# EXTRANEOUS LIABILITY IN ANTITRUST

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*Whether an act gives rise to liability should turn on its tendency to yield particular outcomes rather than on its ultimate effect, which may have resulted from extraneous factors beyond the actor's control and foresight. This principle is firmly ingrained in jurisprudence, yet antitrust law violates this principle in a number of unappreciated ways. The law evaluates commercial conduct based not on the nature of the challenged behavior to bring about particular results, but on the stochastic confluence of extraneous factors. This Article explores the phenomenon of extraneous liability in antitrust law, finding fault with several important features of the modern antitrust system. Nevertheless, this Article accepts a legitimate role for extraneous factors in antitrust analysis. To the extent that such forces are both reasonably identifiable and at least somewhat determinate ex ante, they may appropriately affect the legality of conduct, the future commercial impact of which depends on those forces.*

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## INTRODUCTION

This Article addresses an overlooked, and profoundly odd, feature of the U.S. antitrust regime.[1] Specifically, prevailing jurisprudence permits the government to condemn actions that were entirely lawful at the time that they were carried out.[2] The Author characterizes this phenomenon as "extraneous liability," which reflects the process by which antitrust faults conduct not by reference to the proclivity of that behavior to produce particular negative results, but solely by the action's ultimate consequence, which extraneous factors may have shaped, guided, or transformed in an unanticipated manner.

Such liability is anomalous, as it contravenes two fundamental principles of justice. The first is that the law should not hold a person responsible for consequences that bore no discernible relationship to her corresponding behavior ex ante. Similarly, though no less importantly, the law has no business revisiting the status of a discrete and completed act that was proper when completed. These two norms overlap to a considerable extent, though they are not perfectly coterminous.

These uncontroversial principles materialize under a variety of guises. In the realm of criminal law, the U.S. Constitution prevents the government from passing ex post facto laws.[3] As a result, one cannot impose criminal sanctions on

1. 15 U.S.C. §§ 1–7, 12–27 (2006).
2. *See infra* Part III.
3. U.S. CONST. art. I, § 9, cl. 3.

an individual today whose impugned, though completed, behavior was lawful yesterday. In the civil setting, the law makes liability contingent on foreseeability and proximity, the latter of which limits the legal concept of causation. These tenets of tort relieve one of liability when there was no discernible causal connection between the relevant act and the ensuing harm. This limitation serves a crucial purpose: when a person acts, the consequences do not always, or even typically, follow a path that one can predict with mathematical precision. Instead, the causal effects of one's behavior are often intertwined with, and shaped by, extraneous factors, which combine to produce an ultimate result. Subjecting an individual to sanctions or liability for an outcome that she could not have envisioned would not only be inequitable, it would eradicate incentives to act efficiently. Where an initial effect combines with extraneous factors to produce a wildly unpredictable or random final result, the law declines to impose liability. To do otherwise would be to command the impossible, requiring people subject to the laws to refrain from actions the negative consequences of which one could not identify ex ante.[4]

Given the potentially abstract nature of these principles, it is important to clarify the limits of the Article's relevant policy prescription. This Article submits that one cannot legitimately impose sanctions with respect to an act that was neither unlawful nor liability-generating at the time of its completion. The Food and Drug Administration ("FDA"), for example, could legitimately revoke approval of a drug that, despite all cost-feasible testing and scrutiny during clinical trials, later turns out to yield harmful side effects. This should not be surprising, for it would be odd to pre-commit a regulatory agency to a policy that was optimal when rendered in a context of incomplete information. Subsequent, superior information may become available that counsels a change of course.

Yet, there is a critical difference between (1) imposing constraints on future behavior and (2) subjecting an entity to sanctions for a prior act that was not tortious when completed, but that later yields negative effects. The FDA's right to prohibit future sales is distinct from the imposition of liability on the drug company for sales that preceded new information as to negative side effects. The prohibition on such retroactive punishment encompasses not only criminal sanctions, but damages at common law and backward-reaching equitable relief, such as disgorgement. Forward-reaching equitable relief may be permissible when it does not punish a prior act, but merely forbids future behavior that can be detached from that earlier act.

The "extraneous liability" criticized by this Article encompasses more than ex post facto laws. It encapsulates civil proceedings that would impose retroactive sanctions for conduct that produces negative consequences too remote or minute to warrant efficient alterations in behavior ex ante. Current principles of antitrust violate these principles. They do so in three broad ways.

*First*, according to the Supreme Court's rule in *United States v. E.I. du Pont de Nemours & Co.*, courts must determine an acquisition's conformity with

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4. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 266 (7th ed. 2007).

the antitrust laws at the time of suit, rather than at the moment the deal closed.[5] This principle allows the government, which is not subject to a statute of limitations, to bring an action any time, even decades after a merger, even though all agree that the deal was lawful at the time of its being consummated and the ensuing anticompetitive effect was wholly unforeseeable at the time of the merger's inception.[6]

*Second*, consider a merger or acquisition that observers expect to result in some transitory power over price. The sanction decision will turn on whether the reviewing agency considers entry in response to the ensuing output restriction to be timely, likely, and sufficient.[7] This aspect of the law reflects the fundamental principle that transitory market distortions are not fitting objects of antitrust condemnation.[8] By definition, such an inquiry is forward-looking and hence probabilistic. If the government considers entry likely to occur within a sufficiently short time frame to render the relevant merger unprofitable, it will probably approve the arrangement.[9]

What happens, however, if no entry occurs, or entry takes place on an inadequate scale, or entry occurs in an insufficiently prompt manner to prevent consumer harm? It is well settled that the enforcement agencies can challenge an acquisition post-consummation that turns out, against expectations, to yield anticompetitive effects.[10] Yet, consider the matter from the merging entity's perspective: it has done everything it can do to abide by the law, save for abandoning its desired merger. The nature of the acquisition is identical in both states of the world: the one in which entry occurs within the expected time and that in which it does not.

Perhaps merging parties must assume the risk that the future will turn out to be something other than what they and the government envisioned, but this seems like a facile response. What if the reason for the absence of or delay in entry is not due to an identifiable feature of the market that might have led investigators ex ante to deem entry unlikely to be timely? What if it is instead due to the actions of the merging entity's competitors, which chose not to enter (perhaps in a purposeful manner to induce antitrust liability against their rival) or came into the market at a later time than they hoped due to mismanagement or inattention? Now the matter appears more complicated. Should one really condition otherwise lawful conduct on the vagaries of future third-party behavior? Capricious determinations

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5. 353 U.S. 586, 607 (1957).

6. Indeed, in the *du Pont* case itself, over thirty years had passed from the time of acquisition until the time of suit. *Id.* at 588.

7. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 9 (rev. ed. 2010) [hereinafter MERGER GUIDELINES], *available at* http://ftc.gov/os/2010/08/100819hmg.pdf.

8. *See, e.g.*, Colo. Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 695–96 (10th Cir. 1989); Dimmitt Agri Indus. Inc. v. CPC Int'l Inc., 679 F.2d 516, 530 (5th Cir. 1982).

9. *See* MERGER GUIDELINES, *supra* note 7, § 9.1.

10. As explained below, this particular tenet of antitrust law is problematic. *See infra* Part III.A.

of guilt are surely unsound when ex ante analysis would have demonstrated that the relevant actions conformed to the law.

*Third*, some courts have construed individual companies' exclusive arrangements in light of "cumulative foreclosure."[11] This facilitates a potentially troubling outcome. Specifically, a court will deem a fringe firm's imposition of loyalty rebates or other exclusive-dealing requirements entirely lawful if none (or few) of its similarly small rivals impose such conditions on their customers.[12] As the number of its competitors insisting on such sales conditions increases, however, the volume of commerce fettered by such arrangements will rise. Eventually, the marginal rival's decision to follow its colleagues will lead to a critical degree of foreclosure.[13] A court may then deem all firms who have imposed these restrictions to be in potentially criminal violation of the antitrust laws.[14]

For reasons explored at length in this Article, the Author concludes that all three of these antitrust phenomena are potentially improper due to their ability to invoke unpredictable and unforeseeable liability. Nevertheless, although their impropriety may seem self-evident in light of traditional principles of justice, these incidences of ex post liability implicate difficult policy questions. Sustained examination of these complications, however, bolsters this Article's thesis.

In the first place, one might object that the rule in *du Pont* only subjects a company to forward-acting injunctive relief, such as divestiture. In this respect, the fact that anticompetitive conditions were an unforeseeable result of an earlier acquisition should be no impediment to enjoining that acquisition at a later time. One should distinguish equitable relief of this kind from criminal or common-law liability that would impose punitive sanctions for actions that were proper when undertaken. Based on these considerations, one might question this Article's conclusion that the rule in *du Pont* bears the potential for perverse application.

Such criticism would be mistaken. It is true that ex post, forward-looking injunctive relief would not necessarily fall within this Article's scope of prohibited liability. Yet, the "necessarily" condition is important. Although one could arguably construe a company's stock or asset acquisition as an ongoing act, it is better characterized as complete—and therefore unassailable—if the following condition holds. Specifically, to be ongoing, the challenged merger must have been of a kind that created an appreciable risk of anticompetitive harm at the time of consummation, even if the expected social value of the deal was positive ex ante. This is most likely to be the case where the merger, though efficiency enhancing or not considered likely to create negative price effects, will materially

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11. *See infra* Part III.C.

12. *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000).

13. *See* Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*, 112 YALE L.J. 681, 698 n.53 (2003).

14. *See* Frank M. Hinman & Brian C. Rocca, *The "Aggregation Theory": A Recent Series of Decisions in Bundled Discounting Cases Threatens to Expand Section One into Uncharted Territory*, ANTITRUST SOURCE, Feb. 2007, at 1 (citing cases).

increase concentration in an already concentrated market. By approving such a merger, the relevant antitrust agency explicitly conditions its approval on the nonoccurrence of anticompetitive results that are foreseeable by all parties. Until these results do or do not materialize, the acquisition constitutes an ongoing, and hence permissibly enjoinable, act. Second, if acquired stock is private or a company integrates acquired assets within its organization, the cost of a later, forward-acting injunction increases and may effectively punish the earlier acquisition. Such considerations weigh on the question of whether a later-challenged merger constitutes a complete or ongoing act at the time of challenge.

The Author submits that the law cannot legitimately impose ex post sanctions—even ostensibly forward-acting ones—on completed conduct that was permissible when undertaken. So, for instance, a merger of the kind that occurred in *du Pont*, which did not trigger antitrust concerns at the time of consummation due to the modest nature of the merger vis-à-vis the larger market of which it was a part, should not be subject to a later divestiture order if anticompetitive conditions unexpectedly arise. This is because an antitrust ruling that imposes a divestiture requirement with respect to a bounded act is tantamount to imposing punitive sanctions for prior conduct, and it is objectionable for that reason. In such circumstances, the agencies should recognize the legitimacy of the earlier merger and wait for the market to self-correct, as is the norm with respect to § 2 of the Sherman Act. Similarly, were the government to seek disgorgement of profits on the basis of a merger that turns out, against reasoned expectations, to yield anticompetitive conditions, such "equitable" relief would also fall within the confines of improper "extraneous liability."

A second possible objection to this Article's thesis lies in the possible negative consequences that could result from revoking the government's ability to revisit merger-approval decisions that later turn out to have been misplaced. Were the law to fetter the agencies in this way—by virtue of the principle that ex post liability is improper—it is possible that the government would be more reluctant to give the green light to mergers in close cases. Conceivably, this could negatively impact social welfare by reducing the number of efficiency-enhancing mergers that take place.

Nevertheless, there is reason to doubt that such pernicious repercussions would arise. The first point, from a normative perspective, is that the presence of costs to a proposed change of direction is in itself an insufficient basis to eschew that course. The relevant question is whether the costs exceed the benefits. The second point is that the antitrust agencies, which the law charges with administering competition rules in furtherance of social welfare, will rationally approve acquisitions the expected consequences of which are socially positive. It is possible in merger cases of exceptional public note that political pressures will render the agencies risk averse, thus leading them to reject proposed mergers that, judged ex ante, are desirable.

One solution might be to qualify the approval of mergers that the agencies expect to yield immediate and substantial levels of market power. One can distinguish such acquisitions on the basis that the merging parties clearly envision the possible—and perhaps probable—consumer-welfare-reducing impact of their

action. This is not a case in which extraneous factors are likely to combine to yield an unforeseeable, negative outcome. Perhaps there is reason, then, to distinguish price-increasing mergers that the law will approve only on the basis of swift market self-correction from those acquisitions the anticompetitive consequences of which are highly attenuated and the predicted benefits of which are substantial.[15]

Ultimately, it does not follow that extraneous factors lack a legitimate role in antitrust analysis. Were one to eschew any reference to such factors, the law would have to focus purely on the nature of a company's actions in isolation of the environment within which those actions occur and without regard to the spectrum of causal effects that may ensue from the company's behavior. This would be folly. To adopt a simple illustration, a dominant firm should not enjoy the same freedom of action as its fringe rival, which possesses merely a trivial share of the market. Those two entities' decisions to require their respective customers to boycott the sales of the other, for instance, may have vastly asymmetric market effects from a consequentialist perspective. Because the differing causal consequences of their actions are readily perceptible ex ante, it may be appropriate to prohibit the monopolist from entering into such contracts, while leaving the fringe competitor free to behave in such a manner if it so chooses.[16] Although the nature of the contracts into which the dominant and fringe companies entered may be identical when divorced from the context in which they are employed, this does not in itself warrant equivalent treatment under the law.

Instead, one should judge the quality of an antitrust defendant's actions on extraneous factors only to the extent those factors were within the relevant company's sphere of control and foresight. Third parties and other environmental determinants may have an important role in shaping the impact of a company's action, thus serving as a transformative conduit between cause and effect. Yet, to hold an entity liable for an effect that it could not have reasonably thought to flow from a particular cause is simply to condemn after the fact what the law could not have objected to before. Such liability is comparable to ex post facto illegality. It is an extreme form of strict liability that lacks the requirement of proximate causation. As explored in depth below, establishing a company's conformity with the antitrust laws on such a basis is objectionable on utilitarian, deontological, and corrective-justice grounds.

The courts should not entertain antitrust violations in the situations of ex post liability addressed below.[17] This Article explores the nature of retroactive

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15. Yet, even in the former case, the courts should be cautious before finding an antitrust violation. It would be wholly improper to regard the acquisition as improper *ab initio*. Instead, the law should limit recovery to prospective injunctive relief. As explained below, contemporary principles of antitrust law violate these principles.

16. *See* Alan Devlin, *Analyzing Monopoly Power Ex Ante*, 5 N.Y.U. J.L. & BUS. 153, 153–62 (2009) (explaining the possible benefits of allowing fringe firms to do what their dominant rivals cannot).

17. One must be mindful of the limits of this normative proscription. This Article does not argue that the law must treat homogeneous actions identically in all situations. Nor does it contend that making the legality of an action contingent on third-party conduct is necessarily objectionable. Instead, it argues that extraneous factors are proper determinants of antitrust legality when they are perceptible ex ante. So, for example, the following

liability, explains why such liability is normatively improper, and examines the phenomenon of antitrust law condemning actions in this manner. Part I provides background discussion on what this Article refers to as "extraneous liability." Part II argues that this phenomenon is objectionable for a variety of reasons, explaining that it goes beyond strict liability and the normative justifications that underlie that doctrine. Part II also explains that the extraneous-liability phenomenon encountered in antitrust is unique because it differs in crucial ways from other incidences in which a person's liability is made contingent on another's actions. It concludes that one cannot justify extraneous liability in antitrust. Part III explores the range of instances in which such liability can result under current principles of antitrust jurisprudence. Ultimately, it explains why extraneous factors are legitimate sources of concern for the enforcement agencies and courts, but stresses that the law should revise the manner in which it engages in analysis of such factors. A brief conclusion follows.

## I. EXTRANEOUS INFLUENCES AND LIMITING PRINCIPLES IN THE LAW

It might strike some observers as profoundly odd that the law could condemn a company not for the tendency of its actions to yield specific market distortions, but for a series of events beyond its control that ultimately produce an unforeseen negative result. In related fashion, it would be surprising to learn that the government could impose sanctions on prior incidences of conduct that were neither illegal nor liability-inducing ex ante. Before considering the propriety of retroactive determinations of liability in antitrust, however, it is helpful to explore a general but important question: should the law treat identical conduct in identical fashion?

There are, of course, two broad divisions to bear in mind in addressing the posed inquiry. They involve the fundamental distinction between civil and criminal liability. Under the latter body of law, an act is generally defined as being either criminal or lawful at the time of its occurrence.[18] One cannot punish today what was legal yesterday, for such retroactive condemnation would amount to an unconstitutional ex post facto law.[19] Nor can the law generally take two identical actions and treat one as giving rise to a criminal violation, but not the other—at

situation would be permissible: Imagine that several companies in the same market seek merger approval at the same time. Those that are sufficiently fortuitous to be reviewed first by the enforcement agencies may be permitted to merge, while those analyzed subsequently may be denied approval on account of rising market concentration. This is a legitimate use of extraneous factors to distinguish actions that are otherwise qualitatively identical, because the circumstances giving rise to illegality are within the immediate perception of the parties at the time they engage in the relevant conduct.

18. Whether indistinguishable actions can permissibly be subject to asymmetric determinations of legality is a more difficult issue that will be examined below.

19. *See, e.g.*, Chiraag Bains, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 HARV. C.R.-C.L.-L. REV. 483, 485 (2007) (observing that "any statute that imposes retroactive punishment on people for conduct that was legal when committed, or that increases the penalty attached to the crime when it was committed, is unconstitutional").

least insofar as the analogous actions can be expected to give rise to the same consequences in light of the context in which they are taken. A variety of rules protect defendants from arbitrary application of the criminal laws.[20]

Civil liability is distinct because it is contingent on actual harm being suffered before the law will recognize a right of action.[21] Criminal law has no such condition precedent to its applicability. In one respect, then, private law can, and in fact does, differentiate between two forms of identical behavior based on the ultimate result of the relevant actions. Crucially, however, liability requires that the challenged act be the proximate cause of the relevant harm.[22] Related to this, liability is generally subject to a simultaneity condition between cause and effect, such that there be no protracted, temporal divide between the two. When such a divide emerges, causation can prove tenuous and, in some cases, insufficiently proximate.

Broadly speaking, one may justify an outcome-based approach in which liability is contingent on harm on the grounds of corrective justice (being required to make good the harm actually caused) and utilitarianism (maintaining marginal incentives). Whether negative consequences alone should suffice to establish liability is a more protracted question—one which raises fundamental questions concerning the legitimacy of strict liability over a necessary showing of unreasonableness and foreseeability.

The following discussion explores the extent to which the law can properly bring incommensurate treatment to bear on otherwise identical forms of behavior.

### *A. Asymmetric Treatment of Comparable Conduct*

Let us begin by exploring a subset of the instances in which the law applies asymmetric judgment on homogenous acts that, due to extraneous factors, result in a spectrum of potential consequences. One might argue that the law should judge comparable behavior similarly based on its inherent capacity to bring about desirable or unwelcome effects. Such a position, however, would be mistaken.

Take the easy case of drunk driving. If the act itself is deemed inherently wrong, presumably due to its tendency to produce harm outweighing any benefits, shouldn't the law condemn all instances of such conduct? The unsurprising answer, of course, is that it does. The law typically deems a person found to be driving with a blood-alcohol content beyond the legal limit to have committed a

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20. *See, e.g.*, Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109, 1143 (2008) (noting the "procedural checks and balances that protect criminal defendants from arbitrary . . . applications of the law").

21. *See* Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 830 n.113 (2009); Linda Sandstrom Simard, *Meeting Expectations: Two Profiles for Specific Jurisdiction*, 38 IND. L. REV. 343, 350 (2005).

22. *See* Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 49 (1991).

per se offense.[23] This result makes sense even if some, and indeed most, drunk-driving excursions do not result in actual harm.[24] The important point is that any remotely thoughtful person would be aware that the expected costs of the action far outweigh the expected gains. A drunk driver is not a victim to the vicissitudes of circumstances when he embarks upon the road. That is, extraneous factors that are beyond the drunk driver's control need not combine to a cause an accident—horrific consequences may ensue from the driver's actions behind the wheel alone. People can easily avoid breaking drunk-driving laws because the illegality of the proscribed conduct is obvious ex ante. Thus, it is obvious that the law should condemn all instances of drunk driving, regardless of whether harm results in a particular case.

A further issue concerns optimal punitive measures, for the law does not treat two identical actions equally by condemning both, but instead by punishing one more than the other.

Assuming a set blood-alcohol level and comparable driving environment, the nature of the act is largely similar from case to case and actor to actor. Would it be improper to punish every person caught driving at a particular blood-alcohol level identically, regardless of the harm caused in any particular case? It is not immediately clear that it would be, given that the moral culpability of each driver's action is largely identical. Some may be fortuitous, in which case no harm shall accompany their reckless conduct. Others may not be so lucky. Yet, can one confidently conclude that the former group is less culpable from a moral standpoint? Is luck a constituent element of an action's morality? Ultimately, one might question whether the vicissitudes of chance should dictate the penalty.[25]

Nevertheless, real-life punishment varies dramatically depending on the harm caused. A person may drive without incident while avoiding detection by law enforcement, in which case he escapes any form of liability. The police may instead catch him in the act and prosecute him for driving under the influence—a charge that can carry a variety of punishments from fines and driver's license restrictions to probation and even jail time.[26] There is also the worst-case scenario, in which the driver harms innocent third parties. In that case, manslaughter charges and lengthy prison sentences inevitably follow.[27] In the event of being detected and

23. *See, e.g.*, David G. Dargatis, Note, *Put Down That Drink!: The Double Jeopardy Drunk Driving Offense Is Not Going to Save You*, 81 IOWA L. REV. 775, 796 n.145 (1996).

24. *See, e.g.*, West v. Aetna Life Ins. Co., 171 F. Supp. 2d 856, 904 (N.D. Iowa 2001).

25. *See* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1601–03 (1974).

26. *See DUI Laws by State*, DRIVINGLAWS.ORG, http://www.drivinglaws.org/resources/dui-and-dwi/dui-laws-by-state (last visited Aug. 15, 2011).

27. *See id.*

prosecuted,[28] the array of punitive legal measures brought to bear on the culpable party is vast, despite the nature of the act remaining constant.

Should this be problematic? Few would think so, if only because people tend to think of justice not only in terms of incentivizing proper behavior, but also in serving a retributive purpose.[29] The law properly holds an individual who kills an innocent family on the road to account for those deaths with many years of incarceration, while it appropriately subjects the drunk drivers who avoid injuring themselves or others to more lenient punishment.[30] This manner of tailoring penalties is, of course, consequentialist in nature. Such asymmetric treatment is justified not only by a moral determination that the punishment should reflect the harm actually caused,[31] but by utilitarian considerations that promote the concept of marginal deterrence.[32] We, of course, wish to disincentivize drunk driving, but for those who persevere in the face of criminal laws, we want to encourage them to exercise as much care as is possible in their impaired state.[33] By enforcing more draconian punishments against those who cause injuries to third parties, society furthers this goal.[34]

Drunk driving thus constitutes a simple illustration of why the law may categorically prohibit, yet asymmetrically punish, behavior that bears the potential for, though does not guarantee, injurious consequences. The example is a simple one because the conduct at issue is wrong, whether viewed from a deontological or consequentialist perspective. One can therefore condemn it summarily.

What about behavior, however, that most would perceive as being wholly legitimate, but that nevertheless carries some potential capacity for third-party harm? We might define "morality" for this purpose by comparing the expected gains from allowing everyone to engage in the relevant behavior to the expected costs.[35] From this utilitarian perspective, an act may be "moral" and therefore

28. One would reasonably exclude from consideration the case of the driver's not being detected, given that we are concerned with the proper form of punitive sanction brought to bear on identical instances of behavior that yield distinct results in probabilistic fashion. Yet, the elusive culprit remains important analytically, given the repercussions for proper punishments that probability of evasion introduces. Importantly, the greater the probability of getting away, the larger the sentence that must be imposed to disincentivize the rational actor at the margin.

29. *See, e.g.*, Regina A. Robinson, *Crime and Punishment: Rehabilitating Retribution as a Justification for Organizational Criminal Liability*, 47 AM. BUS. L.J. 109, 124–27 (2010).

30. *See, e.g.*, Jennifer L. Tampoya, *What Works, What Doesn't: Revising DUI Laws in West Virginia to Reduce Recidivism and Save Lives*, 111 W. VA. L. REV. 283, 287–88 (2008).

31. *See, e.g.*, Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 120–21 (2008).

32. *See generally* Steven Shavell, *A Note on Marginal Deterrence*, 12 INT'L REV. L. & ECON. 345 *passim* (1992).

33. *See* POSNER, *supra* note 4, at 222.

34. *See id.*

35. *See, e.g.*, Jacob Viner, *Bentham and J.S. Mill: The Utilitarian Background*, 39 AM. ECON. REV. 360, 362 (1949).

lawful even if it may result in some harm.[36] In such cases, an actor's behavior need not carry direct injurious potential but may nevertheless initiate a chain of events that yield an unwelcome outcome.

If the law is to challenge negative repercussions flowing unexpectedly from socially desirable conduct, there obviously must be a limiting principle. This holds true regardless of whether one speaks of criminal or civil law. Chaos theory gives the famous example of the butterfly effect, which suggests that an action as miniscule and prosaic as the flutter of an insect's wings can initiate a sequence of events that ultimately result in a hurricane.[37] In a similar way, a person's entirely innocuous act may lay the foundation for undesirable, though "unforeseeable," results.

By way of example, my walking to the shops may combine with the actions of many others to tragic effect. Perhaps my presence on a street will induce a third person to alter his course along the path, thus leading her to trip on a crack in the pavement that she would otherwise have avoided. Should I therefore be held liable for her injuries? Of course not, even though but-for causation is technically present. Notice that the previously discussed factors in the drunk-driving case are absent. The expected social gain of my taking the trip exceeded the expected costs. I had no reason to expect that my choice to walk up the road would result in such an outcome. Whether that unlikely fall took place was almost exclusively outside my control—extraneous factors control the day. In addition, it is not straightforward for me to avoid violating a law that would hold me liable in such a case, since the risk of such an outcome would be systemic in almost everything I do. Obviously, one cannot avoid what one cannot envision. Ultimately, the expected gain of my walk far exceeded the expected costs, and there is no substitute activity that would better promote social welfare. Liability would effectively amount to a tax on living one's life and would discourage socially desirable activities.

The preceding example illustrates an important point—to hold someone liable for ex post harm alone threatens unjustly to impose perverse incentives on engaging in valuable conduct. The rationale for using reasonableness, foreseeability, and proximate causation as limiting principles in the civil realm is therefore self-evident. If people cannot envision the effects of their actions, they cannot adjust their behavior to avoid those consequences.[38] Moreover, if one cannot show that a particular form of conduct bears some innate propensity to bring about an identifiable harm, it would be difficult to find a moral duty to refrain from such behavior for deontological purposes.[39] To allow injured parties

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36. Such a state of affairs is referred to in the law-and-economics literature as being Kaldor–Hicks efficient. *See, e.g.*, JULES L. COLEMAN, MARKETS, MORALS, AND THE LAW 98 (1988) (describing Kaldor–Hicks efficiency).

37. *See generally* Edward Lorenz, *Deterministic Nonperiodic Flow*, 20 J. ATMOSPHERIC SCI. 130 (1963).

38. *See* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 46 (1998).

39. *See infra* Part II.A.

to seek redress through the legal system for what, judged ex ante, was innocent behavior, would simply be to create an inefficient insurance regime.[40]

The case for not subjecting such behavior to criminal or civil liability is also compelling because, ex ante, the law could not articulate a rule or standard that would prohibit the relevant behavior. A standard purporting to condemn as illegal anything that results in harm would be unconstitutionally vague.[41] It would also fall victim to the Ex Post Facto Clause of the Constitution because courts would have to find criminal that which a defendant had no basis to believe was illegal at the time of her acting.[42]

### *B. Limiting Principles*

Consistent with these considerations, the law often limits liability for acts the consequences of which may not have been clear. Perhaps the most obvious examples of such limitations emanate from tort law. The law will not always deem a tortfeasor liable when a chain of causation matches her conduct to resulting injury—harm does not necessarily beget liability. If a series of independent, intervening events ultimately led to the harm in question, the law may not deem them the proximate cause of the injury and so the courts will not hold the initial actor legally responsible.[43]

Ultimately, a court will find a tortfeasor liable only for the foreseeable results of his actions.[44] That extraneous factors over which the tortfeasor has no control may shape the ultimate effect of those actions does not necessarily render that effect unforeseeable. After all, we operate in a probabilistic environment in which our actions combine with those of myriad others in yielding a final result. We must be cautious, therefore, in defining "foreseeable." As Judge Posner has observed, most accidents are low-probability occurrences, so the fact that an outcome was unlikely should hardly absolve a tortfeasor of liability.[45] Yet, if the test becomes what could possibly result from a particular form of behavior, then all manner of attenuated risks that come to fruition would give rise to a cause of action. Thus, foreseeability cannot mean that the unpleasant event was an unimaginable result of the relevant action.

This approach suggests that foreseeability is related to the concept of "reasonableness."[46] As noted, a sufficiently literal definition of foreseeability

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40. *See* POSNER, *supra* note 4, at 181.

41. *Cf.* Skilling v. United States, 130 S. Ct. 2896, 2927–28 (2010) ("To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983))).

42. U.S. CONST. art. I, § 9.

43. *See* David Gruning, *Pure Economic Loss in American Tort Law: An Unstable Consensus*, 54 AM. J. COMP. L. 187, 194–95 (2006).

44. *See generally* Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 *passim* (1961).

45. *See* POSNER, *supra* note 4, at 187.

46. *See, e.g.*, Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 802 (1958).

would effectively be all-encompassing—consider the parade of horribles that could conceivably befall a person as he undertakes the most prosaic of tasks. One must therefore qualify the legal concept of foreseeability to reflect some kind of cost–benefit calculus.[47] This, in turn, links to the familiar concept of the reasonable person. That hypothetical individual has been the subject of competing characterizations under deontological and utilitarian theories of law.[48] Adopting the latter perspective (which has been far more influential in recent times, in light of the law-and-economics movement),[49] one can tie reasonableness to a cost–benefit assessment, pursuant to which a person acts reasonably if he takes precautions up to the point where the marginal cost of further expenditures on safety equals the marginal benefit in the reduced expected cost of an accident.[50] The ability of extraneous factors to yield unwelcome consequences in random fashion is thus relevant to the probability of injury. The more attenuated the confluence of those factors' producing that negative result, the greater the harm caused by that result will need to be for a "reasonable" person to be required to expend resources on avoiding it.

The related concepts of reasonableness and foreseeability thus serve foundational roles in the law as limiting principles. Their application makes axiomatic sense in light of the intuitive notion that people should not be punished for consequences that would not seem to be the natural result of their acts. These concepts serve an important role in analyzing the legitimacy of current antitrust doctrine that facilitates the imposition of extraneous liability.

### *C. Strict Liability*

Despite the propriety of the limiting principles just described, there are instances in which the law departs from them. Thus, not all unforeseeable events or consequences serve to alleviate an actor of responsibility. Nor does a person's acting "reasonably"[51] necessarily foreclose liability. In other words, the fact that an incident is unavoidable does not necessarily alleviate a tortfeasor of having to make good the harm caused.

There are several well-known examples where the law imposes no-fault liability. The criminal laws typically require that a defendant acted with a guilty

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47. *See* Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 105 (Gerald Postema ed., 2001) (observing that "it is only by referring to a cost-benefit analysis that we can say whether or not a given type of harm is reasonably foreseeable, i.e., whether or not it *should* be foreseen").

48. *See, e.g.*, Penney Lewis, *Procedures That Are Against the Medical Interests of Incompetent Adults*, 22 OXFORD J. LEGAL STUD. 575, 613–14 (2002).

49. *See, e.g.*, Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 142 (2003) ("[T]here is no dispute that law and economics has long been, and continues to be, the dominant theoretical paradigm for understanding and assessing law and policy.").

50. *See* POSNER, *supra* note 4, at 167–71.

51. That is, in a cost-justified way by treating the attenuated risk of extraneous factors combining with her conduct to result in injury as insufficiently grave and by proceeding with the course of action undeterred.

mind, such that she must have had some form of intent to bring about the harmful result.[52] There are, however, exceptions. One involves the felony-murder rule, in which the typical mens rea requirement is jettisoned in favor of strict liability.[53] To be guilty of murder, typically one must purposefully, knowingly, or recklessly cause the death of another person.[54] With respect to deaths that occur during the course of a felony, however, it is irrelevant whether the victim's demise was purposeful, foreseeable, or wholly improbable given the actions undertaken during the commission of the crime.[55] Other examples in criminal law involve strict liability for a variety of regulatory offenses, such as violations of parking ordinances and environmental laws.[56] Academics justify the lack of a culpable-mind requirement by the technical nature of the violation at issue, the mild (sometimes pecuniary) nature of the sanctions typically involved, and the traditionally perceived lack of stigma associated with committing the offense.[57] An important outlier in the criminal setting involves statutory rape, where a person's honestly held, but mistaken, belief as to a minor's age is no defense.[58]

Strict liability appears with some regularity in the civil setting. In the realm of contract law, most breach is unintentional and in many cases the events leading up to the breach may not have been within the contemplation of the contracting parties.[59] Nevertheless, the law will almost always hold the promisor to her word, requiring performance or an equivalent amount of monetary damages.[60] This holds true even in the event of "efficient breach."[61] Liability is very much strict. It is only in extreme circumstances, such as where the parties shared a fundamental misconception as to an essential element of the agreement, or where intervening events serve to eviscerate the entire raison d'être of the deal, will the contract be set aside.[62]

Strict liability also enjoys a prominent role in accident law. Although the majority of torts requires some form of unreasonable (negligent) behavior, the law eases this requirement in the context of ultra-hazardous activities.[63] For instance,

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52. *See, e.g.*, Mohammed Saif-Alden Wattad, *The Meaning of Guilt: Rethinking* Apprendi, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 501, 539 (2007).

53. *See, e.g.*, Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1514 (2007).

54. *See* MODEL PENAL CODE § 210.2 (2001).

55. *See, e.g.*, People v. Dillon, 668 P.2d 697, 719 (Cal. 1983) (observing that the felony-murder rule "condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable").

56. *See* Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 11–12 (2010).

57. *See id.*

58. *See generally* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Mode*, 53 AM. U. L. REV. 313 *passim* (2003).

59. *See* Winniczek v. Nagelberg, 394 F.3d 505, 509 (7th Cir. 2005); Saul Levmore, *Stipulated Damages, Super-Strict Liability, and Mitigation in Contract Law*, 107 MICH. L. REV. 1365, 1365 (2009).

60. *See Winniczek*, 394 F.3d at 509; Levmore, *supra* note 59, at 1365.

61. *See* POSNER, *supra* note 4, at 119–20, 127–28.

62. *See id.* at 103–05, 106–08, 117.

63. *See id.* at 179–80.

storing explosive materials and keeping wild animals, in addition to domestic animals that have a known propensity for dangerous behavior, all qualify as dangerous activities to which strict liability applies.[64]

Virtually all of these examples of strict liability have something in common. Specifically, the behavior subject to no-fault condemnation is inherently risky, such that one can expect a person who partakes in it to have foreseen harm. What of statutory rape? Putting aside the fact that many commentators have criticized this tenet of criminal law on the ground that it imposes severe penalties even where knowledge or intent is absent,[65] one should recall that the effect of the rule is to make it incumbent on an actor to ascertain the true age of his partner. Any time he proceeds to have sex ignorant of his partner's status as an adult, he might be said to act with some degree of culpability. The law, after all, has put him on notice of the strict liability that follows from statutory rape. If he elects not to take steps to determine whether his partner is a minor, one might characterize this as a form of mental indifference.

As explained below, the strict-liability nature of antitrust jurisprudence is decidedly unique. Specifically, the man who sleeps with an underage girl has broken the law at that precise moment—a fact about which he may be ignorant, but that was nevertheless within his ability to discover. The temporal coincidence of cause and effect in this example is typical of strict-liability offenses. There is contemporaneity between the act and the harmful effect.[66] This is not so in the realm of antitrust. Indeed, current principles of competition law allow the agencies to revisit the legal status of finalized acts, which at the time of completion were both lawful and non-liability-generating.

Strict liability thus occupies an important niche within the U.S. legal regime. Why does the law operate in this fashion? Why should one judge a person's actions not on their moral quality, but on their ultimate effect, which is influenced by a variety of factors that do not lie within the actor's sphere of power and foresight? When society recognizes the tendency of a particular form of conduct to bring about an unwelcome result, the explanation for the law's imposing strict liability lies in the law's having evolved along consequentialist lines. By requiring a person to consider the full range of potential causal effects of his behavior, the law can cause an individual's private incentives to align with the social optimum.[67]

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64. *See* Charles E. Cantu, *Distinguishing the Concept of Strict Liability in Tort from Strict Products Liability: Medusa Unveiled*, 33 U. MEM. L. REV. 823, 827 n.18, 839–47 (2003).

65. *See, e.g.*, Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 438 (2007). In 2006, the Supreme Court of Ireland found that then-existing Irish statutory rape laws were unconstitutional. C.C. v. Ireland, [2006] I.E.S.C. 33 (Ir.).

66. The same is true of the felony-murder rule.

67. Specifically, strict liability is efficient where social welfare requires reduced levels of engagement in the activity giving rise to the risk of injury but does not require potential victims to take precautions or to reduce their activity levels. Such a utilitarian approach to jurisprudence might be thought to promote net social welfare more effectively

## II. WHY EXTRANEOUS LIABILITY IN ANTITRUST IS BOTH UNIQUE AND PROBLEMATIC

This Part builds on the preceding discussion and seeks to address three fundamental issues. Each concerns the definitional limits of this Article's objection to extraneous liability and also addresses the larger question of whether the phenomenon of extraneous liability in antitrust is unique within the realm of law. All similarly implicate what is likely the most fundamental inquiry: why are the incidences of retroactive condemnation explored in this Article objectionable?

Let us consider the first issue. Much of this Article's objection to extraneous liability emanates from antitrust law's making a company's liability contingent on the actions of third parties. For example, the law may later denounce a merger that the government has previously approved on the basis of anticipated entry when that entry fails to materialize in a "timely" manner. This involves condemning ex post what was legal ex ante because third parties (potential competitors) failed to act.[68] Similarly, one firm's use of a potentially exclusionary practice may be permissible unless its competitors follow suit.[69] To adopt one more illustration, when a company makes an acquisition that is then without competitive significance, but that changed circumstances subsequently rendered problematic years later, the government is free to attack the long-closed deal under the rule in *du Pont*.[70] Of course, these changed circumstances necessarily emanate from third-party conduct, whether that of other companies, regulators, or members of the government.[71]

This Article calls the legitimacy of these phenomena into question, contending that enforcement agencies and courts should not condemn after the fact those arrangements that were permissible when undertaken.[72] This criticism raises an important question, however. Specifically, does that disapproval stem from an aversion to the law's basing liability on third-party conduct? If so, one runs into the objection that there are numerous and well-known instances outside the realm of antitrust in which the legality of a person's conduct is not invariant to the actions of third parties. As explained below, however, the phenomenon of extraneous liability encountered in the antitrust realm is decidedly unique.

Second, are the preceding examples of extraneous liability nothing more than garden-variety manifestations of strict liability? One could argue that a company's merging with another, making a stock acquisition, or engaging in a possibly exclusionary business practice constitutes competitively risky conduct,

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than would one focused purely on subjective morality that considered only the culpability of the conduct under review.

68. *See infra* Part III.B.

69. *See infra* Part III.C.

70. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957).

71. *See infra* Part III.A.

72. To reiterate, this assertion does not mean that prospective injunctive remedies are categorically improper.

which only results in liability should harm befall a protected class.[73] Because the reasonableness of the underlying behavior is irrelevant when an anticompetitive result ensues, one might characterize the phenomenon of extraneous liability as merely a distinct application of strict liability.

Below, the Article rejects this analogy, explaining that extraneous liability in antitrust goes beyond such strict liability. This follows from the fact that strict liability is a normatively inappropriate device to employ against conduct that we do not want to deter. Most fundamentally, however, certain instances of extraneous liability explored in this Article involve negative repercussions that one would not expect to flow from the challenged action. Liability is therefore arbitrary from an ex ante perspective.[74]

Nevertheless, there are some cases of retroactive liability that give rise to eminently foreseeable instances of consumer harm. It may be appropriate to grant the government forward-acting injunctive relief in these cases, even where such a remedy has characteristics that are in some respects punitive toward the earlier, now-impugned act. The paradigmatic example of such a case would be a merger to monopoly, which the agencies permit due to producer-side efficiencies and the prospect of immediate large-scale entry. One might characterize the merger as ongoing, rather than complete, in light of the fact that its normative quality is explicitly contingent on an extraneous condition that is immediately discernible to the merging parties at the time of closing the deal.[75] Even here, though, the law should limit the agencies' ability to intervene when the absence of subsequent entry appears to be the result of strategic, third-party behavior. Similar impediments to agency action should exist in cases where market self-correction, though tardy, is nevertheless imminent at the time of bringing suit.

Third, one might question whether antitrust necessarily entails some form of extraneous liability in application, since it routinely subjects otherwise identical forms of conduct to differing treatment. It does so by focusing not on the abstract quality of the challenged act, but by engaging in context-specific consequentialist analysis. One could conceivably object that the phenomenon this Article criticizes is nothing more than a manifestation of a systemic feature of the U.S. antitrust regime. Such an objection, however, would ring hollow. There is a critical distinction between effect-based analysis conducted on a prospective basis, as opposed to one that courts undertake retrospectively. The Author levels no criticism at the use of extraneous factors in the former regard.

This Part now proceeds by exploring each of the three preceding questions in greater depth. It culminates in a discussion of why the phenomenon of extraneous liability is objectionable. It is not difficult to demonstrate that such after-the-fact condemnation is inconsistent with most commonly accepted

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73. Like the proverbial banana peel discarded with indifference on the street, the challenged action is not deemed unlawful (that is, liability-generating) until an injury occurs.

74. Furthermore, the extraneous liability criticized below involves liabilities attaching without proximate causation, which is inconsistent with strict-liability theories.

75. Even in this situation, however, the law should only permit the government to obtain divestiture, rather than disgorgement.

conceptions of morality, such as utilitarianism, deontology, and corrective justice. The injustice associated with being deemed liable for actions that one could not have expected to yield injurious consequences, or for those discrete acts that were proper when completed, is largely axiomatic.

### *A. Conditioning Legality on the Actions of Others*

Part III criticizes a variety of instances in which antitrust holds companies accountable for the results of their behavior, rather than for the disregard of an identifiable *a priori* basis for expecting such an outcome to ensue. Each incidence of extraneous liability cited with disapproval involves a company being held in violation of the antitrust laws not based on its actions alone, but due to the behavior of others. Is that contingency the definitive hallmark of objectionable extraneous liability? If so, how can one distinguish the antitrust examples cited through this paper from those incidences that arise with some frequency in other areas of law?

Answering the first question is straightforward: it may not be the definitive characteristic, but one seeking a positive account of the extraneous-liability phenomenon could accurately observe that antitrust does make liability contingent on third-party conduct. This would be accurate from a descriptive perspective. Yet, that contingency is by no means a sufficient ground for finding antitrust liability problematic. Third-party behavior is an extraneous factor, largely like any other, and to the extent one can envision its interacting with the chain of events initiated by one's action toward a discernible result, then it is wholly proper to factor it into a consequentialist inquiry aimed at establishing the legality of the relevant act.

Going further, the law may deem a person liable for another's actions, but this is not objectionable when that dependence arises pursuant to a formalized relationship. To be specific, conditioning the legal status of one person on the activities of another may be legitimate depending on the principal's sphere of control or influence over the relevant third party, on the former's ability to foresee harm from the latter's conduct, and on the principal's capacity to determine the legality of the third party's actions at any particular time.

There are, of course, instances in which the law makes a person's liability contingent on another's actions. A good example involves an employer's potential liability for the negligent conduct of one of its employees acting in the course of employment.[76] Liability under the doctrine of respondeat superior, however, is different from the antitrust phenomenon of ex post liability—an employer can control its employees' actions, or at least exercise significant influence over

76. *See* McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 328 (4th Cir. 1996). Another example arises in the criminal context, where the law deems a conspirator responsible for the foreseeable actions of his co-conspirators because a conspirator can control, or at least influence, his partners in crime. *See* United States v. Duran, 407 F.3d 828, 835–36 (7th Cir. 2005).

them.[77] Moreover, the employee's actions must be foreseeable for liability to attach.[78] Furthermore, and unlike the actions addressed in this Article in the antitrust context, which are generally discrete, the employer–employee arrangement involves an ongoing relationship. As noted above, there is an important distinction between ongoing and complete acts.

We can therefore say two things about the manner in which the law normally makes one person's liability contingent on a third party's actions. First, the person held liable must exercise control or influence over the third party. Second, the third party's actions must be foreseeable.

None of these traits holds true with respect to the antitrust phenomena discussed in this Article. As but one example, *du Pont* assailed the anticompetitive conditions resulting from an extended period of third-party conduct over which the defendant enjoyed no power. The events that transpired were the indiscernible result of extraneous and uncontrollable factors. Yet, injunctive relief of a punitive nature ensued.

As the preceding discussion reveals, extraneous liability does not occur whenever the law bases the legality of a person's conduct on the actions of another. Instead, it arises when the law imposes liability over a harm that results from the interplay of extraneous factors and an actor's innocuous-when-completed act. Extraneous liability occurs when one attacks ex post what was permissible when undertaken.

### *B. Ex Post Guilt as a Form of Strict Liability*

Part I explained that extraneous factors are silently ubiquitous in legal analysis, but also observed that the law puts in place limiting factors, principally in the form of reasonableness, foreseeability, and proximate causation.[79] Strict liability serves as a partial exception to that cabining of liability, however. It may nevertheless be justified on law-and-economics grounds, because it imparts incentives on an actor to internalize the full social costs and benefits of his actions.[80] The primary advantage of strict liability over negligence is that it induces potential tortfeasors to reduce their participation in the relevant hazardous conduct by substituting it for a safer alternative behavior.[81] When combined with some form of contributory or comparative negligence, strict liability can maximize social welfare by incentivizing both prospective injurers and victims to take

77. *See, e.g.*, Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 682–83 (9th Cir. 2009); *cf.* Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Tort Opinions*, 62 FLA. L. REV. 667, 709 (2010).

78. *Wal-Mart Stores*, 572 F.3d at 835–36.

79. *See supra* Part I.B.

80. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 179–80, 184–85, 193–99 (2004).

81. *Id.* It bears noting, though, that to the extent strict liability attaches to activities that are not inherently dangerous, it would often seem to be in tension with both deontological and utilitarian considerations.

optimal levels of care and also to induce the former to engage in risky behavior at a desirable rate.[82]

This is a crucial ground of distinction. In the extraneous-liability examples explored below, at the time of the action the relevant company is then in compliance with the antitrust laws. Yet any ensuing anticompetitive result—no matter how attenuated in time, foreseeability, or proximate causation—may render that earlier action violative of the Sherman or Clayton Act. Liability is inappropriate in this setting because it may not have been possible ex ante to draw an expected causal link between a prospective course of conduct and the ultimate harm that transpires.[83] Similarly, to the extent that the law does not condemn a bounded action at the time of its being carried out, it should not later permit courts and agencies to assail that completed act.[84]

There is therefore an important, though perhaps subtle, distinction between subjective awareness of harm and the presence of objective facts that could lead an inquiring person to perceive a connection with planned cause and ensuing effect. The latter trait is what is missing with regard to extraneous liability in antitrust.

In addition, proximate causation is a necessary element of strict liability. Yet, such causation, which would seem to track a tortfeasor's moral culpability,[85] is absent in the extraneous-liability phenomena explored below. It typically exists when there is simultaneity or at least close proximity in time between the challenged conduct and ensuing injury.[86] This is also the case for conduct that is ongoing. For instance, a landowner may store explosives that unexpectedly ignite and harm a neighbor's land. In such a case, there is simultaneity between the ongoing, dangerous act (storing explosives) and the effect (injury).[87] The same

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82. *Id.* at 202. This approach maximizes social welfare only where it is more important that tortfeasors reduce their activity levels than it is for victims to reduce theirs. *Id.*

83. This is why strict liability requires a tortfeasor to engage in some form of conscious risk creation, typically by conducting an inherently hazardous activity. *See, e.g.*, George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV. 1658, 1662 (1993). Yet, many commercial activities that later yield anticompetitive results could not have been expected to have such injurious consequences ex ante.

84. An interesting question is whether one can characterize an act as "complete" when the law qualifies its legal status on subsequent, consequential factors. As explained below, the Author believes that the answer is no.

85. *See, e.g.*, MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS 97–100 (2009).

86. *See* Thomas A. Cinti, Note, *The Regulator's Dilemma: Should Best Available Technology or Cost Benefit Analysis Be Used to Determine the Applicable Hazardous Waste Treatment, Storage, and Disposal Technology?*, 16 RUTGERS COMPUTER & TECH. L.J. 145, 148 (1990).

87. One might think of products liability, which is subject to a form of strict liability, as an exception, since the act of faulty manufacturing or defective design may precede the resulting injury by some time. However, this is not a true form of no-fault liability, since the product giving rise to an injury must have been improperly manufactured or designed in an inherently dangerous way. In practice, this requires the judiciary to undertake a cost–benefit analysis reminiscent of that followed in regular negligence cases.

holds true for any creation of a nontransitory risk in which the act's potential for harm is constant—its capacity to cause injury does not transform over time by virtue of extraneous factors.

In the antitrust context, by contrast, lawyers may unanimously agree shortly after a closing that the acquisition is in full compliance with the Clayton and Sherman Acts, due to immediate efficiencies and an expected absence of negative price effects. Yet, the government may challenge what was a previously innocuous acquisition many years, or even decades, later should an anticompetitive result transpire.[88] Although this may be thought of as an extreme form of strict liability, it is distinguishable from other areas of law in which strict liability is imposed due to the protracted, temporal gap between action and injury. Proximate causation may not exist.

This conclusion gives rise to a further insight. Due to the temporal delay between a then-lawful and ostensibly innocuous cause and later, undesirable effect, condemnation of that cause appears quite similar to an ex post facto attack. At the very least, this phenomenon lies in tension with the spirit of society's hostility to ex post facto laws.[89]

### *C. Extraneous Liability as Revisiting a Completed Act*

This Article's exploration of extraneous liability in antitrust requires a further refinement. If it is wrong for the law to impose liability based on an action that was lawful when performed, then one cannot violate that norm if the relevant act has not yet been completed (i.e., if it is of an ongoing variety). To adopt a simple example, a shopkeeper who spills an unusually slippery form of oil near the entrance to his shop may have been negligent in permitting the spill to happen, but his negligence has an enduring dimension. Imagine that a customer falls several days after the spill. One can readily reject the following formalistic argument: it would be improper to find the shopkeeper liable because his initial act did not give rise to liability when it was performed. Obviously, the shopkeeper's failure to remove the oil would be continuously unreasonable, such that a person's ensuing fall would be contemporaneous with the tortfeasor's negligence. In contrast, if an action is bounded and discrete, its being deemed lawful when completed ought to preclude its legality being revisited at a subsequent time.

This basic observation raises a question about the form of antitrust liability explored in this Article. If one construes a merger or acquisition as an ongoing act, one cannot accurately suggest that subsequent condemnation amounts to ex post facto liability. In other words, criticizing an after-the-fact imposition of

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A well-designed and manufactured product that injures a consumer will not give rise to liability. Moreover, the defect inherent in the product can be traced directly back to the moment of its manufacture. Harm was sure to result upon consumption, whenever that may have been.

88. *See infra* Part III.A.

89. *See* Vashti Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since St. Cyr: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 753 (2006) (observing that "retroactivity . . . is heavily disfavored in the civil context"). Of course, ex post facto illegality in criminal cases violates the Constitution. U.S. CONST. art. I, § 9.

damages for a practice that was lawful when undertaken requires that the relevant action be complete before its legality is later called into question. If the conduct has an ongoing dimension, then its subsequently being found to give rise to damages or prospective equitable relief need not be problematic *unless* the law adjudges liability to accrue from the moment of the conduct's inception rather than from the moment of its being deemed unlawful.

It is therefore of the utmost importance to determine whether the business practices of relevance to extraneous liability in antitrust are discrete or ongoing. The Author submits that most of the actions considered in the next Part are of the former variety. For example, one should generally view a merger or acquisition as a discrete event—one that should be lawful or not at the time of its realization. There are two reasons for this. First, an asset acquisition is not comparable to an ongoing act such as discharging industrial waste into the environment, which is a form of continuing behavior that one can discontinue without prejudice to the quality of the prior output. Once a company has absorbed acquired assets, one can no longer view the earlier acquisition as a dynamic action. A company cannot oversee, manage, or otherwise alter a constituent and unmoving part of itself. It therefore makes little sense to make the ongoing legality of a merger contingent on events that the company can neither control nor influence.

There is a stronger argument for construing a stock acquisition as an ongoing act, comparable with, for instance, a landowner's storage of hazardous materials on his land. Publicly traded stock, like materials on land, and unlike assets that a company has absorbed into its operations, is subject to ready alienation. Thus, one might contrast the acquisition of a readily alienable asset with the procurement of a nonalienable one. The former act is ongoing, while the latter is bounded and discrete.

A discrete act, once completed, should not later be declared unlawful. In this respect, mergers are not like a business practice, such as tying, exclusive dealing, or below-cost selling, that can readily be discontinued or modified. It therefore makes sense to hold such practices to divergent standards as the firm employing them goes from being a minor competitor to the dominant player. When the market context is such that a particular company's business practice threatens, for the first time, to yield an anticompetitive result, the law can simply require the cessation of the practice. As long as the law does not declare the practice illegal *ab initio*, there is no problem. This is quite unlike many of the merger examples considered in this Article. It would also appear to be unlike the unique circumstances created by "cumulative foreclosure," which may allow courts to condemn a company unchanged in size or market power for continuing to engage in a practice that was previously regarded as acceptable.[90]

There is an additional potential objection to this Article's thesis that is worth addressing. One might argue that a company's compliance with the antitrust laws necessarily depends on extraneous factors, such that criticizing the phenomenon of extraneous liability is nothing more than questioning the

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90. *See infra* Part III.C.

functioning of the entire antitrust regime. Such an objection, however, would be mistaken.

While it is true that antitrust legality turns on consequentialist analysis, such that the environmental factors in which a firm operates are of determinative importance, this is not at all objectionable. Extraneous factors are a crucial component of analysis, but one can legitimately employ them only when one can appreciate their presence and tendency to transform the effects of a practice ex ante. So, for example, a dominant firm can observe the marketplace in which it resides and, at the moment it acts, make an informed assessment of the likely market repercussions of its behavior. The law generally tracks that inquiry. If the firm enjoys 90% market share and imposes an exclusive-sales requirement, it can tell that its third-party competitors are likely to lose market share. A court or antitrust authority called upon to construe the legality of that action at the moment the dominant company puts it into effect would conclude that it violates the antitrust laws for the same reason.

Since the market is comprised of extraneous forces the characteristics and capabilities of which are immediately observable, the law can legitimately employ them for the purpose of analysis. By contrast, consider the merger that economists on all sides expect to yield efficiencies and to have a negligible effect on the market-clearing price. Should we be able to say that the merger is lawful at the moment of its inception? Yes. The courts and merger guidelines indicate that the merger is proper if it is unlikely to injure consumers—a determination founded in part on whether the agencies expect entry to be timely, likely, and sufficient.[91] This determination of legality is based on the market and the extraneous factors that comprise it. If entry into the market is easy or post-merger competition will probably constrain pricing power, then the merger is lawful precisely because those factors are expected to operate in a particular, beneficial way. Finding the merger lawful is the correct result because, ex ante, it is the socially desirable action. If the future turns out to be something different than everyone envisioned by virtue of the unexpected interplay of various extraneous factors, then that fact should not transform what was previously lawful into an illegal combination. This yields the unqualified conclusion that any retrospective liability, disgorgement remedy, or criminal condemnation would be categorically improper.

### *D. Why Extraneous Liability Is Objectionable*

Again, companies can act in a manner that all agree is then in compliance with the antitrust laws—i.e., they can act "lawfully"—but the agencies and courts can nevertheless punish them after the fact should a negative result ensue. This is improper. If a particular act has an identifiable tendency to interact with extraneous forces to produce undesirable consequences, then it may make sense to impose some form of liability should such consequences arise. If forced by rule to internalize the full costs and benefits of a planned course of action—but only those costs and benefits that are perceivable ex ante—companies will then engage in the relevant behavior at the appropriate rate.

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91. *See* MERGER GUIDELINES, *supra* note 7, § 9.

The situation is entirely different, however, when courts deem a company liable for consequences that one could not expect to flow from a particular action. In this case, one can legitimately construe the relevant act as discrete—conduct the legal consequences of which are cabined by the consequences that one can envision at the moment of completing the act. For liability to be proper, an effect must have some identifiable connection to a cause ex ante. Yet, this is exactly what happens with respect to the extraneous phenomena explored in this Article. As far as the Author is aware, there is no other area of law in which such an outcome can permissibly occur.

So, why is this phenomenon wrong? Unless one would deem an action qualitatively improper if it ushers harm, regardless of its causal tendency to yield negative consequences, it simply makes no sense to condemn an act for its ultimate effect when the relevant cause and effect bore no discernible relationship ex ante. This holds true under utilitarian, deontological, and corrective-justice theories of harm.

From a law-and-economics (utilitarian) perspective, imposing liability is desirable only to the extent it imparts desirable incentives. Extraneous liability in antitrust involves condemning ex post what was permissible ex ante. This cannot impart desirable incentives; it imposes a cost on conducting socially desirable behavior. The utilitarian case against extraneous liability is therefore clear.

From a deontological perspective, an act cannot be immoral without its being tied to a bad will.[92] One can fairly regard a person's conscious creation of a known risk to others by engaging in an inherently dangerous activity as being based on an improper desire—a fact that may justify the use of strict liability.[93] What of the situations of extraneous liability in antitrust that this Article explores? The answer should be clear: it is not possible to reconcile liability for unpredictable consequences with the deontological notion that justice requires adherence to a moral duty.[94] If one cannot anticipate harm as a result of a chosen course of action, then it is not possible to derive a duty to avoid pursuing that

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92. In other words, an act is not moral if a motive of complying with a duty does not underlie it. *See* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1215 n.167 (2005).

93. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 187–90 (1995).

94. *See* JULES L. COLEMAN, MARKETS, MORALS AND THE LAW 177 (1988); Bailey H. Kuklin, *The Justification for Protecting Reasonable Expectations*, 29 HOFSTRA L. REV. 863, 867–69 (2001).

path.[95] This conclusion is consistent with that reached by some influential philosophers of the law.[96] Ernest Weinrib has representatively explained:

> Because it is triggered solely by the causation of injury, strict liability has right without duty. Strict liability reflects extreme solicitude for the plaintiff's rights. Under strict liability, the plaintiff's person and property are a sacrosanct domain of autonomy, within which the plaintiff is entitled to freedom from interference by anyone else. But strict liability protects the plaintiff's rights without allowing room for an intelligible conception of the defendant's duty. A duty must be operative at the time of the act that the duty is supposed to govern. Under strict liability, however, the actor's duty not to do the harm-causing act need not appear until the moment of injury. Only retrospectively through the fortuity of harm does it then turn out that the defendant's act was wrong. Thus under strict liability, the sufferer has a right to be free from the harm, but that right is not correlative to a duty, operative at the moment of action, to abstain from the act that causes the harm.[97]

For that reason, Weinrib finds no-fault liability to be inconsistent with Kantian right.[98] To the extent that deontological notions of justice might be called to bear on the phenomenon of extraneous liability discussed in this Article, they would seem to be decidedly contra.[99]

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95. A company might merge, acquire assets, or engage in business practices with no intent or expectation of harming consumers, but instead planning to achieve efficiencies, bolster a product line, or grow the enterprise. If illegality is to attach for unforeseen consequences, it would seem to be inconsistent with deontology. Indeed, Kant even found actions moral that were based on a good will but that unintentionally, yet foreseeably, resulted in bad consequences. *See generally* IMMANUEL KANT, *On the Supposed Right to Lie Because of Philanthropic Concerns* (1785), *in* GROUNDING FOR THE METAPHYSICS OF MORALS (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993).

96. *See* WEINRIB, *supra* note 93, at 171–83, 187–90; John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1073 (2003); Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 476–77 (2005); Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURISPRUDENCE 147, 150 (1988); Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 TEX. L. REV. 2115, 2132 n.67 (2001). *But see* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 187–89 (1973).

97. *See* WEINRIB, *supra* note 93, at 178–79.

98. *Id.*

99. This should not be surprising, since many would deem it unjust that an entity could be condemned for innocently pursuing actions that (1) were lawful at the time of their being undertaken, (2) resulted in negative effects due to factors outside the entity's control and foresight, and (3) were worth taking under a cost–benefit analysis (i.e. they were "reasonable") or were not improper by way of categorical imperative (i.e. they were not contrary to a moral duty).

The same conclusion holds true with respect to the Aristotelian concept of corrective justice,[100] which requires individuals who wrongfully cause harm to others to make good the injury caused.[101] Since most understand the theory of corrective justice to require some form of wrongdoing or moral fault,[102] causal responsibility cannot in itself be enough to justify strict liability.[103] It follows that the law should not hold a company liable for the unforeseeable consequences of its appropriate conduct.[104] One commentator has opined that corrective-justice scholars can provide "no normative theoretical support for no-fault liability."[105]

Ultimately, it should require little in the way of recondite theory to convince the reader that it is improper retroactively to castigate a practice that was neither illegal nor liability-inducing when undertaken. Societal aversion to after-the-fact denunciation of this sort is enshrined in the constitutional prohibition of ex post facto criminal laws.[106]

There is only one possible justification. This involves an insurance function—by holding the injurer liable for any harm caused by her actions,

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100. ARISTOTLE, NICOMACHEAN ETHICS bk. 5, pt. 4, at 120–21 (Martin Ostwald trans., Bobbs-Merrill 1962) (350 B.C.E.).

101. JULES COLEMAN, THE PRACTICE OF PRINCIPLE 5 (2001); *see also* Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 59 (2003).

102. This is the majority position among philosophers. *See* Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1597–98 (2008). There are, nevertheless, some people who support strict liability on corrective-justice grounds. *See, e.g.*, Allan Beever, *Corrective Justice and Personal Responsibility in the Law*, 28 OXFORD J. LEGAL STUD. 475, 491–92 (2008); Curtis Bridgeman, *Reconciling Strict Liability with Corrective Justice in Contract Law*, 75 FORDHAM L. REV. 3013 *passim* (2007); Epstein, *supra* note 96, at 158–60. But to the extent they support liability for any negative consequences, no matter how attenuated, flowing from socially desirable conduct, their position is highly questionable. *See* Posner & Sunstein, *supra*, at 1597–98.

103. *See* WEINRIB, *supra* note 93, at 187–90; *see also* Gregory C. Keating, *The Heroic Enterprise of the Asbestos Cases*, 37 SW. U. L. REV. 623, 625 (2008) ("Corrective justice theorists have often been unfavorably disposed to liability without fault.").

104. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 15 (2000); Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 162 (2005); Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 292–94 (2007); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 195 (2000); Kuklin, *supra* note 94, at 870; Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1749–55 (1996); Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1537 (2006); Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445, 446–47 (1992). *But see* Beever, *supra* note 102, at 491–92; Bridgeman, *supra* note 102; Epstein, *supra* note 96, at 158–60.

105. Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245, 274 (2008). Indeed, this inconsistency has proven to be particularly problematic for scholars of contract law, in which liability is almost invariably strict in the event of breach. *See, e.g.*, Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 362–63.

106. U.S. CONST. art. I, § 9.

regardless of those actions' reasonableness or perceptible proclivity to yield such negative consequences, the law can ensure that every injured party will be made whole. It is impossible, however, to justify such a rationale on efficiency grounds where, as with extraneous liability, proximate causation is absent.[107] Nor can one approve it on grounds of equity, for the injurer is no more morally culpable than the injured—favoring the latter over the former thus entails an arbitrary judgment. Because alleviating an injurer of the obligation to make good the damages caused is efficient in this instance, and because no other rule would be more equitable, the normative position is clear: no liability should ensue in such instances of extraneous liability as those explored in this Article.

## III. EX POST LIABILITY IN ANTITRUST

The Supreme Court has described the antitrust laws in such grandiose terms as the "magna carta of free enterprise."[108] Their enforcement promotes vigorous competition, which forecloses the artificial acquisition of economic power and reduces unwelcome distortion of free-market forces.[109] The precise metric against which the courts should measure the desirability of commercial behavior remains somewhat elusive.[110] Nevertheless, it is widely agreed that the Sherman and Clayton Acts exist to promote efficiency in the name of consumer welfare.[111] With the purpose of the antitrust laws so identified, it falls to the enforcement agencies and courts to demarcate conduct that promotes efficiency from that which restricts it. For the most part, such analysis proves simpler in theory than in practice, though the law has devised a rich set of rules by which to determine the legality of many forms of business behavior. These rules have been developed based on economic theory, which predicts the propensity for different forms of commercial conduct to yield desirable or undesirable effects.[112] If a company seeks to act in a way that analysis reveals to bear too great a potential for nefarious results, the antitrust laws will stand in the way. Clear examples include horizontal price-fixing,[113] market-sharing,[114] exchanging sensitive price and cost

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107. With respect to the example of "untimely" entry following a merger approved on the basis of entry's being expected to occur promptly, it is fair to say that the proximate cause of any ensuing anticompetitive effect is the third-party competitor that delays its entry or chooses not to enter.

108. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

109. *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . .").

110. *See* Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 59–60 (2010).

111. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (stating that the Sherman Act creates "a consumer welfare prescription" (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1966))).

112. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 95–99 (4th ed. 2005).

113. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

data with horizontal rivals,[115] merging to monopoly,[116] and engaging in certain predatory practices that might be undertaken by dominant firms.[117] Corporations advised by antitrust counsel know not to proceed along such paths.

Consider a different situation, however: one in which governing antitrust principles indicate that a desired course of conduct is not merely of equivocal legality, but is unquestionably proper when undertaken. Antitrust counsel correctly gives the green light for their clients to proceed. The company's actions, however, set in motion a series of developments that ultimately result in its enjoying a dominant position in the market. Viewing such anticompetitive market conditions with consternation, the enforcement agencies bring suit, notwithstanding the fact that many years have passed since the challenged act and that the dominance so obtained was an improbable and unintended consequence of that reasonable act. The law allows the agencies to proceed in this fashion, in what is essentially an extreme strict-liability regime for otherwise lawful actions that turn out, against expectations, to yield unwelcome effects ex post.[118]

This disquieting phenomenon is not merely a creature of speculative possibility in light of contemporary antitrust doctrine. It has occurred and will surely continue to occur. This Part begins by exploring the quintessential case in which extraneous forces combined to create an antitrust violation ex post where none existed at the time of the challenged action. The paper then proceeds to address numerous other scenarios in which current antitrust rules bear the potentially perverse potential for ex post facto condemnation. In the discussion that follows, the paper explains the manner in which extraneous factors may legitimately be considered in antitrust analysis.

### *A.* **United States v. du Pont***: Finding Illegality Almost Thirty Years After the Fact*

Our first port of call involves the Supreme Court's 1957 decision in *United States v. E.I. du Pont de Nemours & Co.*[119] Between 1917 and 1919, du Pont acquired a 23% stock interest in its customer, General Motors ("GM").[120] GM was not then the behemoth it is today, producing only 11% of the cars manufactured in the United States during this time period.[121] Apparently, du Pont hoped to solidify and expand its position as GM's principal supplier of automobile

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114. *See, e.g.*, Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990); United States v. Topco Assocs., 405 U.S. 596, 606 (1972).

115. *See, e.g.*, Am. Column & Lumber Co. v. United States, 257 U.S. 377, 411–12 (1921); E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 614 (1914).

116. *See, e.g.*, Val D. Ricks & R. Chet Loftis, *Seeing the Diagonal Clearly: Telling Vertical from Horizontal in Antitrust Law*, 28 U. TOL. L. REV. 151, 160 n.27 (1996).

117. *See generally* Eleanor M. Fox, *What Is Harm to Competition? Exclusionary Practices and Anticompetitive Effect*, 70 ANTITRUST L.J. 371 *passim* (2002).

118. *See infra* Part III.A.

119. 353 U.S. 586 (1957).

120. *Id.* at 588.

121. *Id.* at 599.

finishes and fabrics.[122] During this period, du Pont was growing dramatically in size and scope due to the First World War, which greatly increased demand for its products. Having so expanded, du Pont looked to GM as a substantial market for future sales.

It is worth interjecting that there was no conceivable anticompetitive effect at the time of du Pont's stock acquisition. The theory of harm that the government ultimately put forth focused on foreclosure—the idea being that du Pont's entrenched position as the car manufacturer's preferred supplier prevented third parties from making viable sales pitches to GM. It is well established in law-and-economics literature that exclusive-sales contracts, or other foreclosure-causing arrangements, are of potential concern only if they tie up a sufficiently large percentage of the market.[123] This theory has been reflected in U.S. law.[124] The reason is clear: if a prospective supplier discovered in 1919 that GM's demand was tied up by pre-existing arrangements with du Pont, this would still have left 89% of the market for car manufacturing available for prospective sales.[125] U.S. courts have typically conditioned a finding of illegality on an exclusive arrangement's foreclosing 30–40% of a market.[127] Because the vast majority of the market remained unfettered by exclusive arrangements, no significant competitor would be excluded from the market and it would be unlikely that prices would increase.[128]

Were one to judge the legality of du Pont's acquisition in 1919, it would easily pass muster. This conclusion holds under static and dynamic perspectives. In the former regard, there was no contemporaneous anticompetitive impact on prices or output. From a forward-looking perspective, the Court did not explain why problematic foreclosure was likely to result in the future. Indeed, despite noting the benign plans of all involved at the deal's inception, the Court emphasized that "[i]t is not requisite to the proof of a violation of § 7 to show that restraint or monopoly was intended."[129]

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122. *Id.* at 600.

123. *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329 (1961).

124. *See, e.g.*, D. Waelbroeck, Michelin II*: A Per Se Rule Against Rebates by Dominant Companies?*, 1 J. COMPETITION L. & ECON. 149, 162–66 (2005).

125. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 328–29 (1962) (noting that "foreclosure of a de minimis share of the market will not tend 'substantially to lessen competition'" (quoting the Sherman Act, 15 U.S.C. § 18 (1958))); *accord* Joshua D. Wright, *Antitrust Law and Competition for Distribution*, 23 YALE J. ON REG. 169 *passim* (2006) (advocating a rule of per se legality for "arrangements that foreclose less than 40% of total distribution").

127. *See, e.g.*, Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 68 (1st Cir. 2004). *But see, e.g.*, Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1298 (9th Cir. 1982).

128. *See* Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984); *cf.* Einer Elhauge, *How Loyalty Discounts Can Perversely Discourage Discounting*, 5 J. COMPETITION L. & ECON. 189, 217–18 (2009) (explaining in the specific instance of loyalty discounting that the exclusive effects of these arrangements can theoretically increase prices even at low levels of market foreclosure, but noting that the U.S. rule requiring substantial levels of market foreclosure can nevertheless be justified).

129. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607 (1957).

As even the most casual student of history would know, GM's small market share did not prove to be enduring. In 1949—nearly thirty years after the stock acquisition—the government brought suit, alleging violations of the Sherman and Clayton Acts.[130] By that time, GM had grown to be "the colossus of the giant automobile industry," ranking first in sales among all U.S. industrial corporations and accounting for approximately "one-half of the automobile industry's annual sales."[131] Meanwhile, du Pont supplied 67% of finishes and 52.3% of fabrics to GM in 1946.[132] America's antitrust-enforcement agencies deemed this state of affairs unacceptable, though they faced the inconvenient fact that those anticompetitive conditions were not the necessary, likely, or even aspirational result of the 1919 acquisition.

The *du Pont* facts provided the Supreme Court with its first opportunity to consider whether the government could challenge a consummated merger or acquisition many years after its closing. As the Court noted, the agencies had brought earlier cases under § 7 of the Clayton Act "at or near the time of the acquisition."[133] Nevertheless, the Court saw no problem in finding the nearly 30-year-old acquisition unlawful, holding that such an arrangement violates § 7 if "there was *at the time of suit* a reasonable likelihood of a monopoly of any line of commerce."[134] It justified this outcome on the ground that the statute's "aim was primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil, which may be at or *any time after* the acquisition, depending upon the circumstances of the particular case."[135]

These are extraordinary holdings that were recognized as such by Justice Burton in a spirited dissent.[136] Joined by Justice Frankfurter, he wrote:

> The Court ignores the all-important lawfulness or unlawfulness of the stock acquisition at or about the time it occurred, and limits its attention to the probable anticompetitive effects of the continued holding of the stock at the time of suit, some 30 years later. The result is to subject a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments. Such a view is not supported by the statutory language and violates elementary principles of fairness. Suits brought under the Clayton Act are not subject to statute of limitations, and it is doubtful whether the doctrine of laches applies as against the Government . . . . The growth of the acquired corporation, a fortuitous decline in the number of its competitors, or the achievement of control by an accidental diffusion of other stock may result, under this test, in rendering the originally lawful acquisition unlawful *ab initio*.[137]

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130. *Id.* at 588.
131. *Id.* at 595–96.
132. *Id.* at 596.
133. *Id.* at 598.
134. *Id.* at 592 (emphasis added).
135. *Id.* at 597 (emphasis added).
136. *Id.* at 622–23 (Burton, J., dissenting).
137. *Id.*

The *du Pont* case is therefore our first example of how antitrust defines conformity with the law by reference to extraneous influences. The time-of-suit rule allows the government to condemn an acquisition that ultimately brings about the potential for anticompetitive effects, regardless of how unlikely such effects were to materialize ex ante, how much time has passed between the acquisition and the ensuing harm, or how pure the motives of the acquiring party were. In short, the rule emerging from *du Pont* creates an odd variant of strict liability that jettisons proximate-cause analysis, foreseeability, and reasonableness, which are usually fundamental to legal analysis for reasons of fairness and inducing proper incentives. Far from being limited, the Court's holding in *du Pont* has been applied repeatedly in more recent times.[138] It might be fair to say that the time-of-suit rule has become a staple of merger law.

If one is to condone this decision, it can only be on the basis that it is desirable to arm the government with a regulatory tool with which to restructure markets at whim where they can trace perceived inefficiencies to an earlier acquisition, no matter how removed in time or proximate cause. The radical nature of this power is unsettling, though it does not follow that the rule in *du Pont* is necessarily wrong. Against these self-evident drawbacks, one must weigh the cost of governmental inability to correct market distortions that, though deemed unlikely to have arisen ex ante, have in fact occurred and are apt to be durable. Should the law allow a company that makes an opportunistic acquisition, which later and unexpectedly yields a monopoly, to enjoy its fortuitous dominance at consumers' expense, free from antitrust intervention? Answering this question involves distinguishing two scenarios.

In the first place, there is the situation in which a company effects a stock or asset acquisition that neither it nor antitrust authorities could then envision bringing about an anticompetitive result. Such transaction would be limited to those that do not change market dynamics in such a way as to bestow the acquiring party with elevated power over price. Where an acquisition does not dilute the pricing constraint that competition imposes, and does not otherwise affect market dynamics in such a way that would predictably lead to an equivalent result, the law should construe it as a completed act. Should extraneous factors nevertheless combine to yield anticompetitive conditions that a plaintiff can trace to an earlier acquisition, no liability should ensue. Nor should retroactive equitable relief be available. Such relief—specifically, disgorgement—is akin to damages, and should therefore be excluded.

Yet, even ostensibly forward-acting remedies, such as divestiture, have an inescapably punitive character when applied to a completed act. This is especially so when the relevant injunction requires the alienation of an asset that a company has integrated within its organization or of a stock holding for which there is no public market.

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138. *See* Reading Int'l, Inc. v. Oaktree Capital Mgmt. L.L.C., 317 F. Supp. 2d 301, 310–11 (S.D.N.Y. 2003); Julius Nasso Concrete Corp. v. DIC Concrete Corp., 467 F. Supp. 1016, 1023–24 (S.D.N.Y. 1979). It has also been reaffirmed by the Supreme Court itself. United States v. ITT Cont'l Baking Co., 420 U.S. 223, 240–43 (1975).

One might challenge the conclusion that even prospective injunctive relief is improper in this setting by appealing to nuisance scenarios with which tort scholars are familiar. Imagine a factory that sets up shop in a largely vacant industrial area, which is devoid of residential buildings. After many years of releasing environmentally harmless gases that are nevertheless offensive to the nostrils, a number of individuals decide to purchase lots near the factory and to build homes there. Having moved in, the residents then bring suit to enjoin the release of the unpleasant gas.[139] Most states have abolished the coming-to-the-nuisance defense, and so it is likely that the late-arriving residents would prevail.[140] Would such an outcome run afoul of this Article's condemnation of extraneous liability?

One might imagine so. After all, the factory's setting up operations in the neighborhood was desirable ex ante, and it had no basis then to suspect that the area would subsequently become residential. Furthermore, it is not the case that the residents' enforcing an injunction will be costless to the factory, which may have devoted considerable sunk costs in establishing its facilities.

Although the analogy reveals that the Article's proscription against forward-reaching injunctive relief may be controversial, there are a number of important points about the analogy. First, one could question the desirability of retracting the coming-to-the-nuisance defense, as the inequities involved in the factory hypothetical are comparable to those applicable to the extraneous-liability phenomena examined in this Article. Second, one might distinguish the nuisance example on the ground that the lack of harm incident to the factory's initial output was a function purely of the absence of third parties. The objectionable quality of the acts is constant—it is only the absence of those who would experience the unpleasant odor that renders the release of the gas innocuous. In this respect, it is likely foreseeable that harm will result—i.e., that residents would one day move to the neighborhood. To put it simply, the relevant acts bear an inherent harmful quality. The factory cannot later claim otherwise. By contrast, the competitive quality of an acquisition depends not only on the abstract nature of the acquisition itself, but on evolving market settings.

A more fundamental distinction, however, would involve market self-correction. In the antitrust setting, the law is trustful of free-market mechanisms that promise to undo market distortions.[141] Given the transaction costs entailed in having the many parties privy to a pollution-based nuisance negotiate a solution, the market is unlikely to yield an efficient outcome. The same may not be true of an inadvertent acquisition of monopoly. While it might strike some as odd that the government should be powerless to challenge an innocently obtained dominance, just such a principle is thoroughly engrained in § 2 jurisprudence under the

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139. *See, e.g.*, Lopardo v. Fleming Cos., Inc., 97 F.3d 921, 930 (7th Cir. 1996) (observing that "abatement is the classic remedy for a private nuisance").

140. *See, e.g.*, Patrick v. Sharon Steel Corp., 549 F. Supp. 1259, 1267 (N.D. W. Va. 1982). For the classic case applying the coming-to-the-nuisance defense, see *Spur Industries v. Del E. Webb Development Co.*, 494 P.2d 700, 702–06 (Ariz. 1972).

141. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

Sherman Act.[142] It has long been recognized that monopoly itself is lawful[143] and that the law offers no relief where a company acquires its dominance through historical accident.[144] This is not an anomaly within antitrust; it is widely understood that this body of law does not authorize courts to act as price regulators or otherwise to restructure or to manage the market in the face of perceived imperfections.[145] As explained below, where innocent behavior leads to monopoly conditions, the government should, and must, sit back and allow the market to self-correct, as supracompetitive prices entice entry.[146] The limits inherent in this approach constitute the necessary price of an antitrust regime that limits its reach to constraining anticompetitive behavior, rather than directly managing the economy pursuant to a central-planning process.[147]

The preceding analysis applies to market transactions that economists do not envision bringing about anticompetitive conditions. A distinct species of acquisitions are those that bring about immediate changes in market structure or dynamics of a kind that bear direct potential for consumer harm. Why are these relevant objects of analysis? Won't agencies surely disapprove competition-reducing mergers? In fact, there are a number of reasons why the law might permit such acquisitions. For instance, a merger may entail the achievement of production-side efficiencies that outweigh consumer losses. The current guidelines do not authorize "Williamson mergers"—those in which efficiencies, though aggregate-welfare enhancing, do not protect consumers against price increases.[149] Nevertheless, they do allow price-increasing, though efficient, mergers when competition-restoring entry is expected on a timely basis.[150]

Thus, the agencies can and do approve mergers that they expect to be social-welfare-enhancing, but that nevertheless bear direct potential for anticompetitive repercussions. What if such acquisitions subsequently yield negative effects? Can the agencies effectively revoke permission by obtaining

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142. *See, e.g.*, Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960); United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945).

143. *See Verizon*, 540 U.S. at 407.

144. *See* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

145. *See* Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n, 95 F.3d 593, 597 (7th Cir. 1996) (pointing out that "the antitrust laws do not deputize district judges as one-man regulatory agencies").

146. *See id.* Alternatively, if the industry is one in which natural-monopoly conditions exist, such that entry by additional firms is either infeasible or inefficient in light of the high ratio of fixed-to-marginal cost in the industry, the government can grant a certificate of public convenience and necessity and regulate the monopolist's pricing. The latter path is increasingly rare, given the diminishing areas of industry believed by economists to display diminishing long-run average cost.

147. *See, e.g.*, Arsberry v. Illinois, 244 F.3d 558, 562 (7th Cir. 2001) (rejecting the characterization of antitrust law as a regulatory system); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979) (same).

149. *See* Oliver Williamson, *Mergers, Acquisitions, and Leveraged Buyouts: An Efficiency Assessment* 18–25 (Yale Univ. Ctr. for Studies in Law, Econ. & Pub. Pol'y, Program in Law and Organ. Working Paper No. 60, 1987).

150. MERGER GUIDELINES, *supra* note 7, § 6.

injunctive relief in court? The answer should be yes. These mergers do not fall within the scope of extraneous liability criticized by this Article, for the relevant anticompetitive consequences are immediately discernible ex ante. By qualifying its approval of such arrangements on the basis that eminently foreseeable consequences not materialize, the government appropriately treats the merger as an ongoing—rather than a discrete—act. Should anticompetitive conditions ultimately result, the agency should be able to obtain forward-acting injunctive relief, though not damages or disgorgement.

There is therefore an important distinction between discrete actions undertaken by a company in circumstances where it could not envision negative consequences, as was the case in *du Pont*, and mergers that threaten immediate harm should extraneous factors happen not to neutralize it.

There is one further objection to the rule in *du Pont*, which relates to potential constitutional infirmity. The Ex Post Facto Clause of the U.S. Constitution forbids any retrospective criminalization of conduct that was legal at the time of its performance.[151] Were the time-of-suit rule applied to criminal antitrust actions, it could well be unconstitutional. Despite the troubling nature of the rule in *du Pont*, however, it bears emphasizing that the specific rule articulated in that case does not violate the Ex Post Facto Clause. This is because the government's action was based on the Clayton Act, which, unlike the Sherman Act, does not give rise to criminal liability.[152] Even if the reach of the time-of-suit rule were limited to the Clayton Act,[153] however, the Court's enunciation of a rule that, if applied to the closely related context of the Sherman Act, would be unconstitutional should nevertheless give us pause.

There is no guarantee, however, that the courts or agencies will continue to limit the scope of the rule in this fashion. It is possible that the *du Pont* rule may go beyond its Clayton Act context to create a "time-of-suit" principle for the purpose of the Sherman Act.[154] Although modern practice has been to challenge mergers under § 7 of the Clayton Act, the government is equally free to proceed under §§ 1 and 2 of the Sherman Act and has done so, both recently and in the past.[155] The violation of either § 1 or 2 of the Sherman Act constitutes a felony.[156]

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151. U.S. CONST. art. I, § 9.

152. *See* Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 AM. U. INT'L L. REV. 769, 807 (2004).

153. It should be noted that a plaintiff is generally understood to face a higher burden to establish a violation of the Sherman Act than the Clayton Act. *See* Joshua J. Novak, Note, United States v. Dentsply*: The Third Circuit Bites Down on the 'Alternative Distribution Channels' Defense*, 32 J. CORP. L. 963, 979 (2007). Thus, it is not unlikely that a plaintiff could employ a prior judicial determination that a merger was likely to substantially lessen competition for purposes of offensive collateral estoppel in an ensuing action under the Sherman Act.

154. *See, e.g.*, U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 628 (7th Cir. 2003); *see also* United States v. S. Pac. Co., 259 U.S. 214, 240–41 (1922).

155. *See, e.g.*, United States v. Syufy Enters., 903 F.2d 659, 673 (9th Cir. 1990) (challenging a series of mergers under § 2 of the Sherman Act, as well as under § 7); *see also* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 666 (1964).

Although the Supreme Court in *du Pont* declined to reach this issue,[157] it would be a natural extension of the case to apply the time-of-suit rule to monopolization claims. Any attempt to expand the rule in such a manner would, the Author submits, raise constitutional concerns. This adds a constitutional dimension to a problem that already implicates a wide variety of serious policy concerns.

Finally, there is the problem of intent. It is now black-letter law that a company need not intend, or even expect, anticompetitive consequences to flow from its merger or acquisition for a violation of § 7 of the Clayton Act to follow. It is equally well settled, however, that there must be at least some improper intent for a company to violate the Sherman Act.[158] This would also seem to foreclose the rule in *du Pont*'s application in the criminal setting.[159]

It seems fitting to end on a practical note. What, if anything, should the government do when a previously innocent acquisition yields anticompetitive conditions after the fact if it cannot rely on the time-of-suit rule? The answer must be that it should be limited to challenging the anticompetitive potential of the acquisition at the time of closing.[160] Proof of subsequent, negative effects is surely relevant to the tendency of the underlying deal to produce the anticompetitive conditions presently observed. Yet, if a plaintiff cannot tie those later effects to innate characteristics of the acquisition, such that the acquiring party could have appreciated the potential of its actions to yield market distortions, then the law should not permit the agencies to bring an antitrust challenge. The solution in that event is to let the market self-correct, consistent with the free-market principles that underlie modern antitrust law.[161]

### *B. The Case of Untimely Entry*

This Article's second example of extraneous liability continues the theme of mergers and acquisitions. The enforcement agencies' influential Merger Guidelines ("Guidelines") provide a clear blueprint of how the agencies will apply antitrust rules in determining the legality of a proposed deal.[162] This Section

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156. *See* James R. Eiszner, *Antitrust Civil Damages Remedies: The Consumer Welfare Perspective*, 75 UMKC L. REV. 375, 379 n.23 (2007).

157. United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 588 (1957).

158. *See id.* at 658–59.

159. Union Leader Corp. v. Newspapers of New England, Inc., 284 F.2d 582, 584 (1st Cir. 1960) ("[I]ntending the natural consequences of acts which are in all respects lawful, does not constitute the 'exclusionary intent' that is a prerequisite for finding a violation of section 2.").

160. This assumes that the relevant merger fell under the $63.4 million threshold for mandatory filing under the Hart–Scott–Rodino Act. If the government has already approved the merger, it should not be allowed to revisit that conclusion at a later time.

161. It should be noted that mergers bearing the potential for anticompetitive effects in markets that are characterized by high entry barriers should be heavily scrutinized before being allowed. In other situations, markets should be able to self-correct effectively without intervention, even if a merger unexpectedly yields anticompetitive conditions ex post. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 18 (1990) (observing that "significant entry barriers are the *sine qua non* of monopoly and oligopoly").

162. *See generally* MERGER GUIDELINES, *supra* note 7.

focuses on a particular aspect of those guidelines, in particular, the role of entry in rendering anticompetitive conditions ephemeral and therefore unworthy of condemnation.

The current iteration of the Guidelines provides that a "merger is not likely to create or enhance market power . . . if entry into the market is so easy that the merged firm and its remaining rivals in the market . . . could not profitably raise price or otherwise reduce competition to the level that would prevail in the absence of the merger."[163] To determine the ease of entry, the agencies inquire whether it will be "timely, likely, and sufficient . . . to deter or counteract the competitive effects of concern."[164] The timeliness issue is of great significance, as it signifies a fundamental principle of antitrust law—not all government interventions to correct market distortions are justified. The cost of intervention is warranted only when the market is incapable of self-correcting in an expeditious manner. The Guidelines consider entry timely if it is "rapid enough that customers are not significantly harmed by the merger."[165]

These provisions appear reasonable, but they nevertheless mask an unsettling possibility. This is because they condition legality not on the nature of the act undertaken by a potential antitrust defendant, but on third-party behavior.

To adopt a concrete example in the antitrust context, envision a situation in which everyone believes that a proposed merger, though efficiency-generating, will increase concentration in a market. Economists would expect the arrangement to yield coordinated price effects, such that they might object to the merger on grounds of consumer welfare.[166] Assume, however, that everyone similarly agrees that entry barriers are demonstrably low, as evidenced by the specific plans of large, identifiable competitors to enter the market. Such imminent entry reveals that any pricing power flowing from the merger will merely be transitory. Given this scenario, the Federal Trade Commission ("FTC") or Department of Justice ("DOJ") would likely approve the merger.[167] Indeed, the merger is unambiguously desirable ex ante by virtue of the producer-side efficiency gains it generates.[168] After the merger, prices rise in the market and consumer complaints follow.

So far, so good. Elevated prices are the necessary, albeit ephemeral, cost of the market's self-correction. Indeed, and as the Supreme Court has recognized, supracompetitive prices are the fuel by which the capitalist system operates to a

163. *Id.*

164. *Id.*

165. *Id.* § 9.1.

166. *See generally* David S. Shotlander, *Slotting Fees and Merger Efficiencies: Can Fewer Competitors Yield a Lower Price?*, 13 GEO. MASON L. REV. 1273, 1289 (2006).

167. If the planned acquisition fell below the reporting threshold of $63.4 million for the Hart–Scott–Rodino Act, the merging parties would not be required to inform the agencies and could proceed, seemingly safe in the knowledge that their planned course of action is lawful.

168. U.S. antitrust law, unlike the Canadian system, does not consider efficiencies that do not translate into cheaper prices for consumers. *See* MERGER GUIDELINES, *supra* note 7, § 4.0.

socially desirable end.[169] What if the stars align in such a way, however, that entry does not take place within a time frame than one deems "timely"? Has the merger therefore automatically been transformed into an illegal one? One reading of the Merger Guidelines suggests that the answer is yes.

Perhaps the better way to answer the question whether delayed entry renders a merger violative of the antitrust laws, however, would be to ask whether entry was *likely* from an ex ante perspective.[170] Likelihood, of course, does not equate to certainty. Thus, the fact that entry occurs in an "untimely" manner after the challenged merger is not inconsistent with such entry's having been likely to occur in a prompt fashion. Nevertheless, it is probable that the agencies view the question of likelihood as merely being an interpretive guide to aid its forward-looking assessment of prospective mergers. They may not look at it as a binding constraint on its ex post review of consummated mergers.[171] Indeed, the agencies routinely qualify their approval of notified mergers on the ground that they remain free to challenge the arrangement after the fact should it turn out to yield anticompetitive effects.[172] It is certainly conceivable, then, that entry's not taking place on a timely basis following a price-enhancing merger renders that merger illegal.

The result of all this is that a company that merged in good faith and received the blessing of the relevant agency to proceed may nevertheless find itself in a defensive posture should some unforeseen harm occur. Such harm could be the result of a conscious delay on the part of a rival that regulators expected would enter at the first available opportunity. Alternatively, it could be the result of a holdup in the regulatory process required of entrants into a market. The merging entity is therefore subject to asymmetric treatment under the law despite the nature of its action being identical in the two states of the world in which entry does and does not materialize as expeditiously as envisioned.

This is a clear example of what this Article deems to be "extraneous liability." Legality turns not on the tendency of the relevant action to yield undesirable consequences, but on the ultimate effect that comes to pass. As explored above more generally, this form of consequentialist analysis finds an awkward resting place between strict liability (the merging company must compensate consumers should harm come to pass, even though its actions were not culpable) and ex post facto condemnation (the merger that was legal may become unlawful after the fact).

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169. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407 (2004).

170. *See* MERGER GUIDELINES, *supra* note 7.

171. *See, e.g.*, *id.* § 0.1 (explaining that the Guidelines are forward-looking, which would suggest that the agencies would not feel bound by them in challenging consummated mergers).

172. *See, e.g.*, Terry Calvani, *The Government Has the Right to Challenge Mergers After Hart-Scott-Rodino Review*, ANTITRUST, Summer 1990, at 27–28.

What should we make of this form of extraneous liability which flows from the rule that, to be cognizable under the law, entry must be timely?[173] There are two broad objections. First, one might disagree with the idea that one can deem a company to have violated the Clayton or Sherman Acts by virtue of the actions of others.[174] The second, more powerful, protest is that permitting legality to turn on others' behavior invites strategic third-party behavior.

We have already seen that imposing liability for negative consequences that are not the natural or perceivable result of desirable behavior is improper and broadly inconsistent with utilitarian, corrective-justice, and deontological theories of justice.[175] It also bears mentioning that the financial consequences to a company deemed to have violated the Clayton Act can be severe. If we are to impose any of the potentially draconian sanctions for this civil wrong, which range from divestiture to disgorgement, we would presumably want to ensure that we do so on a proper ground. Let us explore a hypothetical to illustrate the problems with conditioning legality on third-party behavior.

Some background may be helpful. Anticompetitive effects are far and away most likely to occur when a merger takes place in a concentrated market (or in a market that becomes sufficiently concentrated by virtue of the merger). Such markets are deemed "oligopolistic" by the economics literature, by virtue of the fact that each company has to factor in the expected actions of its rivals in determining its profit-maximizing price or output.[176] Coordinated effects are a concern in such markets where mergers reduce the number of entities, thus enhancing the prospect for successful tacit collusion.[177] The Nash equilibrium in oligopolies can be to collude if the probability and price of detection of any company's deviating from the tacitly agreed price are sufficiently high.[178]

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173. We must be cautious in reaching a definite conclusion, however, as to the two-year benchmark. Although the Guidelines' two-year test appears quite rigid, courts have proven to be rather more flexible. The Tenth Circuit in 1989, for instance, found no violation of the antitrust laws where anticompetitive conditions were set to prevail for ten years, but were guaranteed to come to an end upon expiration of the defendant's contractual right to the plaintiff's pipeline capacity. Colo. Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 696–97 (10th Cir. 1989). Yet, the D.C. Circuit found a delay of one year to be insufficient to cure an antitrust violation, Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 252 (D.C. Cir. 1987), while the U.S. District Court for the District of Arizona found three years to be the appropriate metric, Metro Mobile CTS, Inc. v. Newvector Commc'ns, Inc., 661 F. Supp. 1504, 1523–24 (D. Ariz. 1987). Such malleability suggests that the courts would be hesitant to condemn a merger where entry in fact took incrementally longer to occur than was originally envisioned. Nevertheless, given the influence of the Guidelines, it is probably fair to say that two years represents the baseline by which most courts will judge the timeliness of entry. Whether we use that precise figure or one close to it, however, the problem with extraneous liability remains.

174. As explored above, this objection would be edentulous. *See supra* Part II.A.

175. *See id.*

176. *See, e.g.*, Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 483–84 (1st Cir. 1988).

177. *See* Alan Devlin, Note, *A Proposed Solution to the Problem of Tacit Collusion in Oligopolistic Markets*, 59 STAN. L. REV. 1111, 1116 (2007).

178. *See id.* at 1115–22.

Imagine a merger in such an oligopoly. The government approves a deal between two of the six companies in the market, despite the risk of coordinated pricing effects occurring post-closing. It does so on the bases that the parties will likely attain merger-specific efficiencies and that entry by a known competitor in a related market is probable. Once the deal has closed, prices rise by virtue of conscious parallelism that is unassailable by the antitrust laws.[179] The supracompetitive prices surely act as a magnet to entry.[180] Yet, that allure is only one incentive that the expected entrant experiences. Knowing that the legality of its competitor's merger is predicated on its entering in a prompt fashion, the potential entrant may instead elect to wait out the relevant period, thus transforming the otherwise innocuous merger into an improper one. Such a move may be financially irrational, possibly driven by management's intense dislike of its competitor. Alternatively, it may fear that the production-side efficiencies garnered by the merger would grant its rival an advantage were the two entities to compete.[181] If the potential entrant delays entry for a sufficiently long time, or better yet, signals in some way that it intends not to enter after all, it may induce the relevant antitrust agency to undo the merger on its behalf.

Of course, the fact that a rule invites strategic behavior does not guarantee that such nefarious conduct will always, or even often, ensue. Yet, it should be disconcerting that the law can judge a practice on such a basis. This is especially so when merging parties cannot discern the extraneous factors that delay entry ex ante. How, then, should the law treat a merger or acquisition whose lack of anticompetitive consequence requires that entry take place in a timely manner?

In answering this question, we must distinguish between three possibilities. First, the government could bring suit after entry has occurred, albeit in an "untimely" manner. Second, the FTC or DOJ might bring an action where entry has not occurred during the two years (or other time period deemed appropriate), but such entry is in fact imminent at the time of suit. Last, the government could sue in circumstances where prediction and the actual future have diverged so wildly that effective entry, whether timely or untimely, no longer appears likely.

It should be obvious that the agencies should not initiate proceedings in the first two scenarios. Where an anticompetitive effect no longer exists, or where it is on the cusp of being eliminated, costly enforcement actions are difficult to justify on efficiency grounds. One would imagine that the FTC and DOJ would better use their limited budgets in challenging ongoing anticompetitive practices, rather than on seeking compensation on behalf of consumers for sunk costs.

The last situation is the most taxing. Society charges antitrust with promoting social welfare by facilitating free-market forces, which it trusts to undo

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179. *See, e.g.*, City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 572 (11th Cir. 1998).

180. *See* Erica L. Rice, Note, Evanston*'s Legacy: A Prescription for Addressing Two-Stage Competition in Hospital Merger Antitrust Analysis*, 90 B.U. L. REV. 431, 441 (2010).

181. *See* Thomas A. Lambert, *Tweaking Antitrust's Business Model*, 85 TEX. L. REV. 153, 178 (2007).

anticompetitive conditions. Yet, for reasons discussed above, one can accurately characterize acquisitions that carry significant competitive dangers—such as those that yield price increases or materially enhance market concentration—as ongoing acts. This is because the merging parties are aware of specific dangers that may arise in foreseeable fashion. Should those dangers in fact materialize—and if market self-correction does not appear to be imminent at the time of suit—the law should permit the government to obtain forward-acting injunctive relief. It should not allow the government, however, to seek disgorgement. Nor should it entertain private lawsuits seeking damages for the anticompetitive conditions experienced on account of the merger, which the agencies, at the time of closing, considered to be socially desirable.

### *C. The Problem of Accumulation in Exclusionary Contracting*

This Section considers a different effect on an antitrust defendant's liability. It is well settled that a dominant company can violate the Sherman Act by entering into exclusive contracts with its customers.[182] Such agreements, which can range from explicit boycott requirements to loyalty rebates, can prevent purchasers' obtaining future supplies from any source other than the immediate seller.[183] Although these arrangements have long been the subject of ire, economic analysis reveals that they can fuel scale efficiencies on the part of sellers.[184] More importantly, where a sufficient percentage of the market remains unfettered by such exclusionary agreements, consumers are free to eschew the company that insists on those contracts in favor of one of its competitors that does not.[185] Without getting into unnecessary detail, current economic theory provides that exclusive contracts are unlikely to be anticompetitive if they do not foreclose a sufficiently large percentage of the market.[186] This result makes intuitive sense.

The corollary, of course, is that an entity's possessing a sufficiently large share of the market may cause anticompetitive harm by insisting that its customers accept such restrictions. For this reason, a monopolist that insists on bundled discounts, loyalty rebates, or other exclusive arrangements runs a high risk of being found to have violated the antitrust laws. Although some have argued that exclusionary agreements imposed by even dominant companies are not necessarily improper,[187] these issues are outside the scope of this Article. Rather, it is the potential for this area of law to produce a distinct variant of extraneous liability that commands this Article's attention.

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182. *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); *see also* Fed. Trade Comm'n v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 395 (1953).

183. *See* Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 636 (1999).

184. *See* Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119, 137–60 (2003).

185. *See* Paddock Publ'ns, Inc. v. Chi. Tribune Co., 103 F.3d 42, 44–45 (7th Cir. 1996).

186. *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 731–40 (2002).

187. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX (1978).

Consider the case not of the gargantuan monopolist, but of the fringe firm that possesses merely a modest fraction of the market. Should that company in isolation insist on an exclusive arrangement with its customers, no conceivable anticompetitive effect can result. Consumers who find such conditions unpalatable can bring their money elsewhere. Now, imagine the following scenario. Assume that the fringe company just described is merely one of twenty firms in the market, each of which possesses 5% market share. Acting alone, any firm's imposition of loyalty rebates, bundled discounts, or boycott requirements will be without competitive effect. Imagine that firm one imposes such a condition. No violation of the Sherman Act can ensue. What happens, however, if firms two through six decide to proceed in the same fashion? Now, 30% of the market is tied up by exclusionary contracts. This may or may not implicate a sufficient volume of commerce to constitute illegal exclusion. But assume that firms seven and eight follow suit. Now, 40% of the market is foreclosed to consumers who object to exclusive requirements that they consider to be coercive.[188]

Recent case law controversially suggests that firms in this situation may have violated § 1 of the Sherman Act, notwithstanding the fact that they have not acted in concert.[189] This is a clear example of potentially improper extraneous liability. The nature of firm eight's action is substantively identical to that of firm one. Yet, the former is illegal at the time of implementation, whereas the latter's action was not. Far worse, firm eight's insistence on an exclusionary contract may subsequently render firm one's act a criminal offense, even though it was entirely lawful when undertaken.

Courts and agencies can condemn activity of the preceding kind pursuant to the so-called "aggregation theory."[190] This doctrine has drawn fire from commentators.[191] Yet, is such criticism warranted? To answer this question, we must specify the relevant objections. There are at least two. First, one might contend that, because the nature of firm eight's action is precisely akin to that of firm one, it is improper to subject those two acts to dissimilar treatment under the law. Second, one could object to firm eight's being able to alter firm one's legal status by its acts alone. In other words, a company should not be able, by its course of conduct, to transform what was previously lawful conduct by its competitor into an unlawful action. These two objections are different, and each gives rise to a distinct answer.

Despite the possible discomfort in saying that two ostensibly identical actions can legitimately be treated differently under the law, it is not the case that the law must treat acts in a manner wholly blind to the context in which they are

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188. *See* Wright, *supra* note 125, at 183. *See generally* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

189. For a European perspective, see Case 23/67, Brasserie de Haecht v. Wilkin and Wilkin, 1967 E.C.R. 407, 415.

190. *See* Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 ANTITRUST L.J. 663, 670–73 (2010).

191. *See* Hinman & Rocca, *supra* note 14. *But see* 9 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1709, at 78, 87 (2d ed. 2004).

undertaken, which may affect the likely consequences of the behavior.[192] This necessarily follows from the fact that antitrust jurisprudence has adopted a consequentialist and utilitarian approach, such that asymmetric results in particular cases may indeed counsel different legal consequences. As applied to the present example, the conduct of firms eight and one is not identical. While the substantive nature of each firm's act may be indistinguishable as an abstract matter, in that each company imposes precisely the same conditions on its customers, the proclivity of those respective actions to yield harmful results is highly distinct. The marginal anticompetitive effect of the eighth company's decision to insist on an exclusive contract is greater than the first's, such that a consequentialist promotion of social welfare suggests banning the former, though not the latter.

This Article does not reject the relevance of extraneous factors in antitrust law. As this example indicates, such factors can legitimately weigh on the legality of a commercial practice if they are both identifiable ex ante and can be expected to yield relevant consequences. Unlike the rule in *du Pont* and the subsequent-entry examples discussed above,[193] the theory of cumulative foreclosure does not have to result in cases where a company's actions are indisputably legal ex ante, but whose legality is nevertheless contingent on certain future events. Surveying the market before acting, firm eight discussed above can see that seven of its nineteen competitors are presently imposing contractual requirements that it, too, would like to implement. If the law provides that such contracts are unlawful if 40% of the market is thereby foreclosed, however, the company can determine that its planned course of conduct will result in its violating the law. In this situation, there is simultaneity between cause and improper effect. The latter is not conditioned on an outcome driven by extraneous factors beyond the entity's control.

This reasoning forecloses the possibility that firm eight's decision to impose exclusive-dealing requirements on its customers should result in firms one through seven also being deemed in violation of § 1. From a consequentialist perspective, it should also be pointed out that condemning the marginal actor whose conduct creates objectionable levels of market foreclosure can serve adequately to keep exclusive contracting within acceptable boundaries. Banning all instances of exclusive contracting based on the marginal actor whose requirements cause more than 40% of the market to be fettered by such restrictions would deprive some companies of the efficiency benefits of those arrangements.

## CONCLUSION

It is a fundamental feature of the U.S. constitutional tradition that one must determine the legality of a person's conduct at the moment he carries it out, rather than after the fact. This holds true even in the event of strict liability, due to the general coincidence of cause and effect. Hostility to after-the-fact determinations of liability and criminality should hardly be surprising, because being punished for doing what was previously regarded as acceptable represents an injustice of axiomatic magnitude.

192. *See supra* Part I.
193. *See supra* Part II.B.

Of course, this does not mean that an individual can always ascertain with confidence whether she is in compliance with the law. The law regularly relies on indeterminate standards to demarcate the boundaries of acceptable conduct.[194] The crucial fact, however, is as follows: individuals acting in the presence of a legal standard are on notice that the courts will judge their behavior after the fact to determine whether it aligned with social norms of "reasonableness." People, guided by counsel, can make probabilistic determinations as to the likelihood that a judge will ultimately deem their planned courses of action lawful. They can mold their behavior in a way that presents acceptable levels of risk vis-à-vis the expected gain associated with the desired behavior.

Legal indeterminacy of the preceding kind is to be distinguished from situations in which the legality of particular behavior is clear due to the lack of a contemporaneous harm, but is later revisited after the fact if injury subsequently arises. An aversion to ex post condemnation is so firmly ingrained in the social conscience that there is a constitutional prohibition on such legislative action in criminal cases. Although constitutionally permitted in civil matters, rewriting the legality of completed conduct for purposes of civil liability is fundamentally disfavored.[195]

Antitrust is therefore an outlier. Its capacity to condemn ex post what was lawful ex ante belies the spirit of society's hostility toward ex post facto laws. Prevailing jurisprudence allows plaintiffs to appeal to ultimate effects that are far removed from the challenged cause. A company that engages in commercial behavior that is then unequivocally lawful (in both the criminal and civil senses) may nevertheless later be found to have violated the U.S. antitrust laws. This phenomenon may arise regardless of the ex ante reasonableness of the relevant action and of the risk of harm attendant upon such conduct. This Article characterizes such outcomes as instances of extraneous liability. The Article's thesis is that determining the legality of a practice by appealing to extraneous factors is legitimate only to the extent to the relevant inquiry is framed in ex ante, as opposed to ex post, terms.

The Supreme Court in *du Pont* gave plaintiffs *carte blanche* to challenge mergers and acquisitions any time, no matter how far removed, after a closing when such combinations show signs of producing anticompetitive results. It is no defense that the deal was unequivocally lawful when closed. Nor is an absence of improper intent relevant.

This feature of the antitrust regime is disturbing. The potential for rewriting the legality of an action ex post, however, is not limited to the rule in *du Pont*. Mergers may be lawful due to the perceived nature of the market to self-correct promptly, thus neutralizing any supracompetitive prices. If entry or

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194. Employing another's copyrighted expression is lawful if such use is "fair." Swerving and causing an accident on the road, killing an attacker, providing professional advice that ultimately proves detrimental to a client—none gives rise to liability if the relevant action was reasonable in light of all the circumstances. Few actions governed by a standard can accurately be characterized as definitively legal or illegal at the time of their being carried out.

195. *See* Van Wyke, *supra* note 89, at 753.

incumbent expansion does not appear as expeditiously as envisioned, however, the government may be able to sue for violations of the Clayton or Sherman Acts. There are two fundamental objections. First, and worst, the rule creates perverse incentives for third parties to engage in strategic behavior. Second, because the acquisition may have been desirable ex ante from a social-welfare perspective, and since legality turns on extraneous factors (rather than the acquiring party's behavior beyond the simple act of acquisition alone), the rule remains in effect one of ex post facto condemnation. It serves to tax desirable conduct.

Other worrisome possibilities exist. A company's utilization of contracts with exclusionary effects may be legal or illegal depending on the degree to which its rivals engage in similar practices. On a broader level, it remains true that the law brings asymmetric treatment to bear on companies with different market shares that undertake precisely the same actions. It is a staple of competition law that dominant firms cannot lawfully do many things that other companies can do.

This Article argues that the time-of-suit rule of *du Pont* carries the potential for perverse application in civil cases and may in fact be unconstitutional if applied in the criminal setting. This insight would seem to foreclose the rule from *du Pont* being applied to monopolization claims under the Sherman Act. This Article similarly objects to the possibility of acquisitions being lawful or unlawful based on the strategic behavior of third parties. It also counsels against aggregation theory in cases of cumulative, exclusive contracting.

Nevertheless, it does not follow that extraneous factors are a necessarily improper subject of antitrust inquiry. The Author objects only to the ex post manner in which modern antitrust jurisprudence considers these forces. The fatal flaw with such after-the-fact analysis lies in its inescapable transformation of what were in fact stochastic influences into determinate ones. This no-fault, ex post facto condemnation carries with it a host of undesirable consequences, which run the gamut from fairness to perverse incentives. Instead, courts and agencies should approach practices that yield anticompetitive results from an ex ante basis, asking whether the challenged act was likely to trigger identifiable harms at the time the defendant carried it out. This inquiry would reveal whether the relevant behavior is ongoing or complete. Any attempt to impose liability for, or to enforce injunctive sanctions against, acts of the latter kind run afoul of this Article's rejection of "extraneous liability."

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