

# A LOOK AT BEHAVIORAL ANTITRUST FROM 2018



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## Should Antitrust Survive Behavioral Economics?

By Avishalom Tor



## The EU Google Decisions: Extreme Enforcement or the Tip of The Behavioral Iceberg?

By Amelia Fletcher



## Facts Over Theory: The Contribution of Behavioral Economics to Competition Law

By Andreas Heinemann



## Behavioral Firms: Does Antitrust Economics Need a Theoretical Update?

By Elizabeth M. Bailey



## Behavioral Economics and Antitrust Law: Hindsight Bias

By Christopher Leslie



## Behavioral Economics: Antitrust Implications

By Stephen Martin



## A Look at Behavioral Antitrust from 2018

By Max Huffman



## March to The Middle? Herd Behavior, Video Economics, and Social Media

By Adam Candeub



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## I. INTRODUCTION

Behavioral antitrust is an approach to antitrust analysis that marries the fields of behavioral law and economics and antitrust law. Its expression as an independent mode of analysis dates to early work by professors including Avishalom Tor (2002) and Maurice Stucke (2005), and in the ensuing years many others, including this author, have commented on behavioral antitrust. To a thinker inclined to disparage behavioral antitrust, it is one of a parade of challenges to the dominant mode of analysis, frequently described as Chicago School antitrust, and like other of those challenges may disappear with the retirement of its leading scholarly or political proponent. To a thinker, like this author, inclined to find behavioral antitrust useful, the approach is a sharpening of a set of tools grown dull over fifty years of single-minded application.

A review of the arguments surrounding behavioral antitrust teaches (1) the case for considering behavioral economics in antitrust analysis is as strong as it ever was; (2) the arguments that behavioral economics does nothing to inform antitrust analysis are overstated; and (3) the two conversations seem to be ships passing in the night, with neither argument really engaging the other on its own terms.

## II. BEHAVIORAL LAW AND ECONOMICS

### A. *The Social Science*

Behavioral economics, a field that has spawned at least two Nobel Prizes in recent decades (Daniel Kahneman, 2002, and Richard Thaler, 2017 – the 2001 Nobel for “information asymmetry” is not about behavioralism, but there are analogs), challenges assumptions about human behavior that are the basis for so-called “rational choice economics.” Studies of human behavior were found to disprove assumptions including that humans are rational utility maximizers, humans have consistent preferences, humans have the will-power needed to realize their preferences, humans have the intelligence needed to realize their preferences – and so on.

None of this was surprising to any honest observer of human conduct – examples of hyperbolic discounting (e.g. failing to save for retirement); the endowment effect (e.g. overpricing items when reselling on Craigslist, or low-balling when buying on Craigslist); framing (e.g. paying more than you planned because you first saw the really expensive option); and loss aversion (e.g. overly safe investing and missing out on capital growth), to name a few, are well understood and common fodder for both folk wisdom and popular press accounts. What behavioral economics proved was that there was sufficient consistency in deviations from rational choice theories to model human behavior based on those deviations, a point most compellingly made in the popular press book by Dan Ariely, *Predictably Irrational*.<sup>2</sup>

<sup>2</sup> Dan Ariely, *Predictably Irrational* (2010).

An important lesson from Ariely's (and others') demonstrations that supposedly irrational behavior was predictable is that the pejorative term "irrational," while perhaps descriptive rather than normative to an economist, is inappropriately applied when evaluating policy choices. Few would recommend legal rules designed to accommodate irrational behavior – for example, when evaluating "deception," common law and the Federal Trade Commission rely on consumers' "acting reasonably under the circumstances."<sup>3</sup> Many of the critiques of the use of behavioral economics in legal and policy analysis build on too-cute turns on the idea of irrational behavior, sporting titles like "Misbehavioral Economics," and "Law and Economics' Perfect Rationality . . . Behavioral Law and Economics' Equal Incompetence."<sup>4</sup> The importing of behavioral economics into law necessitates an understanding that behavioral economics insights improve the modeling of behavior, rather than highlight quirks.

## **B. Law and . . .**

The foundational text for behavioral law and economics may be the 1998 article by Professors Jolls, Sunstein & Thaler, *A Behavioral Approach to Law and Economics*,<sup>5</sup> which identified a number of likely applications of behavioral economics to legal rules built on rational choice economic theory. Their applications included contracting behavior, a broad topic that covers employment relationships, lending behavior, commercial activity, and dispute resolution. Behaviorally informed law and economics might show that the endowment effect, for example, undermines the Coaseian result that initial endowments are irrelevant to reaching efficient outcomes, rendering correct allocations of endowments more rather than less important – a starting point for resource allocation decisions. Understanding individuals' tendencies to engage in hyperbolic discounting gives some explanation for laws against usury, which a traditional economics account treats as an efficient arms-length transaction. Inertia leading to failing to select away from defaults suggests a policymaker might improve outcomes through "choice architecture."

*A Behavioral Approach* reaches far broader, discussing the First Amendment's "prior restraints doctrine" and environmental regulation. In the ensuing two decades, the paper has spawned an enormous academic literature covering topics including criminal law, corporate governance, labor law, health law, election law, securities law – and many other fields and sub-fields, including antitrust.

## **III. BEHAVIORAL ANTITRUST**

### **A. The Subject**

Antitrust is the most natural application of behavioral law and economics because the field is the most completely dependent on economic analysis of all of the major fields of law. (This is a deliberately aggressive claim, made with a recognition of the overweening importance of economics in corporate and securities law, contract law, administrative law, and utilities regulation, to name a few.) Innovations that improve economic analysis should work their way into antitrust. Antitrust is also a natural application of behavioral law and economics because of the process by which antitrust law develops, moving by common law rather than by statute or regulation and frequently – approaching always, at the appellate and Supreme Court levels – enjoying the benefit of expert insights by amici from the federal and state enforcers, the academy, and sophisticated think-tanks representing all political views. Antitrust law is not subject to politically motivated rule-making and has generally avoided populist legislation and baldly ideological adjudication.<sup>6</sup>

Behavioral antitrust has been much remarked in academic commentary since the initial article by Avishalom Tor in 2002, with a Westlaw search for the phrase "behavioral antitrust" turning up 112 law review articles, and approximately half again on a search for the phrase "behavioral economics" in close proximity to the word "antitrust."<sup>7</sup> Its formal adoption in the courts has been much slower – a search for the phrase "behavioral antitrust" turns up no judicial opinions – the same for variations including "behavioral economics" in close proximity to "antitrust."

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3 Federal Trade Commission, Policy Statement on Deception 2-4 (October 1983), available at [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptiontmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptiontmt.pdf).

4 Josh Wright & Judd Stone, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 *Cardozo L. Rev.* 1517 (2012); Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 *Georgetown L.J.* 67 (2002).

5 50 *Stan. L. Rev.* 1471 (1998).

6 Exceptions exist. See, e.g. Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 *Houston L. Rev.* 285 (2007) (criticizing legislation supplanting a pre-existing "modestly successful common-law scheme").

7 Searches conducted for phrase "behavioral antitrust" and ("behavioral economics" /p antitrust) in Law Reviews and Journals database, [next.westlaw.com](https://next.westlaw.com) (conducted Dec. 16, 2018).

Based partly on such database searches, Judge Ginsburg, writing in the CPI print journal, has gone so far as to say that behavioral antitrust does not offer any meaningful assistance to judges in antitrust cases.<sup>8</sup>

Such word-searching seems likely to understate behavioral antitrust's usefulness in light of the nature of behavioral economics and behavioral antitrust. As an academic discipline, behavioral economics may be separable from "other" economics, but in application, when lawyers, judges, or policy-makers apply economics to antitrust analysis, they are fundamentally trying to determine market effects from conduct or from a merger. Whether those market effects are driven by market actors' conduct that is consistent with or inconsistent with rational choice theory is not part of the question. It would be silly if it were: imagine an observed price effect from conduct, but an argument that the effect was brought about by consumers' cognitively biased behavior, and a judicial or prosecutorial determination that the effect must be ignored because its existence violated the predictions of rational choice theory.<sup>9</sup>

As one author pointed out:

Antitrust analysis has long accepted that particular firms or individuals may act in idiosyncratic ways. For example, "maverick" firms may be particularly disruptive. Behavioral economics, however, may provide a mechanism for explaining why firms or individuals behave in the way they do (e.g., why apparently irrational business plans are implemented), but, again, the fact of such behavior has long been recognized.<sup>10</sup>

Apart from indulging the tendency to characterize conduct that deviates from unrealistic assumptions as "idiosyncratic" or "irrational," this is a well-stated explanation for why behavioral economics operates under the radar in antitrust analysis.

Probably the best-known (but insufficiently recognized) example of behavioral antitrust arose well before the birth of behavioral law and economics as an academic discipline. The Supreme Court's 1992 opinion in *Eastman Kodak Corp. v. Image Technical Services*<sup>11</sup> has been much remarked as the leading example of the post-Chicago school of antitrust analysis, the Court's strongest recent pronouncement of the importance of reaching antitrust decisions in light of marketplace realities. I have argued that the consumer conduct that led to price effects, despite what the dissent contended was opportunity for the market to discipline Kodak's conduct, can best be explained by reference to lessons from behavioral economics. Well-remarked biases including hyperbolic discounting, anchoring, optimism, and ownership bias all may be in play in explaining why the market does not in fact discipline meaningful exercises of monopoly position.<sup>12</sup> Other authors have identified examples including *Microsoft Corp.*; the "Overlap Group" case in the Third Circuit; and FTC decisions or opinions by individual commissioners from recent years.<sup>13</sup>

## **B. Specific Applications**

Entry: the earliest article on behavioral antitrust exploded "the fable of entry," arguing that cognitive biases affecting decision-makers within firms rendered successful entry less, rather than more, likely – with the result that monopolizing conduct was more likely to be profitable than rational choice theory would predict.<sup>14</sup> The prediction that monopolizing conduct, such as predation strategies, are unlikely to succeed may be the best-known and most successful Chicago-School argument for noninterventionist policy, driving the results in cases like *Matsushita*, *Trinko*, and *Weyerhaeuser*. Professor Tor has argued convincingly that all entry is not equal, and much entry is unsuccessful; this is not the product of random failures but of predictable cognitive biases; and if the law were to account for this it would be more open to evidence of recoupment that historically is treated as unlikely.

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<sup>8</sup> Douglas Ginsburg & Derek Moore, *The Future of Behavioral Economics in Antitrust Jurisprudence*, 6 Comp. Pol'y Int'l 89 (2010).

<sup>9</sup> This is in fact a fair analysis of the dissent by Justice Scalia in *Eastman Kodak Corp. v. Image Technical Services*.

<sup>10</sup> Allan Shampine, *The Role of Behavioral Economics in Antitrust Analysis*, 27-Spring Antitrust 65 (2013).

<sup>11</sup> 504 U.S. 451 (1992).

<sup>12</sup> See Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 Antitrust L.J. 105 (2012).

<sup>13</sup> *Microsoft Corp. v. United States*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993); Statement of Chairman Timothy J. Muris, *Genzyme Corp./Novazyme Pharm., Inc.*, FTC File No. 021-0026 (Jan. 13, 2004); Concurring Statement of Commissioner J. Thomas Rosch at 1, *FTC v. Ovation Pharm., Inc.*, FTC File No. 0810156 (Dec. 16, 2008).

<sup>14</sup> Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 U. Mich. L. Rev. 482 (2002).

Cartelization: a common attack on traditional beliefs underlying antitrust results speaks to the understanding of cartel behavior.<sup>15</sup> The traditional treatment of cartels holds that they are fragile and unlikely to succeed in displacing competition in the long run.<sup>16</sup> This belief, best stated by Nobel Laureate George Stigler, underlies holdings like that of the Supreme Court in *Brooke Group* that a coordinated recoupment strategy is so unlikely to succeed because competitors will cheat on the coordinated price increase.<sup>17</sup> Behavioral economics may upset this understanding, demonstrating corporate decisionmaker tendencies (1) to support the group rather than to go it alone; and (2) to accept stable but lesser profits instead of maximizing profits by cheating on the cartel.

Rule of reason for vertical price agreements: in 2007 in *Leegin*, the Supreme Court reversed the 96-year-old *per se* rule and applied the rule of reason, a rule consistent with Chicago School arguments that vertical price fixing is unlikely to present harm to consumers that is not overcome by economic benefits.<sup>18</sup> A confounding problem post-*Leegin* has been how to apply the rule of reason to conduct when (1) the primary marker of net harm is the price effect of conduct; and (2) the very purpose of a vertical price fix is to increase price. Tor & Rinner argued that evidence from behavioral economics suggested overuse of resale price maintenance schemes with both anticompetitive as well as inefficient (but neutral with regard to competition) results, favoring a rule of reason treatment that more critically examined the practice. Tor & Rinner also spell out behavioralist insights that better explain inefficient uses of resale price maintenance.<sup>19</sup>

Behavioral exploitation: the most natural application of behavioral economics in antitrust targets the driving force of antitrust policy – the different sophistication of centralized, well-capitalized, repeat-player firms acting as producers and diffuse individual consumers frequently participating in the market too rarely, or too casually, to develop experience. I have termed the result “behavioral exploitation,” a label that I think on revisiting it may be more normatively charged than is appropriate.<sup>20</sup> As a theory of harm, the argument goes this way. One side of the transaction – in most cases the seller side, although antitrust accommodates theories of monopsony power as well – develops a sophisticated data-driven understanding of drivers of consumer decisions. The profit-maximizing strategy is to use that data to enable it to raise prices and reduce costs without sacrificing market share to competitors. This can be achieved by targeting bases for consumer decisions that are different from price and quality, by targeting well-known cognitive biases. That this occurs in fact is firmly established in marketing literature that long predates the discussion of behavioral antitrust or behavioral law and economics generally.

Behavioral exploitation is likely to succeed in markets for durable goods, in which consumers engage rarely – maybe, in the case of a house purchase, once in their lives. Daniel Heidtke and I develop this explanation for what were retrospectively improvident (but were prospectively understandable) consumer decisions that led to the 2007 financial crisis. It is also likely to succeed in markets with substantial aftermarkets. *Kodak* did this by exploiting consumers’ realistic inability to engage in life-cycle pricing for enterprise-scale photocopy machines. Other examples of behavioral exploitation as profitable strategies include sales of technology peripherals and airline baggage charges. Because the success of such a strategy will turn on its sophistication, monopoly power in data-rich markets is likely to be enhanced through behavioral exploitation. And because nothing about the strategy is deceptive, as the term is used in consumer protection law, it has not been attacked as a matter of common law or regulation governing individual consumer transactions.

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15 Avishalom Tor, *Understanding Behavioral Antitrust*, 92 Tex. L. Rev. 573 (2014).

16 George Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964).

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

18 *Leegin Creative Leather Prods. v. PSKS Unltd.*, 551 U.S. 877 (2007).

19 Avishalom Tor & William Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason after Leegin*, 2011 U. Ill. L. Rev. 805.

20 Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 Antitrust L.J. 105 (2012); Max Huffman & Daniel Heidtke, *Behavioral Exploitation Antitrust in Consumer Subprime Mortgage Lending*, 4 Wm. & Mary Pol’y Review 77 (2012).



## IV. CRITIQUES AND RESPONSES

### A. “Not Ready for Prime Time”

Professor Wright & Judd Stone wrote a strongly-worded rebuke of behavioral antitrust and a criticism of its proponents that has become the go-to reference for critics. In *Misbehavioral Economics: The Case Against Behavioral Antitrust*, Wright & Stone set up straw men and then ably knock them down again. First, they argue that proponents of behavioral antitrust uniformly favor greater intervention, a point several, including critics, have debunked. Second, they contend the enterprise does not offer “clear policy implications for the law.” As I note below, I think in part the authors are simply talking about something different from what behavioral antitrust proponents are discussing. But, too, “clear policy implications” overstates what any social science can do for legal rules. Wright’s and Stones’ argument is captured by their pithy phrase, “not ready for prime time.” While it is possible two Nobel Prizes in the field of behavioral economics would convince the authors otherwise, the more important point is that the use of behavioral economics in antitrust is best understood as using economics as evidence, not as a policy tool, and in the space of factual development, whether for adjudication or policy-making, any provable fact is “prime.”

### B. Paternalistic and Accepts “Irrational” Behavior

A number of critics have attacked behavioral law and economics generally for its paternalism and its preventing those infected with biases from learning how to act rationally. These arguments have more weight in some policy uses of behavioral economics than they do in the context of antitrust. At its most paternalistic, behavioral economics has been suggested as a means for “choice architecture,” with an example from the Thaler and Sunstein book *Nudge* being the ordering of food in cafeteria lines: desserts first, people eat more sugar; vegetables first, people eat more vegetables.<sup>21</sup> I concede the failure of that particular application of behavioral economics, taken in light of the known tendencies of elected or appointed decision-makers to make grievous errors on topics like nutrition.

The paternalism critique becomes hollow when applied to behavioral antitrust. No decision-maker is tasked with achieving a market outcome that accommodates biased decision-making in antitrust. Rather, conduct that interferes with unfettered markets to negative effect is challenged, and behavioral economics can help to determine whether there is a harmful effect from the conduct. Anti-paternalism does not, in this context, have the effect of protecting us from short-sighted or improperly influenced government agents seeking to limit consumer choice. If anything, it has the impact of precluding oversight of private market interference that is provably causing harm. Anti-paternalism, as applied to behavioral antitrust, is merely a prescription ignoring information that informs whether and how to enforce the law.

A related critique speaks to the necessity of cognitively biased regulators and the effect that can be expected to have on enforcement.<sup>22</sup> In an area of first-order regulation, where government employees establish prices or dictate menus or determine building design, that critique has some force, though it remains imperfect. (Training and experience can overcome cognitive biases.) Antitrust is not an area of first-order regulation, and neither courts nor agencies dictate terms of doing business outside of remedies imposed through the adversarial process. Bias that exists is likely to be muted by that process and the interplay of the many actors involved. Even if it is not, there is no reason to believe that *failing to consider* biases possessed by market actors might somehow mitigate the effect of biases possessed by enforcers or courts.

### C. Conflicting Biases

Several authors point out that biases seemingly conflict with one another and which bias is likely to overbear which may be difficult or impossible to predict. According to one paper: “The sheer number of cognitive biases upon which the discipline focuses confounds predictability, not least because their effect on behavior is multi-directional. Any policy prescription based on those biases will inevitably be incoherent and capricious.”<sup>23</sup> These authors continue to list biases that are in counterpoise, “biases suggesting lack of substitutability” followed by “biases indicative of rapid substitution”; “biases suggesting that entry is more likely” and “biases suggest that less entry will occur” – and so on.

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<sup>21</sup> Richard Thaler & Cass Sunstein, *Nudge* (2009).

<sup>22</sup> James Cooper & William Kovacic, *Behavioral Economics and its Meaning for Antitrust Agency Decision-Making*, 8 J. Law, Econ., & Pol’y 779 (2012).

<sup>23</sup> Alan Devlin & Michael Jacobs, *The Empty Promise of Behavioral Antitrust*, 37 Harv. J.L. & Pub. Pol’y 1009 (2014).

The conflicting biases argument is the most difficult to confront head-on, because it goes to the heart of the predictability of deviations from rational choice theory. Take the entry argument from the 2002 Tor paper: if the traditional rule is that recoupment is unlikely in the presence of entry, leading to a *de facto* higher burden to bring a predation case, upsetting that traditional rule necessitates a reliable showing of the insufficiency of entry. The Devlin & Jacobs argument, and others like it, follows Wright & Stone in conflating evidentiary facts with recommendations for broad changes to policy. Tor did not argue that recoupment should not be required as an element of a predation claim, but that recoupment was possible even in the presence of entry. The reason does not depend on what way it is that observed entry fails to check monopoly pricing, but only on the fact that the entry is not sufficient, in terms of both scale and sustainability. The same general response holds for other theory-based critiques of behavioral arguments.

## V. SHIPS PASSING IN THE NIGHT

Critics and proponents sometimes seem to be having two different conversations that are as ships passing in the night in their failure to engage with one another. A proponent of behavioral antitrust may argue that a cognitive bias may support an observed price effect, strengthening a plaintiff's case for enforcement of the law. A critic may state that behavioral economics does not provide a unified theory and therefore antitrust law cannot depend upon it. Both statements, in their respective spheres of application, can be true. One author characterizes Professor Wright's critique of behavioral antitrust, "While mentioning individuals, he is improperly focused on the aggregate. His approach is one of an economist, not a litigator. But the difference between economics and litigation is critical to properly understand the value of behavioral economics."<sup>24</sup>

In a 2005 article, Professors Lopatka & Page outlined the different uses of economics in antitrust analysis, relying on the core difference between rule and fact.<sup>25</sup> They attributed the importance of economic expertise on factual questions to the decline of *per se* rules, a process that has accelerated in the past four decades, with most conduct formerly subject to *per se* rules now analyzed under the rule of reason.

Economics in antitrust operates on two distinct planes. One is the theoretical plane on which policy is made and lawmaking is conducted. This plane is subject to change with political and historical movements, but for the past 40 years has been largely occupied by theories of economic regulation and efficiency most commonly associated with the Chicago School. These tell us that antitrust law maximizes welfare (whose welfare remains debated). This broad theoretical plane is where we look for standards, among others, such as:

- economic justifications are required to overcome anticompetitive effects;
- workers and shareholder are not legitimate antitrust plaintiffs.

Note that rendering these theoretical does not render them immutable – consumer-focused and efficiency-minded antitrust has enjoyed a remarkable run, but is increasingly isolated on a world-wide scale and has a large and increasing number of detractors in the U.S. as well.

The theoretical plane also gives us the *per se* rules both for and against liability. The critics of behavioral antitrust all seem to be operating on the theoretical plane, arguing that when deciding whether to outlaw conduct on a *per se* basis one must average over literally billions of transactions to find a rule that applies for more of them than any other rule. They are thus concerned that an argument to the effect of "but one or more cognitive biases may be at play and we need to accommodate those biases" would clog the system with unwieldy individualized determinations.

The second is the practical plane, where the rules are applied and results in individual cases reached. On the practical plane, economic methods can be used to determine the impact of a single identified course of conduct on a single identified consumer, or group of consumers sufficiently similar in situation to constitute a class. It is here that proponents of behavioral antitrust see its use most readily. If a rule allows proof of an impact, and data suggest the existence of that impact, behavioral economics can offer an explanation for those data. An expert might opine, "yes, we have identified a price effect, and yes, that is sustainable even in the absence of entry barriers."

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<sup>24</sup> Christopher R. Leslie, *Can Antitrust Law Incorporate Insights from Behavioral Economics?*, 92 Tex. L. Rev. See Also 53 (2014).

<sup>25</sup> John Lopatka & William Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 Cornell L. Rev. 617 (2005).

One view is that this after-the-fact explanation is “decidedly prosaic” because “antitrust law requires . . . *ex ante* predictions.”<sup>26</sup> As a practical matter that is frequently not true. When things happen in markets, the ability to explain those things in economic terms may be essential to the application of antitrust rules. This critique also proves far too much. It ignores that after the fact explanations are precisely the experience on which future “*ex ante* predictions” may be made.

Those favoring behavioral antitrust do not, to my knowledge, argue that the enterprise necessitates upending existing standards. It is possible, however, that could one day occur. *Per se* rules develop when experience shows vanishingly small instances of contrary outcomes – for example, if conduct is almost never efficient, it would be illegal *per se*, or if conduct is almost never *inefficient*, it would be legal *per se*. Repeated experiences with conduct and its actual market effects may lead to an adjustment of the standards governing that conduct. This could happen because the behavioralist insight is incorporated into the fabric of antitrust economics at the theoretical level, presumably through appellate rule-making, or it could happen because Congress or the agencies grew tired of waiting for the courts to recognize what experience had proved and adopted the change by legislation or regulation.

## VI. CONCLUSION

No different from any economically informed means of fact gathering, behavioral antitrust is a tool that helps to answer antitrust’s fundamental questions of whether conduct or changes in market structure will lead to harmful effects. Proponents of its use have spelled out a number of specific instances in which behavioral economics gives a clearer picture of how a market might be expected to operate. Their arguments are explanatory in nature and frequently help to understand why an observed effect has occurred, whether that effect is a cartel surviving longer than theory would predict, a merger leading to a greater or lesser price effect than expected, or monopoly power not being eroded by successful entry despite apparent profit opportunities in the market – among a significant and increasing number of examples. None of the challenges to behavioral antitrust has meaningfully confronted these examples on their own terms.

Behavioral antitrust is also not so new as the flurry of writing over the past decade would suggest. Courts interpreting and applying the antitrust laws have always understood their role to be to determine whether conduct or changes in market structure cause, or can be expected to cause, harm out of proportion to any benefit they produce. Those courts have been receptive to evidence of firm or consumer conduct regardless whether it reflects “rational choice” or decisions that best can be explained as based on cognitive biases.

A question that remains unanswered is the use of behavioral antitrust in defining antitrust standards, including, for example, the sorts of conduct subject to *per se* rules or the rule of reason. The progress of antitrust is best understood as a process of evaluating the effects by experience rather than by theory. That experience will include observations of conduct subject to cognitive biases and, where those observations suggest something is in the main harmful rather than not, or vice versa, a standard may change or solidify. In this way, behavioral antitrust will permeate antitrust more broadly than in individual cases.

At bottom, behavioral antitrust teaches that what we expected in any given circumstance may have been misguided. Better informed by new learning, courts and policy-makers can reach better results. As this happens often enough foundational expectations will improve and standards will adapt to reflect those. The law has always progressed this way and only the most outcome-oriented of reasoning would suggest it should not do so where behavioral antitrust is concerned.

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<sup>26</sup> Devlin & Jacobs, *supra* note 23, at 1051.





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