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Reintroducing Intent into Predatory Pricing Law

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REINTRODUCING INTENT INTO PREDATORY PRICING LAW

ABSTRACT

Predatory pricing occupies a strange position in the antitrust laws. Normally, low prices are one of the major goals of antitrust law because they reflect competition and are generally beneficial to consumers. However, in some situations, the antitrust laws condemn prices that are too low as predatory: a company may be able to set prices arbitrarily low to gain monopoly power by excluding rivals or forcing them to acquiesce to its price leadership, and the company may then charge monopoly prices to the detriment of consumers. Separating normal, competitive low prices from predatory low prices is a difficult task, which, if not managed correctly, may completely frustrate the purpose of the antitrust laws.

Prior to the Supreme Court's decision in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, courts used wide-ranging standards to distinguish between competitive low prices and anticompetitive predatory prices. The Court's decision foreclosed some more holistic standards by mandating two prerequisites for any predatory pricing claim: (1) below-cost pricing and (2) feasibility of recoupment. Despite the fact that* Brooke Group *did not foreclose other elements or considerations, courts have tended to treat its prerequisites as dispositive. This Comment argues that such an interpretation has resulted in an overly inclusive rule that is likely to become increasingly problematic given recent scholarship advocating expansion of the scope of the current doctrine. Current law is missing a key element that should be required for any predatory pricing claim: predatory intent. This Comment argues that adding an intent element to the current doctrine would be perfectly consistent with* Brooke Group *and, more broadly, with policies underlying antitrust law. Properly implemented, an intent requirement would add clarity to existing law by producing a theoretically complete definition of predatory pricing and would provide an important limiting principle on the scope of the law.*

INTRODUCTION

Small Town is home to four grocery stores and five gasoline filling stations.[1] Local Grocery, a regional subsidiary of National Grocery, operates two of the grocery stores. Each of its two stores operates a gas station. Gas Filling Services, a regional gasoline wholesaler, operates two of the town's gas stations. Ray's Filling Station operates the remaining gas station. Ray's is a privately owned, local business that has been in operation for thirty-five years.

Several years ago, Local Grocery began a promotion it called the "Grocery Discount Program." Under the program, customers could earn discounts at its gas stations based on the amount they spent at its grocery stores. For the first few months of the program, customers who purchased \$25–\$49.99 in groceries earned \$0.04 per gallon off the posted price of gas, and customers who purchased \$50 or more earned an \$0.08-per-gallon discount. After the first few months, Local Grocery changed the terms so that a purchase of \$35 or more earned a \$0.15-per-gallon discount. Ten months later it deepened the discounts again: a purchase of \$50 or more earned a \$0.20-per-gallon discount. The program was wildly popular among Local Grocery's customers.

However, the program was not popular with Gas Filling Services and Ray's Filling Station. They could not keep pace with Local Grocery's low gas prices, and they lost a significant amount of money as a result. After thirty-six years of operation, Ray's Filling Station was forced to shut down. Gas Filling Services and Ray's Filling Station take issue not only with the effect of Local Grocery's discount program on their profit margins but also with its legality. They file an antitrust lawsuit against Local Grocery, alleging that it attempted to monopolize the local gas filling business through a scheme of predatory pricing. If Gas Filling Services and Ray's Filling Station prevail, they are entitled to treble damages.[2]

Small Town's story illustrates the central difficulty in predatory pricing law. Normally, antitrust laws are aimed at encouraging low prices because they

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1 This fact pattern is based on *Parish Oil Co. v. Dillon Cos.*, 523 F.3d 1244 (10th Cir. 2008). Note that this case was brought under Colorado's Unfair Practices Act, COLO. REV. STAT. §§ 6-2-101 to -117 (2011), rather than under federal antitrust laws. *Parish Oil Co.*, 523 F.3d at 1247. This Comment deals only with federal antitrust laws. The issues, however, are essentially the same.

2 *See* 15 U.S.C. § 15(a) (2006).

reflect competitive markets and benefit consumers.[3] However, predatory pricing doctrine recognizes that, in some situations, low prices are harmful to competition and to consumers. Companies may artificially lower prices to achieve monopoly power and thereafter charge supracompetitive prices to the detriment of the public.[4] The problem arises in attempting to separate competitive low prices from anticompetitive low prices that are likely to lead to a monopoly. From the information available, the Small Town scenario seems consistent with each.[5]

But how do we go about separating competitive low prices, which are the very goal of the antitrust laws, from anticompetitive predatory prices, which the antitrust laws forbid? It would seem logical to begin with a clear definition of what constitutes predatory pricing and then to develop rules for determining when prices fit that definition. However, this is not how the law has developed. Courts and commentators have instead worked backwards, developing various tools for identifying when low prices have anticompetitive effects without first agreeing on any one definition of a predatory pricing scheme.[6] As a result, courts have used fairly wide-ranging standards for assessing predatory pricing claims.[7] The Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* foreclosed some of these standards by making clear that a predatory pricing claim must satisfy two prerequisites: (1) prices were below some measure of cost (though it declined to specify the appropriate measure), and (2) it was feasible that the alleged predator could recoup the initial losses it sustained by pricing below cost.[8] The second prerequisite is important because, if it is not met, a predatory scheme would not be profitable. Because of the flexibility of the *Brooke Group* prerequisites, the decision

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3 *See generally* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 3–7 (3d ed. 2005) (explaining why, as a matter of basic economic theory, competitive markets are a chief goal of antitrust law).

4 *See* 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 723a, at 22 (3d ed. 2008).

5 The fact that Local Grocery's discount program ran Ray's Filling Station out of business is not particularly relevant. The antitrust laws are aimed at protecting "competition, not competitors." Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis omitted)). In other words, harming competitors through low prices is perfectly compatible with normal competition.

6 *See infra* Part I.C.

7 *See generally* MARGARET C. LING ET AL., AM. BAR ASS'N, PREDATORY PRICING LAW: A CIRCUIT-BY-CIRCUIT SURVEY 20–70 (Barbara O. Bruckman ed., 1995) (explaining the standards utilized by each of the federal circuits).

8 *Brooke Grp.*, 509 U.S. at 222–24.

really only foreclosed more holistic standards[9] and did not mandate that its two prerequisites were to be the only elements of a predatory pricing claim. However, since *Brooke Group*, the overwhelming tendency of courts has been to hold that these prerequisites are necessary and sufficient to establish the existence of predatory pricing.[10]

This Comment argues that this interpretation is misguided. This Comment argues that courts should add a third requirement—predatory intent—and that doing so would be perfectly consistent with *Brooke Group*. The Comment proceeds in four parts. Part I provides a background on the role of predatory pricing in the antitrust laws and describes the current status of the law. Part II identifies problems with the current law and predatory pricing doctrine generally. It also briefly discusses several other proposals for reforming the law and considers how these proposals may contribute to the problem in the future. Part III identifies intent as the element lacking in current analyses and discusses the role of intent in the law before and after *Brooke Group*. Finally, Part IV argues that intent should be explicitly required as an element of any predatory pricing claim. This final part clarifies the concept of intent and argues that requiring this element would be more faithful to antitrust law and policy, and would provide an important limiting principle on the scope of the law.

I. BACKGROUND: THE ROLE AND STATUS OF PREDATORY PRICING LAW

Since their inception, the antitrust laws have condemned the practice of predatory pricing.[11] While predatory pricing's illegality has long been a part of the American legal tradition, there has been, and remains, much confusion about the legal and practical limits of the formal predatory pricing doctrine.[12] Then-Professor Easterbrook once suggested that "we have so many theories [of

9 *See, e.g.*, McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1502 (11th Cir. 1988) (explaining a standard under which predatory intent is determinative and the relation between price and cost merely allocates the burden).

10 *See infra* Part III.B.

11 LING ET AL., *supra* note 7, at 9–10 (stating the difficulty early cases had in defining predatory pricing).

12 *See id.* at 1 (discussing the difficulty of defining the doctrine); Daniel A. Crane, *The Perverse Effects of Predatory Pricing Law*, REG., Winter 2005–2006, at 26, 26 ("In the early years . . . courts frequently used conclusory epithets . . . to condemn price-cutting by dominant firms without undertaking any meaningful inquiry . . . ."); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 284 (1977) ("Until recently predatory pricing has been a relatively vague concept in antitrust law. This may be because emotive terms, such as predatory pricing, do not invite and sometimes defy analysis." (footnote omitted)).

predatory pricing] for the same reason that 600 years ago there were a thousand positions on what dragons looked like."[13] While such a suggestion is hyperbole, it does illustrate the elusiveness of the concept. This Part introduces that concept: section A discusses its role within the antitrust laws, section B discusses the applicable statutes, and section C provides a summary of the current framework for analyzing predatory pricing claims.

A. The Role of Predatory Pricing in the Antitrust Laws

The general idea of predatory pricing is that a company may monopolize, or attempt to monopolize, a market by setting its prices artificially low. By charging otherwise-unreasonably-low, nonremunerative prices, a company may exclude rivals or coerce them into following its prices, rather than continuing legitimate price competition.[14] After a company gains monopoly power through this pricing strategy, it recoups the losses it incurred from the low prices by charging supracompetitive prices and realizing monopoly profits.[15] The antitrust laws target this behavior because of its anticompetitive effects.[16]

The difficulty with predatory pricing doctrine is that, in many ways, it seems to be at odds with the objectives of antitrust law: ensuring vigorous competition and low prices for consumers.[17] Aggressive price reductions—even those that eliminate competitors—are generally thought to be pro-competitive and thus beneficial to consumers.[18] Predatory pricing obscures this notion and often seems to confuse the preservation of competitors with the preservation of competition.[19] This obfuscation of antitrust policy has led one

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

[14] AREEDA & HOVENKAMP, *supra* note 4, ¶ 723a, at 22.

[15] *Id.*

[16] *Id.*; *see also* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1399 (7th Cir. 1989) ("[T]he gravamen [of predatory pricing] is that the aggressor sold goods for too little money, hoping to cripple or discipline rivals so that it might sell its wares for a monopoly price later, recouping the losses and adding a hefty profit, to the detriment of consumers."); Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 220–21 (1979) ("The primary objective of antitrust policy is to promote full and fair market competition and to reap the benefits that competition brings with it. Stated in negative terms, the goal is to discourage monopoly, monopolization, and associated monopoly behavior and the inefficiencies they generate." (footnote omitted)).

[17] *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 723a, at 22; ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50–51 (1978); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 50–51 (3d ed. 2005).

[18] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–24 (1993).

[19] *See* Joskow & Klevorick, *supra* note 16, at 221.

commentator to conclude that "[p]redatory pricing is a paradoxical offense."[20] Determining the proper reach of the doctrine so as to square it with the rest of antitrust law is essentially the problem that has plagued courts and commentators.

Some scholars—notably those belonging to the Chicago School—have argued for the outright rejection of the doctrine, suggesting that predatory pricing strategies are irrational and virtually nonexistent.[21] In their views, such a strategy is unlikely to be profitable for a number of reasons. For a firm to employ a strategy of predation, it would have to incur substantial losses by selling below cost for a potentially significant period of time.[22] Losses would be compounded by the fact that, by cutting prices, the firm would simultaneously be expanding output.[23] Furthermore, the firm's entire plan would hinge on its ability to recoup these losses by charging supracompetitive prices for some duration thereafter, which would be difficult because (1) consumers might thwart its efforts by stockpiling in the low-price period, (2) new entry into the monopolized market would be relatively easy unless barriers to entry were high, and (3) the amount recouped would have to be great enough to offset the loss of the time value of its predatory investment and the uncertainty that its strategy would be effective.[24] Given the difficulties inherent in employing a strategy of predatory pricing, this group of scholars concluded that such a strategy is very unlikely to be employed, and because it is very difficult to distinguish predatory strategies from ordinary competition, it is not worth attempting to police the practice: recognizing predatory pricing claims would be more likely to protect competitors than to protect competition.[25]

Other scholars argued that, despite the potential difficulties the doctrine presents, the anticompetitive effect of the practice brings it within the proper scope of the antitrust laws.[26] Rather than dispensing with the doctrine, these scholars sought to establish rules that would enable courts to distinguish

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20 Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 2 (2005).

21 *E.g.*, John S. McGee, *Predatory Price Cutting: The* Standard Oil *(N.J.) Case*, 1 J.L. & ECON. 137, 142–43 (1958); *see also* Jonathan B. Baker, *Predatory Pricing After* Brooke Group*: An Economic Perspective*, 62 ANTITRUST L.J. 585, 586–89 (1994).

22 *See* BORK, *supra* note 17, at 148–49; Easterbrook, *supra* note 13, at 268, 275; McGee, *supra* note 21, at 139.

23 *See* BORK, *supra* note 17, at 149; Easterbrook, *supra* note 13, at 268.

24 BORK, *supra* note 17, at 149–52; Easterbrook, *supra* note 13, at 269–75.

25 BORK, *supra* note 17, at 154–55; Easterbrook, *supra* note 13, at 333–37.

26 *See, e.g.*, Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 697 (1975).

between predatory strategies and ordinary competition.[27] More recently, some commentators have perceived that predatory pricing, far from being a rarity, is actually quite prevalent and have devised broader standards to combat it.[28] In sum, scholarship relating to the proper scope of predatory pricing law is all over the map. However, the mainstream view is that predatory pricing is rare but that antitrust law does have a role in policing it.[29]

B. Statutory Coverage

The primary statutory provisions applicable to predatory pricing claims are section 2 of the Sherman Act[30] and the Robinson–Patman Act.[31] Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, or with foreign nations."[32] "[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[33]

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27 *See id.* at 699–700 ("[W]e will attempt to formulate meaningful and workable tests for distinguishing between predatory and competitive pricing by examining the relationship between a firm's costs and its prices."); Joskow & Klevorick, *supra* note 16, at 223 ("[T]he best way to assess whether current behavior is predatory is to evaluate its expected effects on long-run market outcomes."); F.M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 890 (1976) (summarizing proposed deviations from simple, cost-based rules); Williamson, *supra* note 12, at 306–15 (discussing the optimality of various potential rules).

28 *E.g.*, Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2262–74 (2000); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 941–43 (2002).

29 *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226–27 (1993); AREEDA & HOVENKAMP, *supra* note 4, ¶ 723a, at 22–23.

30 Sherman Act, ch. 647, § 2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 2 (2006)).

31 Robinson–Patman Antidiscrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. § 13(a)). These are not the only statutes under which predatory pricing claims might arise. For example, claims may also arise under section 5 of the Federal Trade Commission Act, *e.g.*, E.I. DuPont de Nemours & Co., 96 F.T.C. 653, 655 (1980) (considering litigation pursuant to section 5 of the Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45)), or under state unfair competition laws, *e.g.*, Parish Oil Co. v. Dillon Cos., 523 F.3d 1244, 1247 (10th Cir. 2008) (considering litigation pursuant to Colorado's Unfair Practices Act, COLO. REV. STAT. §§ 6-2-101 to -117 (2011)).

32 15 U.S.C. § 2. Predatory pricing claims are most frequently brought as attempted monopolization cases, rather than as completed monopolization cases. *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 724a, at 36. For this reason, this Comment deals only with the former.

33 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

The Robinson–Patman Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.[34]

Price discrimination does not have much meaning: it simply means a "price difference."[35] However, the Act does not prohibit all price differences—only those that threaten to injure competition or create a monopoly.[36] Under the Act, there are two types of violations: primary-line violations and secondary-line violations. "Primary line violations are directed at injuring competition with the discriminating seller's direct competitors, whereas secondary line violations are directed at injuring competition among the discriminating seller's customers."[37] Though the vagueness of the respective statutes could lead to different applications of each, predatory pricing is essentially the same under either statute: a business has set unreasonably low prices to gain monopoly power by excluding or coercing rivals.[38] The statutes, ultimately, provide little clarification.[39]

C. Brooke Group *and the Current Status of the Law*

With little statutory guidance, predatory pricing law has been mostly judge-made and heavily influenced by academic proposals. A persisting problem with the development of the law is that courts and commentators have had difficulty even agreeing on a definition of predatory pricing.[40] Rather than developing standards from a unified definition, courts have, over time, developed various tools for distinguishing between competitive and

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34 15 U.S.C. § 13(a).

35 Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993) (quoting Texaco Inc. v. Hasbrouck, 496 U.S. 543, 558 (1990)).

36 *See* 15 U.S.C. § 13(a).

37 Able Sales Co. v. Compañía de Azúcar de P.R., 406 F.3d 56, 60 (1st Cir. 2005).

38 *See Brooke Grp.*, 509 U.S. at 222; A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1399 (7th Cir. 1989).

39 The statutes, however, are somewhat useful in determining the proper limits of the doctrine even if they do not clarify exactly what the offense is. *See infra* Part IV.

40 *See* Joskow & Klevorick, *supra* note 16, at 219.

anticompetitive prices.[41] Three major tools developed: (1) analyzing the alleged predator's price–cost relationship, (2) examining the market to determine whether recoupment was feasible, and (3) focusing on the alleged predator's intent. Prior to the Supreme Court's decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, courts employed wide-ranging standards that utilized some combination of these tools.[42]

Most courts focused on whether the defendant's prices were below its costs; however, there were a number of measures of costs that courts used.[43] In a seminal article, Professors Areeda and Turner argued that the theoretically correct measure was marginal cost; prices below this measure, they argued, were economically irrational unless the firm was employing a predatory strategy.[44] Because of the difficulties of measuring marginal cost, they proposed using average variable cost (AVC) as a proxy.[45] However, other scholars criticized the Areeda–Turner rule on a number of grounds.[46] As a result, the Areeda–Turner rule was influential but not uniformly embraced; instead, courts utilized a number of different measures of cost.[47] In addition to the price–cost relationship, the recoupment inquiry gained traction as a relatively easy-to-employ filtering mechanism.[48] And some courts utilized

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41 *See Rose Acre Farms*, 881 F.2d at 1400–01 (reviewing various approaches developed by courts to distinguish between competitive and anticompetitive prices).

42 *See infra* Part III.

43 *See Rose Acre Farms*, 881 F.2d at 1400. *See generally* MARGARET C. LING ET AL., *supra* note 7, at 25–70 (discussing the measures of cost used in each circuit).

44 Areeda & Turner, *supra* note 26, at 712–13. Marginal cost is the incremental cost of each additional unit of output; it is purely a function of variable costs. *Id.* at 700.

45 *Id.* at 716–17. AVC, as the name suggests, is "the sum of all variable costs divided by output." *Id.* at 700.

46 *See, e.g.*, William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1, 2–4 (1979) (criticizing the "static analysis" of the Areeda–Turner rule for overlooking the "intertemporal" nature of predatory pricing); Joskow & Klevorick, *supra* note 16, at 222 ("[T]o dismiss entirely an assessment of long-run effects, as for example Areeda and Turner seem to do, is to dismiss the essence of the predatory pricing problem." (footnote omitted)); Scherer, *supra* note 27, at 869 ("[Areeda and Turner's] analysis of what it means to set a price below marginal cost is imprecise and incompletely developed. . . . [It] leaves out important variables . . . ."); Williamson, *supra* note 12, at 285–86 ("[The Areeda–Turner] marginal cost pricing rules . . . may not yield the immediate social welfare gains that Areeda and Turner attribute to them and, more importantly, . . . make no allowance for strategic behavior by dominant firms.").

47 *See generally* MARGARET C. LING ET AL., *supra* note 7, at 25–70 (discussing the standards utilized in each circuit).

48 *See, e.g.*, Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986); Ind. Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989); Joskow & Klevorick, *supra* note 16 at 222–23.

more holistic standards that used considerations such as intent as the ultimate touchstone for identifying predation.[49]

Brooke Group settled some—and failed to settle other—disputes. It made clear that, whether a claim arises under the Sherman Act or the Robinson–Patman Act, the law is essentially the same. Furthermore, it set out two prerequisites to recovery in any predatory pricing claim. Under *Brooke Group*, a plaintiff must show that the defendant (1) set prices "below an appropriate measure of its . . . costs"[50] and (2) had a "reasonable prospect" (under section 2(a) of the Robinson–Patman Act), or "a dangerous probability" (under section 2 of the Sherman Act), "of recouping its investment in below-cost prices."[51] The Court affirmed the court of appeals decision—upholding the judgment notwithstanding the verdict—because the plaintiff, Liggett, failed to establish that Brown & Williamson had a reasonable prospect of recouping its predatory investment.[52] The Court therefore emphasized to lower courts its earlier stated view that "predatory pricing schemes are rarely tried, and even more rarely successful."[53] Its analysis suggested to courts that the bar in predatory pricing claims should be high;[54] courts should be skeptical of predatory pricing claims and should scrutinize the feasibility of recoupment. However, the Court expressly declined to settle the split among the lower courts as to the appropriate measure of cost to consider.[55] Furthermore, the Court only established pricing below cost and feasibility of recoupment as prerequisites, leaving open the status of other considerations.[56]

Following *Brooke Group*, the overwhelming tendency of courts has been to hold that plaintiffs fail to satisfy the two prerequisites.[57] As a result, the

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49 See *infra* Part III for a more detailed discussion of the role of intent.

50 Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993).

51 *Id.* at 224.

52 *Id.* at 231–32.

53 *Id.* at 226 (quoting *Matsushita*, 475 U.S. at 589).

54 *See id.* ("These prerequisites . . . are not easy to establish, but they are not artificial obstacles to recovery . . . .").

55 *See id.* at 222 n.1 ("Because the parties in this case agree that the relevant measure of cost is average variable cost . . . we again decline to resolve the conflict among the lower courts over the appropriate measure of cost."). The circuits remain split as to what the appropriate measure of cost is to satisfy the first prong of the *Brooke Group* standard. Some follow the Areeda–Turner approach of using marginal cost (or average variable cost as a proxy), while others use average total cost or some other measure. *Compare, e.g.*, Int'l Air Indus., Inc. v. Am. Excelsior Co., 517 F.2d 714 (5th Cir. 1975) (using a short-run profit-maximizing test), *with* Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917 (6th Cir. 2005) (using average variable cost).

56 See *infra* Part III for a discussion of the role of intent in predatory pricing claims after *Brooke Group*.

57 *See* Crane, *supra* note 20, at 4 ("[A]lthough it is accepted wisdom that no predatory pricing plaintiff has won a verdict since *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, plaintiffs have recently

Court's standard has come under attack as being overly harsh and nearly impossible to satisfy.[58] This Comment maintains that the *Brooke Group* standard does not set an artificially high bar for predatory pricing claims and is not overly harsh to plaintiffs. Quite the contrary: the *Brooke Group* standard is not exacting enough. The current standard sets out requirements that are—and should be—necessary for a predatory pricing claim but should not be sufficient. The current standard is therefore overly broad and risks condemning behavior that poses none of the risks of true predatory pricing.

II. CURRENT PROBLEMS WITH PREDATORY PRICING AND RECENT PROPOSALS

Recent commentary has focused on the fact that, since the Supreme Court's decision in *Brooke Group*, no plaintiff has ultimately succeeded in a claim of predatory pricing in the federal courts.[59] As a result, it might be argued that any debate over predatory pricing law is now purely academic. However, there are several reasons to believe that the contours of predatory pricing law continue to have practical significance and pose substantial concerns.

Conclusory statements that no plaintiff has prevailed since *Brooke Group* are somewhat misleading. Plaintiffs have won some cases in court and have obtained significant settlements in others.[60] Furthermore, despite their low

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won some predatory pricing cases and procured substantial settlements in others." (footnotes omitted)); Edlin, *supra* note 28, at 941 ("Since 1993, when the Supreme Court decided *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, no predatory pricing plaintiff has prevailed in a final determination in the federal courts." (footnote omitted)).

[58] *See, e.g.*, Bolton et al., *supra* note 28, at 2241; Edlin, *supra* note 28, at 941–43.

[59] Edlin, *supra* note 28, at 941; Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 312; Kimberly L. Herb, Note, *The Predatory Pricing Puzzle: Piecing Together a Unitary Standard*, 64 WASH. & LEE L. REV. 1571, 1574 (2007). There are at least a couple of reasons to believe that this does not indicate an overly rigid doctrine. First, plaintiffs' lack of success may reflect judges' skepticism about predatory pricing claims more than a strict legal standard. Second, because of the potentially ruinous size of verdicts in such cases, parties faced with an adverse judgment have a strong incentive to settle. Indeed, a good many have. *See* Crane, *supra* note 20, at 16 (explaining the inducement to settle, noting that "many predatory pricing lawsuits are so-called bet-the-company events").

[60] *See* LePage's Inc. v. 3M (Minn. Mining & Mfg. Co.), 324 F.3d 141, 145 (3d Cir. 2003) (en banc) (noting a $22.8 million jury verdict, trebled to $68.5 million plus interest, in the trial court); Kinetic Concepts, Inc. v. Hillenbrand Indus., 262 F. Supp. 2d 722, 725–26 (W.D. Tex. 2003) (noting a $173.6 million jury verdict that would have been trebled to $520.8 million, but the case was dismissed upon settlement); *Brunswick to Settle Pricing Suits for $65 Million*, N.Y. TIMES, Dec. 23, 1999, at C4 (noting a company's agreement to pay $65 million to settle predatory pricing lawsuits); Harlan S. Byrne, *In a Real Fix*, BARRON'S, Oct. 2, 1995, at 16, 16 (reporting that, after a trial court awarded Thermex Energy $488 million in a suit against ICI Explosives and Dyno Industries, ICI settled for $36 million and Dyno settled for an undisclosed amount); Vicki Vaughan, *Family Feud—Centeno Heirs Battle to Control Ruins of Bankrupt Grocery Chain*, SAN ANTONIO EXPRESS-NEWS, June 2, 1996, at J1 (reporting a $6.5 million settlement between two grocery

success rate, a large number of claims have been filed since the decision.[61] This fact is significant for two reasons. First, the filings themselves make debate about the proper boundaries of predatory pricing law significant because the potential awards are so great—perhaps in the hundreds of millions of dollars, if not greater.[62] Awards are prone to being especially large because of treble damages and the fact that plaintiffs are automatically entitled to receive attorney's fees.[63] With such large potential verdicts, the risk of an erroneous judgment is great.[64] Second, the fact that plaintiffs continue to file predatory pricing claims with little hope of prevailing suggests that plaintiffs are making these claims for other reasons.

One commentator suggests that plaintiffs can "win without winning"[65] by "strategically misus[ing] predatory pricing law"[66] either to force a defendant-competitor to raise its prices or to implement a scheme of tacit collusion.[67] For example, a less efficient plaintiff might threaten or bring a predatory pricing case against its more efficient competitor, using the threat of expensive litigation and a potential adverse judgment to cause its competitor to cease a course of price competition.[68] If the threat does not work, the expenses of litigation may raise the defendant's costs to the extent that it is forced to raise its prices anyway.[69] Such a strategy could likely be employed successfully even though the plaintiff's likelihood of success in court is low—and is even

stores); *Mark L. Kovner—Partner*, KIRKLAND & ELLIS LLP, http://www.kirkland.com/sitecontent.cfm?contentID=220&itemID=7912 (last visited July 5, 2012) (reporting a "very favorable settlement" for Beech-Nut Nutrition Corporation in a predatory pricing suit against Gerber Products Company following a Ninth Circuit opinion in Beech-Nut Nutrition Corp. v. Gerber Products Co., 69 F. App'x 350 (9th Cir. 2003)).

61 Crane, *supra* note 20, at 6–8. At least fifty-seven claims had been filed as of 2005, and Crane estimates that the true number could be in the hundreds. *Id.* at 8 n.19.

62 *See supra* note 60; *see also* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 218 (1993) (reversing a $49.6 million jury verdict, which trebled to $148.8 million); MCI Commc'ns Corp. v. AT&T Co., 708 F.2d 1081, 1160 (7th Cir. 1983) (reversing a $1.8 billion judgment, which was based on a number of antitrust claims, including predatory pricing).

63 *See* 15 U.S.C. § 15(a) (2006).

64 AREEDA & HOVENKAMP, *supra* note 4, ¶ 723b, at 24.

65 Crane, *supra* note 12, at 27.

66 Crane, *supra* note 20, at 6.

67 *Id.* at 5, 16–17.

68 *Id.* at 9. If the threat is credible, a firm might quite reasonably conclude that raising its prices would be less costly than engaging in litigation. *Id.* For the threat to be credible, the potential defendant has to believe that the case would be more costly to it than to the potential plaintiff. *Id.* at 10–11. It may believe this for several reasons: (1) loss aversion (or tendency to weigh losses more heavily than gains), (2) potential reputational harm from an antitrust lawsuit that may have adverse market effects, (3) potential for plaintiffs to hire lawyers on contingency (in contrast to the defendants), and (4) inherent asymmetry in the costs of antitrust litigation. *Id.* at 10–13.

69 *See id.* at 12.

perceived as such. The defendant firm must only perceive the expected cost of the litigation and a potential adverse judgment as less costly than relenting on price[70]—not too tall an order given the high litigation costs and the large size of potential judgments.[71]

Additionally, a plaintiff may use a predatory pricing claim to set the stage for a scheme of tacit collusion. In a normal market, coordination of prices among competitors is thwarted by uncertainty over each other's competitive data and the incentive to—or suspicion that others will—cheat (i.e., unilaterally vary from a coordinated price).[72] Predatory pricing litigation removes many of the impediments to the successful implementation of such a scheme. A complaint itself may serve as a legal means of price signaling "by providing a detailed specification of the plaintiff's objections to the defendant's present pricing structure,"[73] and discovery facilitates the detailed exchange of revenue, cost, and other competitive data, removing uncertainty about competitors' present and future pricing strategies and capabilities.[74] Finally, the courts themselves provide a policing mechanism by monitoring the defendants' pricing behaviors and sometimes enjoining them, at least pending resolution of the dispute, from lowering prices below a certain rate.[75] Thus, there is a very real possibility that plaintiffs sometimes file illegitimate predatory pricing claims to achieve supracompetitive pricing schemes antithetical to antitrust law, and that the laxity of the law contributes to the success of such strategies.

There is also substantial risk of David-versus-Goliath-type rhetoric being employed to punish firms simply for being large.[76] For various reasons completely unrelated to predatory pricing—including economies of scale,

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70 *Id.*; Crane, *supra* note 12, at 27–28.

71 *See supra* notes 60, 62.

72 *See generally* THOMAS D. MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS 64–65 (4th ed. 2009) (discussing the problems faced by cartels in implementing schemes of price collusion).

73 Crane, *supra* note 20, at 17.

74 *Id.* at 17–19.

75 *Id.* at 19–20; *see also* Am. Bldg. Prods., L.L.C. v. Ashley Aluminum, Inc., No. CIV.A. 97-2976, 1997 WL 610877, at *5 (E.D. La. Oct. 1, 1997) (granting a temporary restraining order prohibiting an aggressor company from lowering prices while the case proceeded); Advantage Publ'ns, Inc. v. Daily Press, Inc., No. 83-72-NN, 1983 WL 1829, at *9 (E.D. Va. May 23, 1983) (setting conditions of conducting business for the defendant company in a predatory pricing suit).

76 *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 723a, at 22–23 (noting "exaggerated fears" that large companies engage in predatory pricing); BORK, *supra* note 17, at 4–7 (discussing the influence of "populist hostility to big business" on antitrust law and its enforcement).

vertical integration, and synergies unavailable to smaller companies—large companies can often produce products at much lower prices than smaller companies.[77] At trial, fact finders are unlikely to take these factors into account and may be inclined to hold large-company defendants liable based on their size.[78] This danger is particularly acute if the law is overly generous to plaintiffs.[79] A study of jurors in several antitrust trials—including *Brooke Group*—is telling. Interviews of these jurors revealed that they were completely confused by the underlying law and testimony and that they lacked even a basic grasp of the relevant concepts.[80] From these interviews, the study concluded that the jury verdict in *Brooke Group* in particular was based largely on factors other than legal or factual justifications, including the populist sentiments of some of the jurors.[81]

While a number of suggestions have been made for alleviating some of the current problems with predatory pricing—limiting or eliminating competitor standing, eliminating the remedy of treble damages, implementing a scheme of fee shifting (specifically a loser-pays system), and bifurcating the discovery process[82]—they offer incomplete solutions. Furthermore, recent commentary seems likely to expand the scope of the current law. It has emphasized that more modern economic theory and more recent empirical studies—relying on more sophisticated techniques—suggest that predatory pricing is much more prevalent than previously thought.[83] They have therefore proposed various

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77 *See* MORGAN, *supra* note 72, at 17–18.

78 Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 55–56 (1995).

79 *See* BORK, *supra* note 17, at 5 ("Unless the theory of antitrust is understood and the law brought into line with it, the law will surely move on again, becoming even more unnecessarily restrictive of business freedom."); Crane, *supra* note 20, at 46–47 (noting the importance of courts in preventing the potential bias of juries against large corporations from effecting false positives in predatory pricing claims).

80 Austin, *supra* note 78, at 52–59.

81 *Id.* at 55–57. For an earlier study of the outcomes of predatory pricing cases, see Roland H. Koller II, *The Myth of Predatory Pricing: An Empirical Study*, ANTITRUST L. & ECON. REV., Summer 1971, at 105. The study concluded that, out of twenty-three cases studied in which the defendant was found to have engaged in predatory pricing, the defendant had only attempted a predatory pricing strategy in seven and was successful in even fewer. *Id.* at 112.

82 *See* Crane, *supra* note 20, at 59–64; Crane, *supra* note 12, at 28–31. For a general discussion of the appropriateness of competitor standing in predatory pricing cases, see AREEDA & HOVENKAMP, *supra* note 4, ¶ 723e, at 33–35. Note that, if courts begin to recognize new, strategic theories of predation, limiting competitor standing may be particularly appropriate because such theories assume imperfect information. It would be somewhat contradictory to place no limits on claims that rivals priced below cost when the theory of predation underlying the claim assumes that they lack knowledge of their rivals' true costs.

83 *See* Malcolm R. Burns, *New Evidence on Predatory Price Cutting*, 10 MANAGERIAL & DECISION ECON. 327 (1989) (stating that business letters discovered in the trial records of United States v. American Tobacco Co., 221 U.S. 106 (1911), econometric evidence of the Tobacco trust's behavior, and game-

standards for broadening the current scope of the law to deter predatory schemes. Some have proposed essentially scrapping the current law to allow predatory pricing to encompass even above-cost price cuts where they may result in limited competition and fewer choices for consumers.[84] Other proposals have been less radical, working more within the *Brooke Group* framework. For example, one proposal advocates applying a practical test to the below-cost inquiry that would rely on the defendant's own financial data to reconstruct its calculations of its costs instead of relying on various theoretical measures of cost.[85] Another proposal suggests recognizing several new theories as plausible predatory strategies, including financial-market predation and predation based on several signaling theories.[86] Under financial-market predation, a firm may lower prices to an otherwise-rational level to harm competitors' profits and make lending to them risky—or at least appear to be—to frighten away investors, thereby excluding rivals and deterring entry.[87] Various signaling theories of predation would recognize that firms are sometimes able to use price cuts to send messages to rivals or potential rivals that have the effect of excluding them or deterring entry.[88] At the same time, it would recognize a more robust and clearly defined business-justification defense "as a necessary shield against an overly inclusive legal rule."[89] So while recent proposals have not been one-sided, they have reflected a belief that predatory pricing is more prevalent than it was previously thought to be and have advocated greatly expanding the current scope of the law.

Recent scholarship is likely to influence the courts; in fact, it may already be doing so. For example, in *United States v. AMR Corp.*, the Tenth Circuit

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theoretical models of oligopoly demonstrate the rationality and plausibility of predatory strategies); David Genesove & Wallace P. Mullin, *Predation and Its Rate of Return: The Sugar Industry, 1887–1914*, 37 RAND J. ECON. 47, 47–48 (2006); Fiona Scott Morton, *Entry and Predation: British Shipping Cartels 1879–1929*, 6 J. ECON. & MGMT. STRATEGY 679, 680–81 (1997) (arguing that an empirical analysis of British shipping companies' behaviors around the turn of the nineteenth century suggests the prevalence of predatory strategies); Richard O. Zerbe, Jr. & Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655, 699–708 (1982).

84 *See, e.g.*, Edlin, *supra* note 28, at 945–47, 963 (proposing a rule that would require an incumbent monopolist to freeze its prices following a significant new entry until the entrant is able to gain footing in the market).

85 Herb, *supra* note 59, at 1604–05.

86 *See* Bolton et al., *supra* note 28, at 2248–49.

87 *Id.* at 2285–90.

88 *Id.* at 2299–312. For example, under test-market predation, a predator may cut prices when a competitor attempts a limited entry to evaluate a potential market. By doing so, it can thwart the potential competitor's efforts and discourage entry. *Id.* at 2311–12.

89 *Id.* at 2274.

stated that "[r]ecent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational" and that, because of these developments, it would no longer approach claims of predatory pricing "with the incredulity that once prevailed."[90] These shifting perceptions threaten to make predatory pricing claims more prominent, which may increase the risk of erroneous judgments for plaintiffs. They therefore necessitate a careful consideration of the proper scope of the doctrine. The practice may be rare, and there may be difficulties in separating it from ordinary competition; however, there is evidence that such strategies are both plausible and actually utilized.[91] Where present, such behavior hinders competition and leads to monopolistic results: higher long-term prices, fewer choices for consumers, and reduced incentive to innovate.

As the consistency of some of these recent proposals with the *Brooke Group* standard suggests, the perceived rigidness of the current law is less a matter of a strict standard than it is of judicial skepticism about the plausibility of predatory pricing.[92] Signs that judges are no longer as skeptical as they once were and suggestions for expanding the scope of the current law may therefore be problematic. This Comment argues that the current law is overly broad in one key respect: its failure to consider predatory intent. The next Part discusses the role intent has played in predatory pricing analysis before and after *Brooke Group*, and Part IV proposes that intent be added as a third requirement to provide a limitation on the current scope of the law.

III. THE ROLE OF INTENT BEFORE AND AFTER *BROOKE GROUP*

Prior to the Court's decision in *Brooke Group*, the circuits were widely split on the issue of the proper role of intent in predatory pricing analysis. Section A summarizes the state of the law before the decision, focusing on four important circuit court decisions split between two polar-opposite views. Review of these cases reveals some of the major arguments on either side of the intent debate as well as the general lack of clarity that existed on the matter. Section B then discusses the effect *Brooke Group* had on the role of intent, focusing on its legal and practical ramifications.

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90 335 F.3d 1109, 1114–15 (10th Cir. 2003).

91 *See supra* note 83; *see also* Robert D. Joffe, *Antitrust Law and Proof of Consumer Injury*, 75 ST. JOHN'S L. REV. 615, 625 (2001).

92 *See* Kenneth L. Glazer, *Predatory Pricing and Beyond: Life After* Brooke Group, 62 ANTITRUST L.J. 605, 626 (1994) (noting that *Brooke Group* allows courts to follow their own convictions about the presence of predation).

A. *Intent Before* Brooke Group

Prior to the Supreme Court's decision in *Brooke Group*, there was a substantial split of authority over the role of intent in predatory pricing law. Scholars had divided on the issue for some time. Some argued for largely per se rules that focused exclusively on economic analysis,[93] while others argued that consideration of intent was important to the complex analyses that were required to properly implement the goals of antitrust enforcement.[94] In the years leading up to *Brooke Group*, several circuits considered the problem, and two held intent to be an important component, while two essentially discarded any consideration of intent in evaluating predatory pricing claims.[95] Commentators aligned on both sides of the split.[96]

The Ninth Circuit addressed the issue in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*[97] Plaintiff Inglis, a northern-California wholesale bakery, claimed that Continental, a large, national wholesale baker, engaged in predatory pricing in the market for private-label bread.[98] The plaintiff alleged that the defendant employed this scheme to obtain monopoly power in the private-label-bread market, which it could leverage to reduce the competitive disadvantage of its advertised-label bread.[99] As a result of the

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93 *E.g.*, Areeda & Turner, *supra* note 26, at 697–98, 732–33.

94 *E.g.*, Scherer, *supra* note 27, at 868–69, 890.

95 *Compare* William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1033–36 (9th Cir. 1981) (requiring intent), *and* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1504–05 (11th Cir. 1988) (upholding the intent requirement), *with* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (rejecting the intent requirement), *and* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402–03 (7th Cir. 1989) (same).

96 *Compare, e.g.*, Steven R. Beck, Note, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1242, 1242 (1991) ("A complete test for predatory pricing must consider intent."), *with* Michael C. Quinn, Note, *Predatory Pricing Strategies: The Relevance of Intent Under Antitrust, Unfair Competition, and Tort Law*, 64 ST. JOHN'S L. REV. 607, 628 (1990) (arguing that federal antitrust law should not consider evidence of intent and that state unfair-competition and tort laws provide alternatives for plaintiffs relying on this type of evidence).

97 668 F.2d 1014.

98 *Id.* at 1024.

99 *Id.* at 1024–25. Private-label bread is essentially generic-brand bread: it is produced by wholesale bakers and marketed under a retailer's label. *Id.* at 1024. Advertised-label bread is brand-name bread that is generally available to all retailers. *Id.* A wholesaler's private- and advertised-label breads are essentially the same products, with the key difference being their respective prices. *Id.* Advertised-label bread commands a higher price and thus a larger profit margin for the wholesaler. *Id.* Inglis essentially alleged that Continental engaged in a predatory pricing scheme so that it could eliminate competition in the less profitable private-label market so that it could raise prices in the market and cause retailers to purchase more advertised-label bread at higher prices and profit margins. *Id.* at 1024–25.

alleged scheme, Inglis incurred substantial losses in the private-label-bread market and eventually ceased operations, bringing suit just prior to doing so.

At trial, Inglis presented both market- and intent-based evidence. With respect to the market dynamics, Inglis showed that the defendant had cut its prices per loaf over the alleged predatory period—first from \$0.19 to \$0.18, and then to \$0.172—and thereafter gradually increased prices, allegedly when it realized Inglis was about to go out of business.[100] Inglis showed that these prices were below the defendant's costs; it established that the defendant had incurred substantial losses over this period and introduced expert testimony that the defendant's prices over this period were below its average variable costs.[101] Inglis's intent-based evidence consisted of (1) an independent consultant's report identifying pricing "to hasten wholesaler exit" as one possible means of combating private-label competition;[102] (2) "reports by Continental salesmen targeting Inglis private label accounts for enhanced competitive efforts";[103] and (3) a memorandum written by the manager of one of Continental's regional bakeries in 1974, which opined that Inglis would likely go out of business within the year.[104] In response, Continental argued that (1) the wholesale-bread market in northern California was extremely competitive and that Continental itself lacked market power; (2) that the innovation of "'captive' bakeries," or in-store bakeries, increased competitive pressure in the market during the relevant period; and (3) that federally imposed price freezes accounted for its below-cost pricing and that the termination of these freezes led to its subsequent price increases.[105] The jury returned a verdict for Inglis, but the district court granted defendant's motion for judgment notwithstanding the verdict or, in the alternative, a new trial.[106]

The Ninth Circuit reversed and remanded for a new trial.[107] It emphasized that an attempt claim under section 2 of the Sherman Act requires three elements—"(1) specific intent to control prices or destroy competition . . . ; (2) predatory or anticompetitive conduct . . . ; and (3) a dangerous probability of success"[108]—before settling on a primarily intent-based standard for predatory

100 *Id.* at 1025.
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.* at 1025 n.2.
105 *Id.* at 1025–26.
106 *Id.* at 1024.
107 *Id.*
108 *Id.* at 1027.

pricing claims.[109] The court held "that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power."[110] This meant that the ultimate standard was whether "the justification [for a firm's prices was based] . . . on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses."[111] The plaintiff would bear the burden of showing the defendant's prices were predatory if the defendant's prices were below average total cost but above average variable cost, while the burden would shift to the defendant to justify its prices if the plaintiff showed them to be below average variable cost.[112] Thus, the court justified its rule by tying it into the specific intent required for all section 2 attempt claims, a requirement that developed by analogy to the law of criminal attempt and was seen as necessary to confine the reach of the claim to conduct that threatened monopolization.[113] It further justified its intent-based standard as a way to distinguish between anticompetitive predatory prices, which are the proper subject of antitrust law, and ordinary, competitive ones that should not be constrained.[114] Nonetheless, the court did express some misgivings about relying too heavily on evidence of intent. Specifically, it noted that direct evidence of intent often does not correspond to whether there was indeed an antitrust violation: savvy firms are careful not to leave evidence of any improper intent, and statements that evince ordinary competitive desires may be easily distorted.[115] The court sought to avoid these pitfalls by requiring corroborative conduct.[116]

However, the court found little evidence of predatory intent in the case at hand. It dismissed the consultant's report because, "[r]easonably interpreted, it amount[ed] to no more than a recommendation of intensified price competition,"[117] and the mere suggestion of the idea in the consultant's report

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109 *See id.* at 1035–36.

110 *Id.* at 1035.

111 *Id.* The court identified only one nonpredatory justification for pricing below cost: cost minimization. *See id.*

112 *Id.* at 1035–36.

113 *See id.* at 1027.

114 *See id.* at 1031 & n.18.

115 *See id.* at 1028 & n.6.

116 *Id.* at 1028.

117 *Id.* at 1039.

did not indicate that it was ever considered or adopted by Continental.[118] Apart from the consultant's report, the court found little evidence of unlawful intent and thus held that "[t]he district court did not abuse its discretion in ordering a new trial."[119]

The Eleventh Circuit also maintained an intent requirement in *McGahee v. Northern Propane Gas Co.*[120] *McGahee* involved a claim of predation by a new entrant into the Camilla, Georgia-area propane-gas market against an established firm with a large market share.[121] The plaintiff, McGahee, had served as the defendant Northern's district manager for some time but resigned following a demotion.[122] After leaving the company, he started his own propane business in direct competition with the defendant and at least initially was successful at acquiring a significant share of the market from the defendant.[123] The competition led to a price war during which, the plaintiff claimed, the defendant had engaged in predatory pricing.[124] The plaintiff alleged that Northern sold propane at prices below average total cost and, during some months, below average variable cost.[125] He further presented evidence that Northern sold propane at lower prices in Camilla than in other areas and that part of its price reductions consisted of providing propane tanks to customers rent free.[126] Among the documents McGahee introduced was an internal document in which Northern's district manager referred to the plaintiff as "Floyd The S.O.B." and established "[c]ontribut[ing] to Floyd's financial problems" as a yearly goal.[127] The district court was not persuaded and granted summary judgment for Northern.[128] The Eleventh Circuit reversed, holding that "the test for predatory pricing must consider subjective evidence and should use average total cost as the cost above which no inference of predatory intent can be made."[129]

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[118] *Id.* at 1038–39. The court specifically declined to rule on the admissibility of the report into evidence. *Id.* at 1039 n.41.

[119] *Id.* at 1039.

[120] 858 F.2d 1487 (11th Cir. 1988).

[121] *Id.* at 1491–92.

[122] *Id.* at 1491.

[123] *Id.* at 1492.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* (first alteration in original) (internal quotation marks omitted).

[128] *Id.* at 1491.

[129] *Id.* at 1496 (footnote omitted).

In crafting its standard, the court disapproved of reliance on academic commentary and instead focused on the antitrust statutes, their legislative history, and recent Supreme Court precedent.[130] It concluded that Congress intended a defendant's subjective intent to be an important consideration for several reasons. First, the Sherman Act was a criminal statute codifying and expanding the common law with proof of substantive violations requiring a showing of specific intent.[131] Second, the legislative background of public outcry in 1890 against monopolies demonstrated "Congressional concern with the economic and political power of large combinations and with restraining harmful but not all competition."[132] Finally, discussions surrounding the enactment of the Robinson–Patman Act indicated that Congress intended to distinguish among different purposes for price cuts and differentials.[133] The court thus formulated an intent-based standard in which costs were a means of implementing presumptions and allocating the burden of proof: prices above average total cost could not be predatory, prices below short-run marginal cost carried a rebuttable presumption of predatory intent, and prices between those two measures created a permissible inference of predatory intent.[134] Applying this standard, the court found there to be a genuine issue of material fact and reversed the district court's decision.[135] McGahee had presented evidence that Northern's prices were below average total cost along with several pieces of evidence that—at least conjunctively—the court found could support a finding of predatory intent. This evidence included Northern's investigation of McGahee's financials, Northern's new policy of rent-free tanks aimed at taking advantage of McGahee's financial position, and Northern's internal memorandum.[136]

The First Circuit addressed the issue in *Barry Wright Corp. v. ITT Grinnell Corp.*,[137] becoming the first to reject an intent requirement. Pacific, the defendant in *Barry Wright*, was a manufacturer of mechanical snubbers, or shock absorbers used in the construction of nuclear-power-plant pipe

[130] *See id.* at 1496–1502. The court specifically declined to embrace the Areeda–Turner test, which it described as being "carved from economic assumptions, not from antitrust statutes and judicial precedents." *Id.* at 1495–96.
[131] *Id.* at 1500.
[132] *Id.*
[133] *Id.*
[134] *See id.* at 1503–04.
[135] *Id.* at 1504–05.
[136] *Id.* at 1504.
[137] 724 F.2d 227 (1st Cir. 1983).

systems.[138] Pacific was the only producer—domestic or foreign—of snubbers that met the Nuclear Regulatory Commission's standards[139] and, by virtue of the lack of substitutes, had a 94% share of the domestic snubber market.[140] Grinnell, a maker and installer of nuclear pipe systems, purchased a large share of the mechanical snubbers sold in the United States.[141] It entered into a development contract with the plaintiff, Barry Wright, under which it hoped to secure an alternative source of snubbers.[142] Barry Wright's production was delayed, and Pacific, recognizing the potential competition, offered Grinnell special discounts.[143] Grinnell eventually discontinued its development contract with Barry Wright, and the latter filed suit, alleging that Pacific's discounts amounted to predatory price cuts in violation of section 2 of the Sherman Act.[144]

The court rejected this claim, asserting a purely cost-based standard and finding that the plaintiff failed to meet it.[145] The court expressed general disapproval of a subjective, intent-based approach, stating that it was too vague of a standard and suggesting that it would result in a futile search for "smoking gun" documents or statements.[146] And, if direct evidence of intent were not required (i.e., if intent could be inferred from a firm's conduct and the corresponding economic conditions), an application of Occam's razor suggested that the requirement of intent should simply be eliminated.[147] It therefore did so[148] and found it unnecessary to delve into the intricacies of various measures of cost in order to dismiss the claim, because the prices involved exceeded both average and incremental costs and because "virtually every court and commentator agree[d]" that such prices were lawful.[149] It concluded by expressly disapproving of the Ninth Circuit's standard, which "recognize[d] an economic circumstance in which even 'above total cost' price cutting might . . . hurt the consumer."[150]

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138 *Id.* at 229.
139 *Id.*
140 *Id.*
141 *Id.*
142 *Id.*
143 *See id.*
144 *See id.* at 229–31.
145 *See id.* at 232–36.
146 *Id.* at 232.
147 *Id.*
148 *Id.*
149 *Id.* at 233 (quoting 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 711.1c, at 118 (Supp. 1982)) (internal quotation marks omitted).
150 *Id.*

The court disavowed this possibility for several reasons. First, it asserted that such price cuts are almost certainly precompetitive.[151] Second, it found that this suggestion was vague and might be construed to proscribe "limit pricing," a common practice that it seemed to doubt antitrust laws should reach.[152] Third, the court found it too difficult as a practical matter to distinguish between price cuts with competitive purposes and those with anticompetitive purposes.[153] Finally, it deemed the business uncertainty and costs to be too high under such a rule.[154] And though it rejected the rule, it concluded that the plaintiff would have failed to meet the Ninth Circuit's test because the discounts allowed Pacific to manage its excess capacity more efficiently and therefore were cost saving, a fact that precluded a finding of predatory intent.[155]

The Seventh Circuit followed suit in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*[156] In *Rose Acre*, the plaintiffs, several egg producers, claimed that the defendant, Rose Acre, engaged in predatory pricing by selling eggs to supermarkets below costs.[157] Rose Acre was a vertically integrated firm: it managed all stages of production, from laying to grading, sorting, crating, and shipping.[158] Many integrated egg producers sold surplus eggs that would otherwise go bad to "breakers," or companies that would use the eggs for baked goods or other products.[159] Rose Acre, however, sold its surplus eggs to supermarkets at reduced prices.[160] Between 1978 and 1982, Rose Acre grew significantly, accounting for about 1% of national production, 8.6% in a five-state region, and 23.1% in Indiana.[161] Its growth came at the expense of at least some of its rivals, who brought suit.[162]

They alleged that Rose Acre sold at proportionally lower prices to supermarkets located farther away, although transportation costs were higher, and that its prices were below average total cost—and below average variable

151 *Id.* at 234.
152 *Id.*
153 *See id.* at 234–35.
154 *Id.* at 235.
155 *See id.* at 236.
156 881 F.2d 1396 (7th Cir. 1989).
157 *Id.* at 1398.
158 *Id.* at 1397.
159 *Id.*
160 *Id.*
161 *Id.* at 1398.
162 *See id.* at 1397–98.

cost in one year.[163] They claimed that Rose Acre's discounts diminished after it acquired the business of new supermarket chains.[164] The plaintiffs supported their claim with evidence of Rose Acre's predatory intent. This included the president's statement to a rival—"We are going to run you out of the egg business. Your days are numbered"—and the company's treasurer indicating, in response to a question about the company's pricing, that its costs of production had nothing to do with its prices.[165] At trial, the jury returned a verdict for the plaintiffs, but the judge granted Rose Acre's motion for judgment notwithstanding the verdict, because the verdict was not supported by objective economic indicators.[166]

The Seventh Circuit affirmed,[167] rejecting reliance on intent in the process.[168] The court began by observing the problem of separating aggressive competition from predatory pricing and noting three ways courts make this distinction: (1) scrutinizing the price–cost relationship, (2) focusing on the defendant's intent, and (3) examining the market conditions and the corresponding feasibility of recoupment.[169] The court favored using the third approach and concluded that "intent plays no useful role in this kind of litigation."[170] Specifically, it preferred focusing initially on the feasibility of recoupment as a means of determining whether predation was possible, without requiring a difficult examination of the defendant's costs and prices.[171] If predation is not feasible, the court need not inquire into the specifics of prices and costs because the law should not be concerned with predation that is unlikely to be successful.[172] Even if a company intended to engage in predatory pricing, "it [would be] bootless for the legal system to intervene" where such a scheme would fail, because it would be unprofitable and, therefore, self-deterring; even repeated unsuccessful attempts would be beneficial to consumers.[173]

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163 *Id.* at 1398.
164 *Id.*
165 *See id.* at 1398–99.
166 *Id.* at 1397, 1399.
167 *Id.* at 1408.
168 *See id.* at 1400–04.
169 *See id.* at 1400–01.
170 *Id.* at 1401.
171 *See id.*
172 *Id.*
173 *Id.*

The court further argued that "[i]ntent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition."[174] The court took the evidence presented in the trial court as a prime example. It explained that the statement of Rose Acre's president was completely consistent with hard competition and that the treasurer's statement really showed that Rose Acre was a "price taker," rather than a monopolist.[175] Nonetheless, these were the types of statements that lawyers and jurors were likely to mistake for a smoking gun.[176] The court argued that confusing evidence of this nature also complicated litigation by increasing the parties' focus on the discovery of this type of information.[177] It concluded that "[s]tripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation" and therefore held that intent was not a basis for liability in a predatory pricing case.[178] Because Rose Acre sold in a nearly perfectly competitive market, in which it could not hope to achieve and sustain a large-enough market share to recoup, the court affirmed the district court's judgment in favor of the company based on a finding that recoupment was impossible.[179]

These cases from the First, Seventh, Ninth, and Eleventh Circuits represented the split that existed at the time of *Brooke Group*.

B. Intent After Brooke Group

The role of intent in predatory pricing law is somewhat unclear after *Brooke Group*. On the one hand, the Court in *Brooke Group* did not explicitly disavow any consideration of intent. On the other hand, elements of the decision seemed to implicitly adopt the *Barry Wright*–Occam's razor view that intent simply has no role in predatory pricing analysis. The latter interpretation of the decision seems to have weighed heavily on lower courts.

First, *Brooke Group* does not expressly reject any consideration of intent.[180] Some of the Court's language even suggests that intent may still be

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174 *Id.* at 1402.

175 *Id.*

176 *Cf. id.* ("[T]ake Lois Rust's statement that Rose Acre's prices were unrelated to its costs. Plaintiffs treat this as a smoking gun. Far from it, such a statement reveals Rose Acre to be a price taker.").

177 *Id.*

178 *Id.*

179 *See id.* at 1403–04.

180 *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); AREEDA & HOVENKAMP, *supra* note 4, ¶ 738a, at 168–69 ("*Brooke* holds that no matter what the defendant's anticompetitive intent, likelihood of recoupment must be established by objective evidence. . . . Clearly, intent

highly relevant but is simply not at issue in its review of the case. Importantly, the Court states, "[T]he essence of [a predatory pricing] claim . . . is . . . [that a] business rival has priced its products in an unfair manner *with an object to* eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."[181] The Court's opinion therefore might be read to regard intent as a crucial element of a predatory pricing claim. Such a view seems to be supported by the Court's holding:

> Liggett has failed to demonstrate competitive injury as a matter of law . . . because its proof is flawed in a critical respect . . . .
>
> No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson—*whatever its intent* in introducing black and whites may have been—was likely to obtain the power to raise the prices for generic cigarettes above a competitive level.[182]

This holding undoubtedly preempts any test for predatory pricing that relies on intent as the ultimate touchstone.[183] However, these aspects of the opinion are certainly consistent with the view that intent is still critical—or at least relevant—to a predatory pricing inquiry and that it was simply not discussed in the case because Brown & Williamson's intent was not at issue in the appeal.

On the other hand, the Court's opinion might be interpreted to preclude consideration of intent. The Court's holding itself stresses the importance of objective market conditions and generally disregards the presence of an improper intent. And elsewhere the Court's discussion seems to disapprove of reliance on intent.[184] Also notable is the lack of weight the Court affords to

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evidence cannot be used as a substitute for objective evidence of pricing below the relevant measure of cost. Nevertheless, it might be relevant in other ways."). In fact, the Court in *Brooke Group* cites neither *Barry Wright* nor *Rose Acre Farms* but does cite *Inglis*, albeit on a general, ancillary matter. *Brooke Grp.*, 509 U.S. at 221 (citing William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014 (9th Cir. 1981)).

181 *Id.* at 222 (emphasis added).

182 *Id.* at 231–32 (emphasis added).

183 *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 738a, at 168–69.

184 *See Brooke Grp.*, 509 U.S. at 225 ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."). The Court was also dismissive of its previous decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), which it noted "has often been interpreted to permit liability for primarily-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure." *Brooke Grp.*, 509 U.S. at 221. The Court stated that *Utah Pie* has been criticized extensively on that account but explained that it did "not regard the *Utah Pie* case itself as having the full significance attributed to it by its detractors." *Id.* Though the Court did not overrule *Utah Pie*, it limited the holding from the case to a finding that the evidence was sufficient to support a verdict for the plaintiff and dismissed the opinion as "an early judicial inquiry . . . [that]

seemingly strong evidence of intent.[185] Though some of the evidence of intent presented at trial consisted merely of statements that Brown & Williamson wanted to "speed up Liggett's demise" and "put a lid on Liggett,"[186] the bulk of it consisted of detailed market analysis and plans produced by Brown & Williamson's senior officers.[187] However, the strongest factor that supports this interpretation is the Court's enunciation of the "two prerequisites to recovery" in predatory pricing claims—(1) below-cost pricing and (2) likelihood of recoupment.[188] Though ostensibly these are only prerequisites[189]—and not the only requirements—the Court seems to treat them as dispositive.[190] In fact, the Court's statement of these requirements immediately follows its statement that "the essence of [a predatory pricing claim is that a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market."[191] Though the Court does not cite the cases expressly eliminating consideration of intent, its treatment of these requirements seems to implicitly adopt the Occam's razor view. And taken together, these factors suggest that intent is irrelevant to predatory pricing claims. Lower courts certainly seem to think so; they rarely mention intent and consistently speak of *Brooke Group*'s prerequisites as the only two elements of a predatory pricing claim.[192]

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did not purport to set forth explicit, general standards for establishing a violation of the Robinson–Patman Act." *Id.*

185 *Compare* Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344, 354 (M.D.N.C. 1990) ("The[] documents, indicating B & W's anticompetitive intent, are more voluminous and detailed than any other reported case. This evidence not only indicates B & W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment."), *aff'd*, 964 F.2d 335 (4th Cir.), *aff'd sub nom. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), *and* Glazer, *supra* note 92, at 610–13 (describing the strength of the intent evidence in *Brooke Group*), *with Brooke Grp.*, 509 U.S. at 231 ("Brown & Williamson's entry into the generic segment could be regarded as precompetitive in intent as well as effect . . . ."), *and* Kenneth G. Elzinga & David E. Mills, *Trumping the Areeda–Turner Test: The Recoupment Standard in* Brooke Group, 62 ANTITRUST L.J. 559, 580 (1994) (suggesting the intent evidence in *Brooke Group* was more notable for its volume than for its strength). Regardless of how the intent evidence in *Brooke Group* has been characterized, and despite the Court's ultimate holding, the Court found that there was sufficient evidence of predatory intent to support a jury finding on the issue. 509 U.S. at 231.

186 Glazer, *supra* note 92, at 610.

187 *Id.* at 610–11.

188 *Brooke Grp.*, 509 U.S. at 222–24.

189 *Id.* at 222.

190 *See id.* at 226–27 ("These prerequisites *to recovery* are not easy to establish, but they are not artificial obstacles to recovery . . . . It would be ironic indeed if the *standards for predatory pricing liability* were so low that antitrust suits themselves became a tool for keeping prices high." (emphases added)).

191 *Id.* at 222.

192 Cascade Health Solutions v. Peacehealth, 515 F.3d 883, 898 (9th Cir. 2008); R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 695–98 (7th Cir. 2006); Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 932 (6th Cir. 2005); United States v. AMR Corp., 335 F.3d 1109, 1115 (10th Cir. 2003); Beech-

Thus, the status of intent in predatory pricing cases is ambiguous. *Brooke Group* did foreclose the type of intent-based predatory pricing standards used in *Inglis* and *McGahee*, but it did not expressly disavow all consideration of intent. However, it did suggest to lower courts that its two prerequisites were the only two elements of a predatory pricing claim. Courts below have seized upon that suggestion, effectively ending any consideration of a defendant's intent in predatory pricing cases. The next Part discusses why, in the future, courts should decline to follow such an interpretation and should insist upon intent as a third requirement for a predatory pricing claim.

IV. ADDING AN INTENT REQUIREMENT

While the Court's opinion in *Brooke Group* effectively ended any consideration of intent in predatory pricing cases, it did not mandate such a result. This Part argues that it is a mistake for courts to read *Brooke Group* in such a manner and that they should begin including predatory intent as a third requirement. Courts have eliminated an intent requirement for two reasons. First, they have had difficulty grasping what intent means in predatory pricing cases.[193] Second, the alternative standards considered pre-*Brooke Group* were either intent based or discarded intent altogether.[194] This Part explains that neither explanation presents an obstacle to the inclusion of intent in predatory pricing analysis. It first clarifies what intent should mean in predatory pricing cases and addresses evidentiary issues. It then explains why intent is a key component of any predatory pricing inquiry and that reintroducing an intent requirement into the current legal framework would make the law more coherent and would function as a limiting principle.

Nut Nutrition Corp. v. Gerber Prods. Co., 69 F. App'x 350, 352 (9th Cir. 2003); Bailey v. Allgas, Inc., 284 F.3d 1237, 1244 (11th Cir. 2002); Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 477 (5th Cir. 2000); Nat'l Parcel Servs., Inc. v. J.B. Hunt Logistics, Inc., 150 F.3d 970, 971 (8th Cir. 1998); Rebel Oil Co. v. Atl. Richfield Co., 146 F.3d 1088, 1092 (9th Cir. 1998); Astra Media Grp., LLC v. Clear Channel Taxi Media, LLC, 679 F. Supp. 2d 413, 424 (S.D.N.Y. 2009), *aff'd in part, vacated in part*, 414 F. App'x 334 (2d Cir. 2011); Arnold Chevrolet LLC v. Tribune Co., 418 F. Supp. 2d 172, 182–83 (E.D.N.Y. 2006).

[193] *See, e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (struggling with whether intent means "intent to harm" or some other form of intent).

[194] *Compare* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1503–04 (11th Cir. 1988) (embracing intent as the touchstone of a claim, with shifting presumptions based on the defendant's costs), *with* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989) ("[I]ntent plays no useful role in this kind of litigation.").

A. Meaning of Predatory Intent

Framing the issue of intent has been a source of difficulty in predatory pricing law: there are various ways of doing so, and courts have not always been clear in this regard. And the manner in which it is framed has major consequences. For example, if framed as an intent to harm or destroy competitors, penalizing such intent runs the risk of discouraging competition;[195] if framed as an intent to undertake the price cuts at issue, intent is meaningless[196]—after all, companies do not accidentally lower their prices. To avoid potential difficulties, one must therefore identify what precisely is meant by a requirement of predatory intent before making the case for its addition and elaborating on how it might be employed.

1. Basic Meaning

The meaning of intent flows naturally from the definition of predatory pricing "as a price reduction that is profitable [i.e., rational] only because of the added market power the predator gains from eliminating, disciplining, or otherwise inhibiting the competitive conduct of a rival or potential rival."[197] Viewed from this lens, predatory intent means the intent to profit through a price reduction only by producing exclusionary or disciplining effects. Thus, predatory intent would be present where the theory of profitability behind a company's price reduction is that it would exclude other companies from the market or cause them to acquiesce to the company's later elevated prices. Predatory intent would be absent where the company's price reduction is backed by any other rationale.

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195 *See Rose Acre Farms*, 881 F.2d at 1402 ("[A] desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition."); 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 805b, at 407–08 ("'[S]pecific intent' clearly cannot include: the mere intention to prevail over one's rivals. To declare that intention unlawful would defeat the antitrust goal of encouraging competition on the merits, which is heavily motivated by such an intent."); Edward H. Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373, 395 (1974) ("Plainly . . . the 'specific intent' required in attempt cases is not simply a subjective intent to prevail in the market. Instead, it is the intent to indulge in means that are in some sense untoward.").

196 *See* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 805b, at 409 ("[I]f intent equals conduct, then the separate intent requirement itself becomes superfluous and can be abandoned.").

197 Bolton, et al., *supra* note 28, at 2242; *accord* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (describing predatory pricing as reducing prices with the object of eliminating or inhibiting competition); AREEDA & HOVENKAMP, *supra* note 4, ¶ 723a, at 22 ("[P]redatory pricing involves an immediate sacrifice of profits through unreasonably low prices. These low prices destroy rivals or intimidate them from selling at a lower price than the defendant charges. Then follows a 'recoupment' period . . . . In order for predatory pricing of this variety to be a rational strategy, recoupment gains, discounted to present value, must exceed the immediate losses from the predatory campaign." (footnote omitted)).

Therefore, a predatory intent is essentially the absence of a business justification.[198] Courts have recognized business-justification defenses in some situations, apparently realizing that pure cost-based rules sweep too broadly.[199] However, they have failed to provide any clear guidelines.[200] For instance, courts have recognized promotional pricing as a possible business justification,[201] but beyond that it is unclear what defenses might be available.[202] Despite some general language in cases since *Brooke Group* pertaining to business justifications,[203] courts have not provided any additional guidance. As a result, some commentators have suggested definite recognition of a number of business justifications, such as defensive price-cutting, promotional pricing, learning by doing, and network externalities.[204] To the extent that business-justification defenses are recognized as affirmative defenses, the burden is generally on the defendant to establish them.[205]

Even if the number of recognized business justifications increases, it will necessarily be on an ad hoc basis.[206] Given the relative infrequency of predatory pricing cases, it is unlikely that the law relating to business justifications will develop in an expedient and predictable manner. Thus, if more emphasis is placed on business-justification defenses, the law on what

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[198] *See* Bolton et al., *supra* note 28, at 2274 ("A business justification or efficiencies defense serves as a means of eliminating cases where below-cost pricing by a firm with market power is likely to be welfare-enhancing, rather than predatory. In these cases, the sacrifice of present profits through low pricing is justified for reasons other than exclusion or disciplining of rivals." (footnote omitted)). *Cf.* E.I. DuPont de Nemours & Co., 96 F.T.C. 653, 725 (1980) ("[E]vidence of a respondent's purpose may reveal the extent to which there are legitimate business justifications underpinning the respondent's conduct.").

[199] *See* LING ET AL., *supra* note 7, at 71–76; Bolton et al., *supra* note 28, at 2274 ("The defense . . . serves as a necessary shield against an overly inclusive legal rule.").

[200] LING ET AL., *supra* note 7, at 71.

[201] AREEDA & HOVENKAMP, *supra* note 4, ¶ 746a, at 271–75; *see also* Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1194 (9th Cir. 1984) (price competition in Portland gas market); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc. 601 F.2d 48, 55 (2d Cir. 1979) (free samples of Sunday papers).

[202] *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 748, at 301 (proposing recognition of a "meeting-competition" defense in certain situations); Areeda & Turner, *supra* note 26, at 715 (arguing that meeting competition should not be a defense where the alleged predator prices below marginal cost).

[203] *See* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062 (8th Cir. 2000) ("A Section 2 defendant's proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits."); Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 475 (5th Cir. 2000) ("To determine whether conduct is exclusionary, we look to the proffered business justification for the act."). These cases recite language pertaining to business justifications in their general discussion of section 2 claims but do not address the issue in their predatory pricing analyses.

[204] *See* Bolton et al., *supra* note 28, at 2274–82.

[205] *Id.* at 2274.

[206] *Cf.* AREEDA & HOVENKAMP, *supra* note 4, ¶¶ 746, 748, at 271–79, 301–05 (describing uncertainty with even the most basic business-justification defense and suggesting fairly narrow circumstances in which a meeting-competition defense might apply).

constitutes such a justification will not become settled anytime in the near future. Recognizing intent as the converse of a business justification simultaneously places the burden on the plaintiff to prove the absence of a business justification and settles the question of what constitutes a business justification.

2. *Evidentiary Issues*

Evidentiary issues with the proof of intent appear to have been a driving force behind its elimination from predatory pricing analysis. A major objection to utilizing intent in predatory pricing cases is that plaintiffs' attempts to prove intent complicate litigation by expanding the scope of discovery to produce supposedly smoking-gun-type statements in which the defendant evinces a desire to destroy his competitor and that these statements, once produced, distract and mislead the jury, ultimately reducing the accuracy of decisions.[207] While these concerns may be valid under a different conception of intent, they are inapt for the inquiry this Comment proposes. It is quite right to express concern over the potential for statements such as "Let's pound them into the sand"[208] or "We are going to run you out of the egg business"[209] to mislead the jury. After all, the desire to prevail over one's rivals is completely consistent with hard competition—a principal goal of antitrust law[210]—and the presentation of such statements may give the impression of improper motive where the only motive is to outcompete one's rivals.

But the concern with such evidence is the same that the law has with any nonprobative evidence.[211] Such statements are simply not probative of the issue of intent as it is described in this Comment—that is, they are not probative of a company's theory of profitability underlying its price cuts. Because they do not affect the likelihood of predatory intent, they may be

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[207] *See* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989); AREEDA & HOVENKAMP, *supra* note 4, ¶ 738, at 168–71.

[208] U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695, 703 (Fed. Cir. 1988) (internal quotation marks omitted).

[209] *Rose Acre Farms*, 881 F.2d at 1402 (internal quotation mark omitted).

[210] *See* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 805b, at 407–08.

[211] *Compare* AREEDA & HOVENKAMP, *supra* note 4, ¶ 738c, at 175 ("To encourage judges and juries to wallow in *unprobative data* invites the twin mischiefs of (1) burdening litigation with thousands of documents about the firm's motives and calculations and (2) inviting quixotic results." (emphasis added)), *with* RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 195–96, 327 (6th ed. 2007) (explaining the doctrines of logical relevance and legal irrelevance).

inadmissible for lack of relevance.[212] And, to the extent that such statements are relevant to the issue of intent, they may still properly be excluded under Federal Rule of Evidence 403.[213] Courts, therefore, already have the tools to prevent these types of statements from burdening litigation and manipulating results. Intent should not present any special issue so long as courts adhere to the proper notion of intent.

Judges would simply have to use their discretion, bearing in mind that a simple desire to crush competitors by outcompeting them is not relevant to the inquiry—the goal must be to exclude or coerce. For example, it would likely be appropriate to consider private consultants' reports of the type in *Inglis*, provided that there is a causal link between suggested strategies and those actually adopted.[214] Evidence, such as that in *McGahee*, that a firm investigated competitors' financials prior to implementing its series of price cuts[215] may also be relevant. At the same time, statements, such as those in *McGahee*, merely showing that a firm wanted to crush competitors[216] would not be relevant. A company's statements and memoranda might in some circumstances be pertinent to the intent inquiry, but they would have to go beyond merely stating the goal of crushing the competition to stating the company's projections and expectations for how it will profit from business decisions. Additionally, proof of intent could center around companies' business and financial records.[217] In the absence of foul play, this information should always be easily available[218] and should provide sufficient information from which to glean the defendant's business rationale for its prices. Reliance on these documents is unlikely to complicate litigation beyond its present state

[212] *See* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *id.* R. 402 ("Evidence which is not relevant is not admissible.").

[213] *E.g.*, R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 696, 698 (7th Cir. 2006) (affirming the exclusion of memoranda in which the defendant discussed ways to "shut down" and "kill" the plaintiff). Federal Rule of Evidence 403 provides, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. Because of their tangential probative value and tendency to mislead the jury, statements such as those in *R.J. Reynolds* seem to be of the variety that should routinely be excluded under Rule 403.

[214] The court's treatment of the evidence in *Inglis*, however, was likely appropriate. *See* William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1038–39 (9th Cir. 1982).

[215] *See* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1504 (11th Cir. 1988).

[216] *See id.*

[217] *Cf.* Herb, *supra* note 59, at 1605 (proposing a practical test for predatory pricing claims involving the examination of companies' internal records).

[218] *Id.*

and should focus the inquiry on relatively dry business data that is unlikely to mislead or inflame juries.

Whatever the type of evidence relied upon, to satisfy the burden of production, the plaintiff would have to present some evidence tending to show that the defendant's theory of profitability behind its price cuts was based on the ability to exclude or coerce. It could satisfy this burden either by providing direct evidence of such intent or by demonstrating the inconsistency of the scheme with legitimate business justifications, such as promotional pricing, learning by doing, or network effects. If satisfied, the defendant would have to rebut with some evidence that its prices were motivated by business objectives other than excluding or coercing. The issue would then be litigated in a standard fashion; there would be no need for allocating the burden differently based on the defendant's price–cost relationship. Whatever type of evidence is presented, so long as courts keep in mind the proper definition of intent, the inquiry would be unlikely to complicate litigation further and should focus on information that is unlikely to mislead or inflame juries.

B. Why Intent?

Pre-*Brooke Group* cases addressing the issue of intent provided some arguments for considering intent in predatory pricing analysis. But because those cases relied on a somewhat different conception of intent and utilized it in a different manner than this Comment proposes, they did not fully address the reasons for its inclusion. This section explains that intent is a critical element in predatory pricing analysis both to properly implement the antitrust statutes and to provide appropriate limitations upon the scope of predatory pricing law.

1. Statutory Requirements

The primary statutes under which predatory pricing claims are brought[219]—section 2 of the Sherman Act and the Robinson–Patman Act—support an intent

[219] These are not the only statutes under which predatory pricing claims might arise. For example, claims may also arise under section 5 of the Federal Trade Commission Act, *e.g.*, E.I. DuPont De Nemours & Co., 96 F.T.C. 653, 653, 655 (1980), or under state unfair competition laws, *e.g.*, Parish Oil Co. v. Dillon Cos., 523 F.3d 1244, 1244–47 (10th Cir. 2008). It is also possible for a predatory pricing claim to be brought under section 2 of the Sherman Act as a claim of completed monopolization through a scheme of predation; intent would not be as relevant to a completed monopolization claim because the fact of completion would establish its anticompetitive nature. *See* United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 431–32 (2d Cir. 1945), *superseded by statute*, Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, 96 Stat.

requirement. Section 2 of the Sherman Act makes it illegal to "attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations."[220] "[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a *specific intent* to monopolize and (3) a dangerous probability of achieving monopoly power."[221] Because a violation of section 2 requires a specific intent to monopolize, consideration of intent is certainly necessary in predatory pricing analysis under the statute. The only questions are what constitutes a specific intent and how to assess it.

The specific intent required by section 2 developed by analogy to the criminal law of attempt.[222] As Judge Hand described:

> [C]onduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a "specific intent"; an intent which goes beyond the mere intent to do the act.[223]

A major purpose of a specific-intent requirement, then, is to confine the reach of the attempt offense to conduct that presents an actual threat of achieving its prohibited goals.[224] This analogy therefore supports the idea that specific intent should focus on the business rationale, or subjective purpose, for the alleged predatory prices.[225] The purpose behind the disputed price cuts is crucial in determining whether they threaten monopolization or are consistent with hard competition. Only where there is predatory intent—or no business justification for below-cost prices—is there a threat of monopolization.[226] It is important to emphasize that the intent required is the intent *to monopolize*.[227] The idea

1246 (codified as amended in scattered sections of 12, 15, 28, 30 U.S.C.); 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 805a, at 406.

220 15 U.S.C. § 2 (2006).

221 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (emphasis added).

222 William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1982); 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 804, at 403.

223 *Alcoa*, 148 F.2d at 431–32.

224 *See Inglis*, 668 F.2d at 1027 ("[S]pecific intent [in section 2] is used to confine the reach of an attempt claim to conduct threatening monopolization."); AREEDA & HOVENKAMP, *supra* note 4, ¶ 805b, at 341 ("The purpose of the criminal attempt offense is to save society from the dangers presented by persons who demonstrated their evil proclivities but who fell short of their criminal goals through miscalculation or fortuity.").

225 *See* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 805b, at 409–10.

226 *See* Bolton et al., *supra* note 28, at 2274–82 (grounding several proposed business justifications in their lack of threat to competition).

227 *See* 15 U.S.C. § 2 (2006).

behind business justifications is that there are some legitimate rationales for below-cost prices that make them unlikely to be harmful to competition and thus unlikely to lead to monopoly.[228] In other words, when there is a business justification—and thus no predatory intent—the price cutting is part of a plan *to compete*, not *to monopolize* the plan of which the price cuts are a part is not *to monopolize*, but *to compete*. This is a key distinction: the goal of the Sherman Act—and of the antitrust laws generally—is to prevent monopoly while encouraging free competition.[229] To avoid obfuscating this distinction, the specific intent required by the statute should be construed to mean the type of intent this Comment proposes.

The problem is that courts, consciously or unconsciously, have bought into the *Barry Wright*–Occam's razor view that intent is inferable from objective economic conditions, and so it is unnecessary to consider it separately.[230] This is apparent from the fact that they continue to recite the specific intent requirement when speaking of section 2 generally, but when they begin analyzing predatory pricing issues, they mention only *Brooke Group*'s two prerequisites.[231] Note how precisely the two *Brooke Group* prerequisites map onto the two non-intent requirements of a section 2 claim: below-cost pricing matches closely with "predatory or anticompetitive conduct," and feasibility of recoupment matches closely with "a dangerous probability of achieving monopoly power."[232] The *Brooke Group* prerequisites simply do not capture the specific intent element. If they did, there would be no need for any consideration of a defendant's business justifications. Rather than actually capturing intent, the two-pronged approach simply presumes the requirement is satisfied, sometimes allowing the defendant to show otherwise.[233] This elimination of intent contrasts with judicial interpretation of other statutes that

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228 *See* AREEDA & HOVENKAMP, *supra* note 4, ¶¶ 746, 748, at 271–72, 274, 301–03.

229 *See* 1 *id.* ¶ 103a, at 42–49; E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 16 (5th ed. 2003).

230 *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (explaining that intent is superfluous and potentially distracting).

231 *E.g.*, John Doe 1 v. Abbott Labs., 571 F.3d 930, 934 (9th Cir. 2009); Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893, 898 (9th Cir. 2008); United States v. AMR Corp., 335 F.3d 1109, 1113–15 (10th Cir. 2003); Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 474, 477 (5th Cir. 2000); Astra Media Grp., LLC v. Clear Channel Taxi Media, LLC, 679 F. Supp. 2d 413, 422–23 (S.D.N.Y. 2009), *aff'd in part, vacated in part*, 414 F. App'x 334 (2d Cir. 2011).

232 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

233 *See* AREEDA & HOVENKAMP, *supra* note 4, ¶ 738a, at 169–70, 170 n.7 (noting that lack of intent has occasionally appeared relevant in courts' holdings that below-cost pricing did not amount to an antitrust violation).

impose harsh penalties for engaging in proscribed conduct.[234] Consistency with the statute, and judicial determinations in other areas, should dictate requiring intent as a separate element.

While the Robinson–Patman Act does not provide as strong a textual basis for an intent element, it too should be construed to require intent. The Robinson–Patman Act prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly."[235] As the Court in *Brooke Group* emphasized, "By its terms, the Robinson–Patman Act condemns price discrimination only to the extent that it threatens to injure competition."[236] Furthermore, it provides statutory defenses for price discrimination based on differences in costs,[237] changing market conditions,[238] and good-faith price matching.[239] These explicit exceptions cover a good number of potential business justifications and go well beyond those definitively recognized in predatory pricing law.[240] "Thus, 'the Robinson–Patman Act should be construed consistently with broader policies of the antitrust laws'"[241]—that is, consistently with the Sherman Act and consistently with the goal of preventing monopoly while encouraging hard

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234 *Cf.* Staples v. United States, 511 U.S. 600, 615–16 (1994) (interpreting the National Firearms Act to require a mens rea element where the statute was silent); Morissette v. United States, 342 U.S. 246, 263 (1952) ("We hold that mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced."). The Sherman Act, like the statutes at issue in *Staples* and *Morissette*, does impose criminal penalties. 15 U.S.C. § 2 (2006). While predatory pricing cases are not pursued as criminal actions, *cf.* SULLIVAN & HOVENKAMP, *supra* note 229, at 68 (noting that criminal prosecution will only be pursued for "per se violations" or cases in which a defendant has willfully violated the law), potential penalties are extremely harsh.

235 15 U.S.C. § 13(a).

236 Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993).

237 *See* 15 U.S.C. § 13(a) ("[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .").

238 *See id.* ("[N]othing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.").

239 *See id.* § 13(b) ("[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.").

240 Note that meeting competition is not even a clear-cut business justification in predatory pricing. *See* AREEDA & HOVENKAMP, *supra* note 4, ¶¶ 746, 748, at 271–79, 301–05.

241 *Brooke Grp.*, 509 U.S. at 220 (quoting Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979)).

competition.[242] To do so, it should be read to require an element of intent in predatory pricing cases.[243]

2. Intent as a Limiting Principle

Typically, considerations of intent in predatory pricing law have been thought to reduce the burden on plaintiffs[244] and to produce more false positives. But such impressions are largely of intent-*based* standards. This should not be the case under this Comment's conception of intent. Focusing on intent as a business's rationale for its prices—whether it intended to profit by excluding or coercing rivals, or had some other purpose consistent with competition—would not punish firms for striving to outcompete their rivals. Furthermore, requiring intent as an additional element, rather than as a substitute for more objective, cost-based tools, would not reduce the burden on plaintiffs but would increase it.

Intent is an essential component of a complete definition of predatory pricing. Definitions that do not mention, or at least allude to, intent tend to identify the concept very generally and then seek to determine on an ad hoc basis which prices should be deemed predatory and nonpredatory, respectively.[245] This reveals that price- and cost-based tests leave holes;[246]

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242 *See supra* note 229 and accompanying text.

243 Note that the Act places the burden on the defendant to prove certain statutory defenses. *See* 15 U.S.C. § 13(a)–(b). This might suggest that the burden of proving a nonpredatory intent would be on the defendant. *See* R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 698 (7th Cir. 2006). However, as this Comment has explained, intent is a critical element of the definition of predatory pricing. As such, intent should be part of the plaintiff's prima facie case, and not merely a defense. Similarly, the Act does not place the burden on the defendant to establish the absence of the *Brooke Group* prerequisites, though neither is inherent in the term "price discrimination."

244 *See* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1399–1402 (7th Cir. 1989) (suggesting that intent evidence resulted in a verdict for the plaintiff and will frequently lead to false positives); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (suggesting that a standard that focused on "intent to harm" would almost always seem to be satisfied); AREEDA & HOVENKAMP, *supra* note 4, ¶ 738b, at 171–73 (suggesting that consideration of intent is more likely to result in a finding of illegality); *cf.* Herb, *supra* note 59, at 1605 (proposing a "Practical Test" for predatory pricing, which examines the business's own calculations and data, intended to lessen the financial and evidentiary burdens on plaintiffs).

245 *Compare Brooke Grp.*, 509 U.S. at 222 (referencing the "object" of a firm's pricing strategy in its definition of a predatory pricing claim under the Robinson–Patman Act), *and Rose Acre Farms*, 881 F.2d at 1399 (noting that "the gravamen" of a predatory pricing claim under either section 2 or the Robinson–Patman Act "is that the aggressor sold goods for too little money, hoping to cripple or discipline rivals so that it might sell its wares for a monopoly price later"), *with Barry Wright*, 724 F.2d at 231–32 (attempting to identify the situations in which predatory pricing exists without giving a clear definition of predatory pricing before holding intent irrelevant), *and* AREEDA & HOVENKAMP, *supra* note 4, ¶ 723a, at 22 (explaining that predatory

specifically, they are only "negative indicator[s]," whereas intent is a "positive indicator."[247] Focusing on below-cost pricing and the feasibility of recoupment helps to identify situations in which there was no predatory pricing and establishes situations in which predatory pricing may have occurred, but it does not affirmatively establish the presence of a predatory scheme. Proponents of cost-based rules seem to recognize this much but seem satisfied that such rules are sufficiently tailored so that predation may be presumed if they are satisfied.[248] The incompleteness of the two *Brooke Group* prerequisites presents a major problem of overinclusion. Business-justification defenses limit this problem to some degree but provide an imperfect solution. There are no clear standards for when they might apply,[249] which places a great burden on defendants: they must establish that a business justification should be recognized and that their conduct conforms to that justification. As this Comment has discussed, any rationale for a business's below-cost prices, other than to exclude or coerce rivals, renders them procompetitive. As a result, it does not make much sense to recognize a narrow number of business justifications and to place the burden on the defendant to establish them. Putting the burden on the plaintiff to establish predatory intent better reinforces the distinction between anticompetitive conduct and hard competition.

Requiring intent as an additional element not only would provide a proper limit on the ultimate scope of the law but also may decrease the burdens of litigation. Because intent would be a third element of a prima facie case, it would provide an additional mechanism for defeating meritless claims; claims could be defeated because the plaintiff failed to establish below-cost pricing,[250] feasibility of recoupment,[251] or predatory intent. At least in some situations, this might decrease the burdens of litigating the *Brooke Group* prerequisites. For example, defining the relevant market is often a difficult task and may

pricing exists under "certain conditions [where] low prices may have anticompetitive effects," rather than providing a clear definition of the practice).

246 *See* Williamson, *supra* note 12, at 284–85 (stating that cost-based rules involve purely static economic analysis that "fail[s] to account for . . . intertemporal attributes of predatory pricing"); *see also* E.I. DuPont de Nemours & Co., 96 F.T.C. 653, 727 (1980) ("It is simply unrealistic to divorce conduct from intent.").

247 Beck, *supra* note 96, at 1269.

248 *See* Areeda & Turner, *supra* note 26, at 712.

249 For a discussion of the limited and sporadic availability of business justifications, see generally AREEDA & HOVENKAMP, *supra* note 4, ¶¶ 746, 748, at 271–79, 301–05; and LING ET AL., *supra* note 7, at 71–76.

250 *E.g.*, Rebel Oil Co. v. Atl. Richfield Co., 146 F.3d 1088, 1097–98 (9th Cir. 1998) (finding for the defendant because the plaintiff did not prove below-cost pricing).

251 *E.g.*, Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 478 (5th Cir. 2000) (finding for the defendant because the plaintiff did not satisfy the recoupment prong).

determine whether the prices at issue are below or above cost.[252] The relevant-market issue may have added importance because of the lack of uniformity among the circuits with respect to the appropriate measure of cost.[253] An intent requirement may decrease the importance of vehemently contesting this issue: if intent cannot be established, this and other points are nonissues. Adding an element of intent may therefore reduce the costs of litigation, which could reduce the potential for strategic misuse of predatory pricing lawsuits.[254] Requiring intent as an element of predatory pricing may therefore provide important limits on the scope of the law and minimize current problems with predatory pricing litigation.

CONCLUSION

As this Comment has discussed, the task of separating normal, competitive low prices from anticompetitive, predatory low prices is often difficult, and the dividing line that results is seemingly illusory. Nonetheless, making a clear distinction is necessary. Given the persistence of predatory pricing doctrine over time, and recent scholarship advocating its expansion, it is unlikely that the difficulties of the doctrine will vanish.

This Comment has advocated a novel approach to limiting the scope of predatory pricing law. While traditionally intent has been used to produce more favorable outcomes for plaintiffs, this Comment has argued that intent can be utilized to provide a major limitation on the scope of the law. Doing so will actually increase the burden on plaintiffs in predatory pricing cases and produce more favorable outcomes for defendants, all else equal. At the same time, this proposal may be consistently employed alongside other commentators' proposals, which advocate broadening the scope of the law—to the extent that they are consistent with *Brooke Group*. This is important because if such proposals gain traction with the courts, intent may still be used as a means of limiting those new, broad rules without the necessity of overruling them. Thus, future development of the law may make intent an even more important limiting principle than it presently is.

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252 *See, e.g.*, Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 933–35 (6th Cir. 2005) ("[T]he Supreme Court [has] emphasized that a product market may have submarkets and the definition of a market or submarket focuses on economic realities and industry practice." (citing Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962))).

253 *See generally* LING ET AL., *supra* note 7, at 4–8 (discussing the relevant cost used in various circuits).

254 *See* Crane, *supra* note 12, at 26–27 (explaining that the expense involved in predatory pricing litigation makes the initiation of lawsuits an effective means of controlling rivals' pricing behavior).

Finally, requiring intent as an additional element is consistent with current law. As a result, courts should not have to alter any existing law to implement this Comment's proposal. They can simply add the requirement as soon as the issue arises. Doing so may provide an immediate and effective limit on predatory pricing claims.

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