitive intent of defendants in such cases.<sup>229</sup> Had the Court followed an evolutionarily sound analysis, and allowed the juries to properly consider issues of fairness and intent, each of the cases would have been decided for the plaintiffs. Furthermore, leaving the cases in the hands of citizen jurors would have protected the plaintiffs’ Seventh Amendment jury rights in civil antitrust cases.<sup>230</sup>

### 1. *Matsushita Elec. Indus. Co. v. Zenith*

Could fairness have potential relevance in Sherman Act § 1 cases? After all, what possible relevance could our evolutionary instincts for fairness have as to whether there is a contract, combination, or conspiracy in restraint of trade?

In *Matsushita Elec. Industrial Co. v. Zenith Radio*,<sup>231</sup> a sharply divided 5-4 Supreme Court overturned a Third Circuit ruling reversing a district court’s grant of summary judgment in a Sherman § 1 case.<sup>232</sup> The Third Circuit had ruled “that a reasonable fact-finder could find a conspiracy to depress prices in the American [television set] market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market.”<sup>233</sup>

Citing Chicago School economic theories, the majority adopted an “economic plausibility” or “no economic sense test” in reviewing the allegations that defendants had conspired to restrain trade.<sup>234</sup> The Court then agreed with petitioner defendant Japanese television manufacturers that the “alleged conspiracy [was] economically irrational and practically infeasible,” and that they had “no motive to engage in the alleged predatory pricing conspiracy; indeed they had a strong motive *not* to conspire in the manner respondents [had] allege[d].”<sup>235</sup> The majority therefore ruled that no “genuine issue for trial” existed under Federal Rule of Civil Procedure 56(e) as to the possible existence of an antitrust conspiracy.<sup>236</sup> Since no reasonable jury could find that an antitrust conspiracy had existed, defendants were entitled to summary judgment.<sup>237</sup>

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229. See *supra* Section II.B.

230. U.S. Const. amend. VII.

231. 475 U.S. 574 (1986).

232. *Id.* at 576, 580–82.

233. *Id.* at 599. Plaintiffs alleged that defendants had conspired to violate §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. *Id.*

234. *Id.* at 589–90.

235. *Id.* at 588, 597–98.

236. *Id.* at 598.

237. *Id.*

The four dissenting justices, led by Justice White, argued that “[i]n defining what respondents must show in order to recover, the Court makes assumptions that invade the fact-finder’s province.”<sup>238</sup> Addressing the majority’s “no economic sense test,” Justice White observed that “the Third Circuit [was] not required to engage in academic discussions about predation . . . .”<sup>239</sup>

The Court’s “economic plausibility” test “has greatly increased the burden on plaintiffs”<sup>240</sup> attempting to prove conspiracies on the basis of indirect evidence.”<sup>241</sup> Indeed, “[i]n the antitrust area, *Matsushita* [has] greatly expanded the use of summary judgment, which in turn [has] focused a great deal of the effort that goes into antitrust litigation on preparation for and possible disposition of the case through summary judgment.”<sup>242</sup> In an even broader sense, *Matsushita* has played a key role in the Supreme Court’s recent efforts to severely curtail jury trials in antitrust cases.<sup>243</sup>

*Matsushita* was exactly the type of fact-intensive case that should have been decided by a jury under the Seventh Amendment.<sup>244</sup> Instead of an economic plausibility test, which makes no evolutionary sense, the Court should have left it to a jury to apply their instinctive norms of fairness in evaluating defendants’ conduct. The district court could have asked the jurors as part of the jury instructions a couple of simple questions that jurors could readily understand and apply in reaching a decision. First, did defendants conspire to compete unfairly? Second, did defendants intend to harm competition? And third, was competition harmed by defendant’s unfair and anticompetitive actions?

It is quite likely that reasonable jurors could and would have answered such questions affirmatively based on the extensive evidence before the Court.<sup>245</sup> Had

238. *Id.* at 601.

239. *Id.* at 605–06.

240. Ironically, even though it was adjudicated on the basis of summary judgment standards, “[t]he *Matsushita* case dragged on for over a dozen years.” See Oliver E. Williamson, *Delimiting Antitrust*, in REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS ON LEGAL, ECONOMIC, AND POLITICAL POLICY 211, 233 (Harry First et al. eds., 1991).

241. HERBERT HOVENKAMP, ANTITRUST: BLACK LETTER OUTLINES 108 (5th ed. 2011); see also A. GAVIL ET AL., *supra* note 15, at 277–80.

242. GAVIL, ET AL., *supra* note 15, at 280.

243. See, e.g., Horton, *Antitrust Double Helix*, *supra* note 19, at 647–51.

244. See Horton, *Antitrust Double Helix*, *supra* note 19, at 663, n.281 (“[A] jury of twelve citizens could have more fairly and objectively reviewed the factual evidence and applied the relevant legal theories, and it would not have taken anything close to twelve years to get a final resolution.”); James F. Ponsoldt & Marc J. Lewyn, *Judicial Activism, Economic Theory and the Role of Summary Judgment in Sherman Act Conspiracy Cases: The Illogic of Matsushita*, 33 ANTITRUST BULL. 575, 613 (1988) (“[T]he decision reflects broader political questions about the traditional role and power of juries in our democratic system to adjudicate private property rights and the attempt by the executive branch to infect otherwise private disputes with its noninterventionist ideology, thereby transforming the jury from its essential nonactivist role.”); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 142 (2000) (arguing that decisions like *Matsushita* risk overriding the constitutional imperatives of the right to a civil jury trial under the Seventh Amendment).

245. *Matsushita*, 475 U.S. at 576–578.

basic fairness norms been applied, instead of judges attempting to decide whether the alleged conspiracy "made economic sense," it is likely that citizen jurors would have held the defendants accountable for their conspiracy to restrain trade and monopolize the American television market.<sup>246</sup> Indeed, it is not hard to imagine that an American jury would have been "morally outraged" by defendants' conspiracy.

## 2. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.

*Brooke Group*, like *Matsushita*, involved allegations of predatory pricing to harm competition.<sup>247</sup> Although the case was brought under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, the Court ruled that the two prerequisites to recover were the same as for allegations of predatory pricing under § 2 of the Sherman Act.<sup>248</sup> Plaintiff Liggett developed a line of generic cigarettes that it offered at list prices roughly thirty percent below the list prices for branded cigarettes.<sup>249</sup> Liggett claimed that Brown & Williamson ("B&W") had entered the generic market segment with below-cost prices "to pressure Liggett to raise list prices on its generics, thus restraining the economy segment's growth and preserving Brown & Williamson's supracompetitive profits on branded cigarettes."<sup>250</sup> Importantly, a civil jury agreed with plaintiff Liggett, and returned a verdict in its favor.<sup>251</sup> The district court, however, overturned the verdict and ruled that B&W was entitled to judgment as a matter of law.<sup>252</sup> The Fourth Circuit affirmed.<sup>253</sup>

In a 6-3 decision, the Supreme Court affirmed, relying heavily on its decision in *Matsushita* and its findings about "the general implausibility of predatory pricing."<sup>254</sup> The Court ruled that "the evidence [could not] support a finding that

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246. See *Williamson, Delimiting Antitrust*, *supra* note 217, at 234 (arguing that since *Matsushita* "[t]he study of strategic behavior has been elaborated to include the learning curve benefits of cumulative production, the attributes of investment, techniques for raising rivals' cost, strategic reputation effects, and even international strategic features.").

247. 509 U.S. 209 (1993).

248. *Id.* at 222-24 ("[W]hether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. . . . The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.").

249. *Id.* at 212-15.

250. *Id.* at 212, 214.

251. *Id.* at 209.

252. *Id.* at 218.

253. *Id.*

254. *Id.* at 219.

255. *Id.* at 211, 227. The Court repeated its assertion from *Matsushita* that "predatory pricing schemes

Brown & Williamson's alleged scheme was likely to result in oligopolistic price coordination and sustained supracompetitive pricing in the generic segment of the national cigarette market. Without this, Brown & Williamson had no reasonable prospect of recouping its predatory losses and could not inflict the injury to competition the antitrust laws prohibit."<sup>255</sup> Tellingly, the majority conceded that "the chain of reasoning by which we have concluded that Brown & Williamson is entitled to judgment as a matter of law is demanding."<sup>256</sup>

The dissenters, led by Justice Stevens, noted that: "After 115 days of trial, during which it considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses, the jury deliberated for nine days and then returned a verdict finding that B&W engaged in price discrimination with a 'reasonable possibility of injuring competition.'"<sup>257</sup> Justice Stevens then poignantly observed, "The Court's contrary conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence."<sup>258</sup> He concluded:

In my opinion, the jury was entitled to infer from the succession of price increases after 1985—when the prices for branded and generic cigarettes increased every six months from \$33.15 and \$19.75, respectively, to \$46.15 and \$33.75—that B&W's below-cost pricing actually produced supracompetitive prices, with the help of tacit collusion among the players. But even if that were not so clear, the jury would surely be entitled to infer that B&W's predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, carried a "reasonable possibility" of injuring competition.<sup>259</sup>

What purpose did it serve to engage in the "difficult and demanding business" of applying esoteric normative economic theories to reach pre-ordained conclusions justifying predatory conduct designed and intended to eliminate competition? Instead, the Court should have let the jurors apply their instinctive norms of fairness by considering three additional questions: 1) did the defendant (or defendants) compete unfairly?; 2) did the defendant(s) intend to harm competition; 3) and if so, was competition harmed? It is abundantly clear from the jury's decision in *Brooke Group* that the answer to each of the three questions almost certainly would have been in the affirmative.

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are rarely tried, and even more rarely successful." *Id.* at 226 (quoting *Matsushita*, 475 U.S. at 589). The Court further urged that "the costs of an erroneous finding of liability are high." *Id.*

256. *Id.* at 243.

257. *Id.*; see also *A. A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1400 (7th Cir. 1989) (Easterbrook, J.) (describing application of economic tests in antitrust cases as a "difficult business").

258. *Id.* at 254.

259. *Id.*

260. *Id.* at 258 (citations omitted).

## 3. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber

In *Weyerhaeuser*, the Supreme Court once again overturned a jury finding of predatory activities—this time in a monopolization case under § 2 of the Sherman Act.<sup>260</sup> Plaintiff sawmill Ross-Simmons' ("R-S") antitrust theory was simple.<sup>261</sup> R-S alleged "that Weyerhaeuser drove it out of business by bidding up the price of sawlogs to a level that prevented [R-S] from being profitable."<sup>262</sup> Following a nine-day trial, a civil jury agreed with R-S.<sup>263</sup> The District Court instructed the jury that "[R-S] could prove that Weyerhaeuser's bidding practices were anticompetitive acts if the jury concluded that Weyerhaeuser 'purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [R-S] from obtaining the logs they needed at a fair price.'"<sup>264</sup> The jury returned a \$26 million verdict against Weyerhaeuser, which was trebled to approximately \$79 million.<sup>265</sup>

Holding that "[p]redatory-pricing and predatory bidding claims are analytically similar," the Court vacated the judgment for plaintiff and remanded the case with instructions to the district court to apply the two-pronged *Brooke Group* standard.<sup>266</sup> Consequently, R-S would need to prove: 1) "that the alleged predatory bidding led to below-cost pricing of the predator's outputs"; and 2) "that the defendant ha[d] a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."<sup>267</sup> The Court ignored substantial economic commentary, much less the lessons of history,<sup>268</sup> showing that price predation can be a deadly effective strategy for eliminating a pesky competitor or forcing it to raise its prices.<sup>269</sup>

Once again, the court should have applied a fairness standard by asking the jurors three basic questions: 1) did Weyerhaeuser compete unfairly?; 2) did Weyerhaeuser intend to harm competition?; and 3) if so, was competition harmed by Weyerhaeuser's unfair and anticompetitive activities? Based on the jury's findings, it seems almost certain that the jury would have answered the questions

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261. 549 U.S. 312, 315–16 (2007).

262. *Id.* at 316.

263. *Id.* at 314–15.

264. *Id.* at 316.

265. *Id.* at 317.

266. *Id.*

267. *Id.* at 321, 326.

268. *Id.* at 325.

269. See, e.g., GAVIL, ET AL., *supra* note 15, at 675 ("Predatory pricing is a common feature of accounts of monopolization, and was widely considered a serious problem during the early decades of the 20<sup>th</sup> century."); Chicago School commentators disagree that predatory pricing historically has occurred. See, e.g., John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958) (arguing that *Standard Oil* never engaged in price predation); BORK, *supra* note 35, at 144–45 (arguing that below-cost pricing is irrational because most predators could not reasonably expect to recoup their losses from doing so).

270. See, e.g., Symposium, *Buyer Power and Antitrust*, 72 ANTITRUST L.J. 505 (2005).

in the affirmative.<sup>270</sup> Consequently, the jury's verdict for the plaintiff should have been left in place.

*B. Applying Evolutionary Standards to Consumer Welfare False Positives*

Ironically, applying "consumer welfare" economics in antitrust cases not only creates numerous dangerous "false negatives," as discussed above, but "false positives," as well. As seen, consumer welfare economics frequently produces "false negatives" in cases alleging predatory conduct by dominant firms under Section 2 of the Sherman Act or under the Robinson-Patman Act.<sup>271</sup> Paradoxically, those same "consumer welfare" economics generate false positives in cases that allege collusion under Section 1 of the Sherman Act but pose no real dangers to competition from an evolutionary perspective.<sup>272</sup> Such a false positive was generated in *FTC v. Superior Court Trial Lawyers Assn.*<sup>273</sup> As discussed below, application of an evolutionary-based fairness/intent/competitive harm approach would have yielded a much different and more rational outcome.

*I. FTC v. Superior Court Trial Lawyers Assn. ("SCTLA")*

*SCTLA* involved a group of private practice lawyers in the District of Columbia who agreed to accept appointments under the District's Criminal Justice Act ("CJA") to represent indigent criminal defendants.<sup>274</sup> For many years, CJA lawyers voiced serious concerns to the District of Columbia and its political leaders concerning the inadequacy of the low compensation rates paid to CJA lawyers.<sup>275</sup> Ultimately, a large percentage of the CJA lawyers voted at an SCTLA meeting to stop signing up for new appointments until their fees were increased.<sup>276</sup> "On September 6, 1983, about 90% of the CJA regulars refused to accept any new assignments."<sup>277</sup> After Mayor Marion Berry recommended legislation increasing CJA fees to \$35/hour, and the city council unanimously passed the bill on September 20, 1983<sup>278</sup> CJA lawyers began accepting new assignments the very next day.<sup>279</sup>

Ironically, as Justice Blackmun noted in his separate dissenting opinion, "public opinion supported the boycott"; and city officials and representatives

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271. See *supra* at Part III.A.

272. See *infra* Part III.B.1.

273. 493 U.S. 411 (1990).

274. *Id.* at 414–15.

275. *Id.* at 415–16.

276. *Id.* at 416–17.

277. *Id.* at 416.

278. *Id.* at 418.

279. *Id.*

"may have welcomed the appearance of a politically expedient 'emergency.'"<sup>280</sup> Despite very strong public support and the unanimous passage of new CJA legislation, the FTC saw its mission as protecting the Chicago School's "consumer welfare" standard.<sup>281</sup> The FTC alleged that the SCTLTA and four of its officers had "entered into an agreement among themselves and with other lawyers to restrain trade by refusing to compete for or accept new appointments under the CJA program. . . until the District of Columbia increased the fees offered under the CJA program."<sup>282</sup> The FTC characterized the SCTLTA's activities as "a conspiracy to fix prices and to conduct a boycott."<sup>283</sup> Although the FTC filed its complaint under Section 5 of the FTC Act,<sup>284</sup> each of the tribunals that reviewed the conduct, including the ALJ, the FTC, the District of Columbia, and the Supreme Court found that it was "a classic restraint of trade within the meaning of Section 1 of the Sherman Act."<sup>285</sup> Ultimately, the Supreme Court found that the SCTLTA had conducted a *per se* illegal group boycott to enforce and implement a naked price-fixing agreement that resulted in higher prices to consumers (the District of Columbia taxpayers).

The Court followed a classic "consumer welfare" economics line of reasoning. An evolutionary fairness/intent/harm to competition analysis would likely have yielded an opposite result. First, had the CJA lawyers really conspired to unfairly harm competition? The Court found that "[p]rior to the boycott CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services to the District at CJA rates."<sup>286</sup> But anyone who has actually accepted a CJA appointment in the District of Columbia would find the notion of the lawyers competing for cases to be laughable.<sup>287</sup> First, CJA lawyers have no control over output, since the cases are generated by arrests.<sup>288</sup> Second, there is no fee competition, since the reimbursement rates are set by legislation, and CJA lawyers cannot unilaterally change that.<sup>289</sup> And third, no matter how many lawyers are accepting CJA cases at any one time, the District of Columbia inevitably has to supplement their efforts through the Public Defender's Office and pro bono appointments.<sup>290</sup> Furthermore, the appointments are made on a "first-come/first-serve basis."<sup>291</sup> So how did the

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280. *Id.* at 454 (J. Blackmun concurring in part and dissenting in part).

281. *See id.* at 418-19.

282. *Id.* at 418.

283. *Id.*

284. 15 U.S.C. § 45. The relevant portion of the statute (15 U.S.C. § 45(a)(1)) stated: "Unfair methods of competition . . . and unfair or deceptive acts or practices...are hereby declared unlawful." *Id.*

285. *FTC*, 493 U.S. 411 at 422.

286. *Id.*

287. *See id.* at 414-15.

288. *See id.* at 415.

289. *See id.* at 414-15.

290. *See id.*

291. *See id.* at 415.



CJA lawyers compete in any meaningful sense?<sup>292</sup> Furthermore, in what evolutionary or practical sense did the CJA lawyers act unfairly? The only possible way they could persuade the District to pass new legislation was through a political boycott, which was encouraged by the Mayor and other city officials.<sup>293</sup>

Similarly, where was their intent to harm competition? Since the CJA lawyers were never really competing in any meaningful or practical sense, how could they harm competition? And where was the harm to the competitive process? As Justice Blackmun insightfully noted, the District of Columbia “had the power to terminate the boycott at any time by requiring any or all members of the District Bar—including the members of SCTLA—to represent indigent defendants *pro bono*.”<sup>294</sup> It was well within the political and economic power of the District of Columbia to keep its CJA rates at pre-boycott levels.<sup>295</sup> Because of political pressure, however, the people’s elected representatives unanimously chose not to.<sup>296</sup>

Ultimately, the Court’s consumer welfare economic analysis resulted in an overly technical, politically naïve, and economically frivolous application of Section 1 of the Sherman Act. The false positive that the consumer welfare economic analysis generated could have been avoided through a more practical and meaningful evolutionary fairness/intent/competitive harm analysis. One can only wish that the FTC and the Courts would have spent the same time and energy worrying about trying to stop competitively harmful predatory conduct by dominant firms, as they spent on this frivolous protection of consumer welfare.<sup>297</sup>

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292. In classifying the CJA lawyers as classic economic competitors, the Court cited the Court of Appeals’ reasoning that:

The Commission correctly determined the CJA regulars act as ‘competitors’ in the only sense that matters for antitrust analysis: They are individual business people supplying the same service to a customer, and as such may be capable, through a concerted restriction on output, of forcing that customer to pay a higher price for their service. That the D. C. government, like the buyers of many other services and commodities, prefers to offer a uniform price to all potential suppliers does not alter in any way the anti-competitive potential of the petitioners’ boycott. The antitrust laws do not protect only purchasers who negotiate each transaction individually, instead of posting a price at which they will trade with all who come forward.

*Id.* at 422–23, n. 9.

293. *See id.* at 445. The Court cited the Court of Appeals conclusion that “Mayor Barry and other important city officials were sympathetic to the boycotters’ goals and may even have been supportive of the boycott itself,” and that the Mayor may have actually encouraged the demonstration to create public support. *Id.*

294. *Id.* at 453.

295. *See id.*

296. *See id.* at 415–16.

297. It is a closer call, but a similar example can be found in the case of *United States v. Brown University*, 5 F.3d 658 (3rd Cir. 1993). The case involved an agreement by the Ivy League college institutions and MIT to award financial aid only on the basis of demonstrated need. *Id.* at 661–62. The universities felt that their agreement helped “[promote] socio-economic diversity at member institutions”; “provided some students who otherwise would not have been able to afford [such an education] the opportunity to have one”; and “promoted competition for students...in areas other than price.” *Id.* at 674–75.

## IV. CONCLUSION

Steady and unremitting efforts since the 1970s by neoclassical economic theorists to excise fairness from the antitrust lexicon have been wildly successful.<sup>298</sup> In many contemporary American antitrust circles today, fairness is a dirty word and laughable idea.<sup>299</sup> Consumer welfare and allocative efficiency are the sole goals of contemporary American antitrust.<sup>300</sup> The idea that fairness should be part of the antitrust lexicon is considered naïve and foolish.<sup>301</sup>

Fortunately, overwhelming evidence and findings from the fields of evolutionary biology and behavioral economics are reopening the once closed “fairness versus welfare” debate in antitrust.<sup>302</sup> This development is timely and welcome, as “Chicago School” and “Post-Chicago” consumer welfare economics have been fully field-tested and have failed.<sup>303</sup> The time is therefore ripe to reassess issues of fairness in antitrust from an evolutionary perspective.

Evolutionary biologists and behavioral economists increasingly appreciate and demonstrate how fundamental and critical our sense of fairness has been to our long-term evolutionary and economic success.<sup>304</sup> Throughout our evolutionary history, fairness has been critical to our ability to work cooperatively and effectively in social groups, and to build stable and lasting economic networks.<sup>305</sup> In short, fairness counts.

Unfortunately, in eschewing norms of fairness in our antitrust analyses and theories, we have moved away from our evolutionary heritage and are in danger of becoming “moral zombies” and economic sociopaths. For antitrust to ultimately be meaningful and effective, we must return to a system grounded in moral norms of fairness, and stop trying to make decisions in a moral vacuum.

A workable antitrust fairness standard can be developed and applied by paying increased attention and deference to evolutionary norms of fairness, intent, and competitive harm, including injury to competitors from unfair and

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In a 2-1 decision applying a sort of hybrid “consumer welfare”/evolutionary analysis, the Court of Appeals decided that the District Court should apply a full rule of reason analysis to the case. The dissenting judge applied much more of an evolutionary analysis and noted how “[a]s a result of these policies, the record demonstrates that the number of students from minority groups and non-affluent families who attend [the Ivy institutions and MIT] has increased dramatically in recent years.” 5 F.3d at 682. Dissenting Judge Weis found neither an intent to harm competition, nor actual competitive harm from the universities’ policies.

Once again, a false positive applying a consumer welfare economic analysis would have been negated through an evolutionary analysis.

298. See *supra* Part II.A.

299. See *supra* note 1.

300. See *supra* Part II.A.

301. *Id.*

302. See *supra* Part II.B.

303. See *supra* notes 105–110.

304. See *supra* notes 113–125.

305. *Id.*

predatory acts by cartels, dominant firms, and monopolies.<sup>306</sup> It is therefore recommended that antitrust tribunals and regulators begin applying an evolutionarily based fairness/intent/competitive harm analysis, instead of the biased, outmoded, and dangerously ineffective economic consumer welfare norms currently in use. It is further recommended that we start returning behavioral antitrust cases to jurors, who have evolved the ability to critically evaluate and assess fairness and intent and apply community norms of morality.

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306. The economic arguments that protecting competitors against predatory conduct is inconsistent with either consumer or total welfare have not held up in terms of the importance of enhanced innovation and increased consumer choice, as a result of economic diversity. *See, e.g.,* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007) (emphasizing the importance of consumer choice in antitrust analyses); Horton, *Antitrust Double Helix*, *supra* note 19, at 670, n.311 (discussing a variety of historical, behavioral, and economic reasons why innovation is likely to be reduced in more concentrated markets notwithstanding increased efficiency claims).