Counterfactual Conduct as an Antitrust Defense?

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ABSTRACT—An antitrust defendant might try to defend its conduct by arguing that it is no worse for competition than some lawful counterfactual practice that it would otherwise have undertaken. A specific example of this argument has recently received attention in connection with the *Google Search* case. But this kind of argument could be employed quite broadly. While sometimes reasonable, it can also produce results that are antithetical to antitrust policy. It could allow a defendant to avoid liability based on possible efficiencies or other mitigating factors that do not apply to the challenged conduct at all. It could allow counterfactual judicial errors to produce real ones. And some intuitively appealing arguments about counterfactual conduct incorrectly define the but-for world around legal rules rather than the plaintiff's theory of harm. For these reasons, courts should exercise caution before considering counterfactual conduct as an evaluative benchmark.

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INTRODUCTION

An antitrust defendant might attempt to rely on (lawful) counterfactual conduct—actions it would have taken in lieu of its challenged conduct—as a defense. It argues that the challenged practice did not cause material anticompetitive harm when compared against its lawful counterfactual conduct. For example, in an exclusive dealing case, a defendant might argue that it could have produced similar competitive effects through lawful volume discounting. And a predation defendant might argue that, absent its below-cost predatory pricing, it would still have excluded its rival by pricing slightly above cost (which is not actionable).

Courts sometimes accept versions of these arguments as valid and sometimes reject them.[1] One clear limiting principle is that the argument cannot be cognizable if the counterfactual conduct would plausibly be illegal.[2] Aside from that constraint, however, the issue remains almost entirely unsettled. Neither courts nor academics have identified when it is appropriate to rely on counterfactual conduct as an evaluative benchmark.

A recent article by Carl Shapiro calls attention to this blind spot and offers some specific proposals for addressing counterfactual conduct.[3] His proposed framework calls for an initial step at which courts must identify the defendant's counterfactual conduct.[4] He views this as "logically necessary in all cases."[5] A caveat is that Shapiro's proposal is limited to the Section 2 "causation" inquiry famously associated with *Microsoft*. But, as I note later, there is no particular reason why considerations of counterfactual conduct should be confined to that issue.[6]

Shapiro's analysis is motivated in part by a specific example. In discussions of the *Google Search* case, there has been some speculation that, absent Google's restrictive "default" contracts, it might have entered into "unconditional revenue sharing" agreements instead.[7] Shapiro argues that Google would have entered into the latter deals in the but-for world, that they would be legal, and that they would likely generate similar competitive

[1] See Part I.C, infra.

[2] A defendant cannot justify its conduct by arguing that it is no worse for competition than some other possible antitrust violation.

[3] Carl Shapiro, *Causation After* Microsoft: *Toothless with Bite*, ANTITRUST L.J. (forthcoming).

[4] Id. at 6.

[5] Id.

[6] See Part I.D, infra.

[7] Google itself did not adopt this argument in litigation, however.

effects to the challenged restraints. Some others (including me) have expressed skepticism on some of those points, however.[8]

But this is just one specific example of a very general argument. To that end, this short essay looks beyond the *Google Search* example and attempts to shed some light on the broader question of when it is appropriate to rely on counterfactual conduct as an evaluative benchmark. While I agree that this is sometimes a sensible thing to do, I also point out that it sometimes produces results that are antithetical to antitrust policy.

It is essential to ask not only *whether* the counterfactual practice would be legal, but also *why*. If the reasons do not apply to the actual conduct being challenged, then it may be inappropriate to rely on them as a basis for denying liability. For example, in some situations, the counterfactual conduct is legal not because it is reasonable or privileged behavior, but simply because it falls through the cracks of imperfect legal rules. In this case, relying on the counterfactual as a benchmark might just transform a counterfactual error (a false negative) into a real one.

I also emphasize that the but-for world should be defined around the plaintiff's theory of harm (provided it is legally cognizable), not legal rules.[9] The but-for world is not a legal object; it is a causal inference tool. It sets the zero point used to measure the causal effects of the challenged conduct.[10] Perhaps counterintuitively, the fact that certain counterfactual conduct might be illegal does not necessarily imply it should be off-limits in the but-for world, nor does the presumptive legality of certain conduct necessarily imply that it should remain available in that world.[11] If instead one defines the but-for world in terms of what is legal versus illegal, then the analysis typically becomes acausal and defendants might attempt to rely on counterfactual conduct that is supposed to be off-limits in the but-for world.

I. COUNTERFACTUAL CONDUCT AS A CAUSAL BENCHMARK

This section makes some preliminary points about the use of counterfactual conduct as an evaluative benchmark.

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[8] See Erik Hovenkamp & Douglas Melamed, *Antitrust Analysis of Search Engine Defaults,* ANTITRUST L.J. (forthcoming); Steven Salop, *Unconditional Revenue Sharing by Google Would Still Be Anticompetitive*, PROMARKET (Dec. 23, 2024).

[9] Part III, infra. More accurately, the but-for world depends both on the plaintiff's theory of harm (which determines what conduct is off-limits in the but-for world) and on the defendant's preferences (which determine what the defendant would have done instead).

[10] In other words, the causal effects of a practice are measured in terms of deviations from the but-for world.

[11] Part III, infra.

A. Classifying Counterfactual Conduct

This section identifies three relevant categories of counterfactual conduct. Although the boundaries between them are not always sharp, this will nevertheless provide a useful organizing framework.

1. "Baseline" competition. In most cases, courts (often implicitly) compare the market with the challenged restraint to a counterfactual I will call "baseline competition." This is a world in which the challenged restrictive practice is eliminated and replaced by ordinary unrestrained competition, with all firms operating independently to maximize their own profits. For example, in a merger case, we imagine a but-for world in which the firms remain independent competitors. We do not imagine a counterfactual world in which, for example, the firms engage in some alternative form of horizontal collaboration. Similarly, in a case of resale price maintenance, we imagine a world in which the manufacturer and its dealers all set prices unilaterally at whatever levels they like.

This kind of counterfactual is widely used in economics. The competitive effects of a restrictive practice are usually (though not always) assessed by comparing the resulting equilibrium against a simple baseline equilibrium in which the restrictive practice is entirely absent and all firms just set prices unilaterally to maximize their profits.[12] This no-frills baseline represents a blank slate. It thus provides a natural benchmark for measurement, akin to the zero reading on a scale.

2. Counterfactual alternative practices. A second type of counterfactual replaces the challenged practice with something more elaborate than just baseline unilateral competition: a "counterfactual alternative practice" (CAP). This is some distinct type of competitive practice—one that the defendant does not actually engage in, but which it might have adopted if the challenged practice had been off-limits. For example, if the case involves exclusive dealing, a CAP could involve volume discounting or loyalty rebates or even an acquisition of the relevant trading partners.[13] And in a pharmaceutical product-hopping case, if the defendant's actual conduct involved a "hard switch," then a CAP could involve a counterfactual "soft switch."[14]

3. Moderated conduct. Most restrictive practices are not categorically unlawful, even absent any efficiencies. Frequently, the

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[12] See, e.g., Mark Armstrong & Julian Wright, *Two-Sided Markets, Competitive Bottlenecks and Exclusive Contracts*, 32 ECON. THEORY 353 (2007) (studying exclusive dealing in this way).

[13] I give examples of such arguments in the case law in Part I.C, infra.

[14] See New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015).

relevant practice will not be illegal unless it is sufficiently severe or extensive. For example, exclusive dealing is rarely illegal unless it forecloses rivals from at least 40% of the relevant trading partners.[15] Predatory pricing is actionable only when the defendant sets its price below cost. And in pay-for-delay cases, a reverse payment is typically not illegal unless it exceeds the expected cost of litigation. These and other legal thresholds act as necessary (but not sufficient) conditions for liability.

Thus, a third possible counterfactual involves "moderation." Rather than eliminating the challenged practice altogether, this counterfactual merely tones it down to a legally permissible level. For example, in an exclusive dealing case with a foreclosure share of 70%, a moderation counterfactual could involve narrowing the restraints so that the foreclosure share is only (say) 15%. In a case of below-cost predatory pricing, moderation would involve pricing at or slightly above cost. And in a pay-for-delay case involving a large payment, moderation would involve a smaller payment equal to litigation costs.

B. *Would* Have, or *Could* Have?

An argument about counterfactual conduct can be framed in one of two different ways: as something the defendant *would* have done, or as something it *could* have done. This distinction is important legally, as illustrated by case examples later.

1. "Would-have" arguments. Here the defendant argues that it actually would have engaged in certain counterfactual behavior in the but-for world. This requires that the counterfactual behavior would be the defendant's preferred course of conduct if the challenged practice had been off-limits.

2. "Could-have" arguments. The defendant argues as follows: if I could lawfully engage in some counterfactual practice X, then my actual conduct Y should be lawful too, so long as Y is no worse for competition than X would have been. This does not assert that the defendant actually would have done X if the challenged conduct Y had been off-limits. As such, the argument does not really address the causal effects of the challenged conduct. Rather, it effectively treats the legality of X as a kind of entitlement to restrain competition up to the same extent as X. As discussed below, courts typically reject such arguments, although there are some exceptions.

C. Case Examples

Courts usually adopt a baseline competition counterfactual by default. That is, they imagine a world in which the challenged conduct is fully absent, and they do not consider what alternative practices the defendant

[15] See, e.g., McWane, Inc. v. FTC, 783 F.3d 814, 837 (11th Cir. 2015).

might have adopted to replace it.[16] But, as illustrated in the examples below, defendants sometimes try to rely on CAPs or moderated conduct counterfactuals. As previewed in the previous section, these arguments come in both "would-have" and "could-have" variants.

1. Examples involving CAPs. Defendants sometimes make "would-have" arguments involving CAPs. For example, in the first appeal of the *Amex* case, the defendant argued that "even in a but-for world without the [restraints], Amex could—and undoubtedly would—have undertaken unilateral action to help curb the harmful effects of steering,"[17] referring to a counterfactual conditional refusal to deal with steering merchants.[18] In some pay-for-delay cases the defendants argue that, absent the payment (or "no-authorized-generic" restriction), they would have entered into a payment-free settlement deal specifying the same date of generic entry.[19] At least in private actions, courts seem to accept this as a valid defense.[20]

But courts usually reject arguments about a CAP that the defendant *could* have adopted. For example, in *Standard Stations,* the Supreme Court noted that if the defendant (an oil company) had not engaged in exclusive dealing with independent gas stations, it might have acquired them, allowing it to foreclose rivals in much the same way.[21] But the majority declined to consider this as a defense.[22] Similarly, in a rule-of-reason case centering on the NBA's horizontal restraints, Judge Easterbrook rejected the argument that member teams could have achieved the same results lawfully through other kinds of concerted action, remarking that:

> Whether there are [lawful] ways to achieve the NBA's objective is not the question. Laws often treat similar things differently. Antitrust law is no exception… What the NBA might have done, it did not do.[23]

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[16] See, e.g., Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 82 (2021) (assessing competitive effects relative to "a market without the challenged restraints").

[17] Brief of Defendants-Appellants at 81–82, United States v. American Express Co., No. 15-1672 (2d Cir. Aug. 5, 2015), ECF No. 133.

[18] In other words, Amex says it would have unilaterally refused to serve any merchants who engage in steering, effectively forcing merchants to refrain from steering as a condition of access to the Amex network.

[19] See, e.g., In re Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d 274, 323 (D.R.I. 2019); In re Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 55 (1st Cir. 2016).

[20] Id. at 55.

[21] Standard Oil Co. of California v. United States, 337 U.S. 293, 310-311 (1949).

[22] Id. at 311-312.

[23] Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667, 672 (7th Cir. 1992).

However, there are some exceptions. In cases where the relevant counterfactual conduct involves a lawful refusal to confer access to the defendant's technology, courts sometimes credit a "could-have" argument. This effectively treats the legality of the counterfactual conduct as an exclusionary entitlement. For example, a patent owner can lawfully restrain the output of a licensee-rival, because it could have refused to confer any license at all.[24] This rationale does not require that, absent the output restraint, the defendant actually would have refused to confer any license at all.[25] Similarly, if a defendant could lawfully refuse to deal with a rival, then it will not be liable for subjecting the rival to a "price squeeze."[26] Here too, nonliability is not premised on a finding that, absent the price squeeze, the defendant actually would have refused to deal with the rival.

2. Examples involving moderated conduct. I have not found a clean example of a defendant arguing that it actually would have engaged in moderated conduct in the but-for world. But defendants do sometimes make a "could-have" version of the argument. For example, in *Irvin Industries*, the defendant made a below-cost predatory bid in an auction, which it won.[27] But the district court found that the defendant could still have won the auction even if it had bid slightly above its costs, in which case the bid would enjoy safe harbor even if it were in fact predatory in the economic sense. The district court denied liability on this basis. But the Second Circuit reversed, because the counterfactual above-cost bid was "imaginary" and "too speculative."[28]

D. Scope of Relevance

Shapiro treats counterfactual conduct as relevant to the Section 2 "causation" inquiry highlighted in *Microsoft*.[29] However, the potential relevance of counterfactual conduct is not limited to that issue. The core element of every antitrust violation—harm to competition—already

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[24] See, e.g., Q-Tips, Inc. v. Johnson & Johnson, 109 F. Supp. 657, 660 (D.N.J. 1951) (output limit on licensed sales was lawful, because "[while] the patent remained valid, the plaintiff could forbid entirely any use whatsoever of its patent.").

[25] It could be that, absent the output cap, the defendant's preferred alternative would be a less restrictive licensing deal, not a refusal to license. If so, the but-for world would have been more competitive. But this makes no difference to the rationale for withholding liability, which is about what the patent owner was entitled to do, not what it actually would have done.

[26] *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009).

[27] Irvin Industries, Inc. v. Goodyear Aerospace Corp., 974 F.2d 241 (2d Cir. 1992).

[28] Id. at 246.

[29] That inquiry addresses the causal connection between a defendant's anticompetitive conduct and its acquisition or maintenance of monopoly power. United States v. Microsoft Corp., 253 F.3d 34, 79-80 (D.C. Cir. 2001).

subsumes a causation requirement: the challenged conduct must lessen competition. That is a causal effect. Hence, both the harm inquiry and monopoly causation ask about causal effects of the defendant's conduct and thus are assessed by comparison to the but-for world.[30] As such, the potential relevance of counterfactual conduct extends to both inquiries. Because all antitrust violations (excluding per se violations) require proof of harm to competition, the potential relevance of counterfactual conduct extends to the harm element of all antitrust violations.[31]

II. POLICY CONCERNS

As explained earlier, for a counterfactual practice to be a valid comparative benchmark, a necessary condition is that it would be legal. However, this is not a sufficient condition, because evaluating a defendant's conduct relative to a lawful counterfactual practice will sometimes produce results that are contrary to antitrust policy. These problems can arise under both CAP-based and moderation-based counterfactuals, but they are more pervasive (if not universal) in the latter category.

A. Problems Involving CAPs

A CAP might be lawful because it involves a category of activity that often generates efficiencies that the challenged conduct does not, leading the law to treat it more permissively. For example, Judge Frank Easterbrook notes that

> [A]greements among business rivals to fix prices are unlawful per se, although a merger of the same firms, even more effective in eliminating competition among them, might be approved with little ado… The [merged] entity might achieve efficiencies unavailable to the cartelists.[32]

Mergers often create significant efficiencies, leading the law to treat them less harshly than some horizontal restraints. But we can rarely make precise predictions about what harms or efficiencies will be generated by any *particular* merger. This uncertainty leads courts to rely heavily on proxies for competitive effects, such as market shares and concentration measures. As a result, if two colluding firms have relatively modest market shares, it is likely that they would be permitted to merge even if their merger would not actually create any efficiencies. If so, the counterfactual merger would be no less anticompetitive than the collusion.

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[30] See Erik Hovenkamp, *Monopoly Causation*, VANDERBILT L. REV. (forthcoming).

[31] Indeed, this was the situation in all of the case examples discussed above.

[32] Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667, 672 (7th Cir. 1992).

In effect, it is the *prospect* of efficiencies that renders the deal lawful. That prospect, combined with the administrative difficulties of predicting a merger's competitive effects (including efficiencies), leads courts to err on the side of nonliability when evaluating relatively small mergers.

But, by definition, naked restraints like price fixing do not generate efficiencies. It would thus be perverse to let the possible efficiencies of *mergers* provide a defense for *price fixing*. Efficiencies can provide a rational basis for withholding liability only if there is some prospect that they might actually arise in the case at hand.

This problem is not limited to naked restraints. The point is much more general: it is not enough to ask *whether* the CAP would be lawful; we must also ask *why*. Those reasons might not provide a rational basis for denying liability for the challenged conduct. As in the above example, if the CAP is in fact anticompetitive but evades liability as a consequence of imperfect legal rules, that is not a good reason to deny liability for the challenged conduct.[33]

B. Problems Involving Moderated Conduct

A moderation counterfactual imagines moderating the challenged conduct just far enough to be securely on the lawful side of the relevant legal threshold. This leads to a problem very similar to the one identified in the previous section. This section illustrates the problem with examples. A later section then identifies a more fundamental problem with moderation counterfactuals.[34]

1. Examples: Predatory Pricing and Exclusive Dealing

Consider again the above-cost safe harbor in predatory pricing law. Suppose a defendant engages in below-cost predatory pricing to exclude its only rival. But, because the rival is less efficient, the defendant *could* have excluded the rival by pricing at or just above cost, although this might have taken a bit longer. The defendant then argues as follows: the but-for world should be defined so as to make only *potentially unlawful* conduct off-limits.[35] Therefore, a price just above cost should not be off-limits in the but-for world, even if it is in fact predatory in the economic sense. On this specification, it seems likely that the defendant really would have engaged in above-cost predation in the but-for world, as that would still allow it to

[33] See Part III.D, infra (discussing this point).

[34] Part III.C, infra.

[35] As argued later, this misspecifies the but-for world. See id. But we will set that problem aside for the moment.

achieve its exclusionary goal. If so, it would seem that the defendant's below-cost predation did not cause any harm (in the "but-for" sense).

This argument is intuitively tempting. But once again, it is important to consider why the counterfactual conduct would be legal. The safe harbor for above-cost pricing exists for *administrative* reasons, not because we think above-cost predation is not possible or not anticompetitive.[36] On the contrary, it is uncontroversial in economics that above-cost predation can be a viable anticompetitive strategy when rivals have higher costs than the defendant.[37]

Above-cost predation is no less anticompetitive than below-cost predation. It is just harder to diagnose. To determine that the defendant is engaging in predation, we must establish that it is deliberately setting price below the short-run profit-maximizing (SRPM) level.[38] But we have very limited ability to identify what a firm's SRPM price level actually is. Depending on demand conditions, it could be only slightly above cost. This makes it almost impossible to distinguish above-cost predation from ordinary SRPM pricing in most cases. Courts thus grant safe harbor to above-cost pricing, despite recognizing that it can sometimes facilitate anticompetitive predation.[39]

Crucially, however, this proof problem does not apply to the defendant's actual conduct: its price is in fact below cost. It would be bizarre to deny liability based on administrative concerns that are wholly inapplicable to the case at hand. If the evidence suggests that the defendant's below-cost pricing is in fact predatory, and that there is a

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[36] In *Brooke Group*, the Supreme Court justified the safe harbor on the ground that above-cost pricing either "represents competition on the merits *or is beyond the practical ability of a judicial tribunal to control*…" Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993). This recognizes that above-cost pricing can be anticompetitive in some cases, while nevertheless refusing to consider such cases for practical reasons. Lower courts share this interpretation. See, e.g., ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 273 (3d Cir. 2012) (in *Brooke Group,* "[t]he Court acknowledged that there may be situations in which above-cost prices are anticompetitive, but stated that it is beyond the practical ability of a judicial tribunal to ascertain whether above-cost pricing is anticompetitive…").

[37] See, e.g., Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941 (2002) (a defendant "with a significant cost or noncost advantage" can exclude rivals "by pricing below their cost but above its own"); Patrick Rey, Yossi Spiegel & Konrad Stahl, *A Dynamic Model of Predation*, 56 RAND J. ECON. 738 (2025) ("below-cost pricing is neither necessary nor sufficient for successful predation").

[38] The SRPM price is the one the firm would optimally set if it were not possible to eliminate the rival as a competitor.

[39] See, e.g., Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 408 (3d Cir. 2016) ("While there may be situations where above-cost prices are anticompetitive, it is beyond the practical ability of a judicial tribunal to ascertain this"); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233-235 (1st Cir. 1983) (Breyer, J.) (similar).

dangerous probability of recoupment, then liability is no less appropriate here than in any other case of below-cost predation.

Now consider exclusive dealing. As already noted, a necessary condition for liability is that the restraint generates a sufficiently large amount of foreclosure. This is not because courts think a foreclosure share below 40% can never be harmful, but rather because material harm will tend to be less likely (and harder to prove) in such cases, and because the risk of false positives will tend to be higher.

Suppose a dominant firm engages in exclusive dealing that forecloses its only rival from 70% of key trading partners and lacks any procompetitive rationale. This quickly succeeds in driving the rival out of business. However, evidence subsequently shows that the rival could have been eliminated with a much smaller foreclosure share of 15%.[40] A legal challenge to that moderated counterfactual restraint would almost surely fail due to the low foreclosure share.[41] But it would make little sense to withhold liability on this basis, as the defendant's actual restraint generated a very large foreclosure share and succeeded in eliminating the rival. Why should it matter if a defendant could have made the same kill with a smaller knife?

Contrast the above scenarios with one in which nonliability is predicated on a genuine entitlement. Consider the patent licensing restraint discussed above.[42] In that case, the relevant counterfactual conduct—an outright refusal to license the rival—is lawful for reasons that apply equally to the defendant's actual conduct (the output restraint).[43] Patent law lets patentees exclude others from using their technology because the resulting rents reward (and thus incentivize) innovation. If the patentee instead sells an output-restricted license to a rival, then the resulting rents serve the same reward function.[44]

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[40] Then, if the but-for world is defined so that the moderated deal remains available to the defendant, we would expect that the defendant actually would adopt the moderated restraint, given that it achieves the same exclusionary objective. (However, as noted later, this is not the right way to define the but-for world.)

[41] One might object that the 40% foreclosure screen is not a bright-line rule in the same sense as the above-cost safe harbor for predation. That might suggest that we cannot simply assume the counterfactual 15% foreclosure would have been lawful. But this ultimately leads to the same conclusion I am advocating, which is that this moderation counterfactual is not an appropriate comparative benchmark.

[42] See notes 24-25, supra, and accompanying text.

[43] I assume for purposes of this discussion that the patent is valid and infringed, and that the output restraint applies only to sales that read on the patent.

[44] In fact, the reward is even more socially efficient in this case, as the restricted license generates less deadweight loss than total exclusion.

But the legal thresholds considered above do not reflect a view that the defendant is entitled to lessen competition so long as its conduct remains below the relevant threshold. Rather, they are simply administrative kludges. Their job is to keep administrative costs in check by screening out cases where material harm will tend to be improbable or especially difficult to prove.[45]

2. Counterfactual False Negatives

The two examples from the previous section highlight a perverse implication of relying on moderation counterfactuals as a defense.[46] This would allow a *hypothetical* judicial error (a false negative) to create a real one. In both examples, the counterfactual moderated conduct would have been anticompetitive, and yet it would not have been illegal. That would be a false negative. We reluctantly tolerate some such errors in light of the administrative benefits conferred by the legal thresholds we employ. But if the counterfactual error can be relied upon to set the causal benchmark, then the real case will likewise result in a false negative, even though the defendant's actual conduct successfully cleared the relevant legal threshold.

III. LEGAL RULES AND THE BUT-FOR WORLD

Any statement about what the defendant "actually would have done" absent the challenged conduct necessarily rests on some assumption about how the but-for world should be defined. Before accepting such statements, we should be careful to verify that the assumed definition is correct. To that end, this section focuses on how to define the but-for world, with particular emphasis on how legal rules should—and should not—enter into the analysis.

A. Defining the But-For World

The plaintiff alleges that some specific conduct is anticompetitive. To test that allegation, we investigate the causal competitive effects of the challenged conduct. This requires defining the but-for world. Conceptually, the but-for world is defined through the following two-step procedure:

> **Step 1:** We remove the challenged conduct from the defendant's choice set, rendering it off-limits.[47]

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[45] See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001) (in exclusive dealing cases, the requirement of "substantial" foreclosure "serves a useful screening function.").

[46] As noted later, CAPs sometimes raise the same problem. See Part III.D, infra.

[47] This "choice set" refers to the set of all commercial activities that the defendant *could* engage in, without regard to their legality.

> **Step 2:** The defendant chooses how to behave, subject to the restrictions imposed in step 1. The defendant's "counterfactual conduct" is the conduct it chooses in this step.

The conduct adopted in step 2 (and rivals' responses to it) induce some counterfactual equilibrium. To determine the causal effects of the challenged conduct, we compare the real-world equilibrium (with the challenged conduct in force) to this counterfactual equilibrium.

Crucially, in step 1, we remove *only* the challenged conduct from the defendant's choice set. We do not further remove all other behaviors that are plausibly illegal. If we did that, the analysis would become acausal. That is, by imposing multiple independent restrictions in step 1, the analysis generally would not identify the causal effects of the specific conduct being challenged.[48] Thus, while it is certainly important to determine whether the counterfactual conduct would be lawful,[49] this should be assessed only after determining what the defendant would choose in step 2.

Note, however, that if a CAP is plausibly illegal, this could be relevant to the question of whether the defendant would actually have adopted it.[50] But this is a statement about what the defendant would choose in step 2, not about what restrictions should be imposed at step 1.

1. Step 1: Identifying the Challenged Conduct

The plaintiff's theory of harm asserts a causal hypothesis. It challenges some specific conduct and tries to explain how it allegedly causes anticompetitive harm. So long as the plaintiff's claim is legally cognizable,[51] it dictates what restrictions should be imposed at step 1. This is how we test whether the plaintiff's hypothesis has merit.[52]

In most cases, the plaintiff identifies a specific restrictive practice and challenges it in its entirety, implying the relevant activity should be made completely off-limits in step 1. For example, in an exclusive dealing case, the plaintiff argues that the market would have been more competitive if the exclusive deals had been *completely* absent. To test this allegation, in

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[48] To identify the causal effects of a specific intervention, the counterfactual world must eliminate *only* that intervention while leaving all else unchanged. See, e.g., James J. Heckman, *Econometric Causality*, 76 INT'L STAT. REV. 1, 2 (2008).

[49] See Part III.B.2, infra (discussing this legality requirement).

[50] For example, if a CAP is obviously illegal, then the prospect of antitrust penalties might have deterred the defendant from adopting it.

[51] This legal constraint is addressed in the next section.

[52] Of course, the plaintiff must also prove the basic factual allegations underlying its theory of harm. For example, it must prove that the defendant actually engaged in the conduct being challenged.

step 1 we eliminate all exclusive dealing from the defendant's choice set, including counterfactual moderated deals. Courts allow this even though sufficiently moderated exclusive deals would be lawful.[53]

Alternatively, in some cases, the plaintiff might challenge only a portion of the defendants' restrictive activity. For example, in a joint venture case, the defendants might employ many horizontal restraints, only some of which are challenged by the plaintiff.[54] In that case, the unchallenged restraints should remain available to the defendants in the but-for world, and our analysis should focus on the incremental competitive effects of adding the challenged restraints into the mix.

2. Step 2: Identifying the Counterfactual Conduct

While the plaintiff's theory of harm determines the restrictions imposed at step 1, it does not dictate what counterfactual conduct the defendant would actually choose in step 2. That is an open question of fact. Both sides can make arguments about how the defendant would or would not behave in step 2.

An important question is how proof burdens should be allocated when identifying counterfactual conduct in step 2. Proving harm to competition is part of the plaintiff's prima facie case. As noted earlier, courts tend to adopt a simple counterfactual of baseline competition by default. In my view, this is a sensible default rule. If a plaintiff's theory of harm hinges on some specific counterfactual practice, then of course it should have to prove that.[55] But a plaintiff should not have to affirmatively *disprove* all CAPs that a defendant could possibly undertake in the but-for world.

Rather, if the defendant wishes to argue that it would have adopted some specific CAP, then it should have to furnish some evidence in support of that claim. The evidence should suggest that it really would have adopted the CAP in the but-for world and that it would have been legal. If the evidence shows these things—and if using the CAP as an evaluative benchmark would not be legally inappropriate[56]—then the plaintiff should be required to prove harm relative to the CAP. Under this policy, the

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[53] I am aware of no exclusive dealing case in which the court has indicated that the plaintiff must prove anticompetitive harm relative to a moderated benchmark involving narrower (and presumably lawful) exclusive deals.

[54] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010).

[55] For example, in a merger challenge arising under the "actual potential competition" doctrine, the plaintiff must prove counterfactual market entry by the acquiring firm. See, e.g., Federal Trade Commission v. Meta Platforms, Inc., No. 5:22-cv-04325, 2023 WL 2346238 (N.D. Cal. Feb. 3, 2023).

[56] That is, the court should not permit the defendant to rely on the CAP if it would raise the kinds of normative concerns identified in this article.

ultimate burden of proving harmful causal effects remains with the plaintiff, although in some cases the defendant would be required to proffer evidence about the appropriate counterfactual benchmark.

B. Where the Law Factors In

The two-step procedure above is not normative. It defines the but-for world around the plaintiff's theory of harm (in step 1) and the defendant's preferences (in step 2). The law enters into the analysis in other ways.

1. The Theory of Harm Must Be Legally Valid

The law constrains what theories of harm the plaintiff can assert. A plaintiff's theory can be invalid in the sense that the challenged conduct is not unlawful even if it lessens competition. For example, if the challenged conduct involves petitioning the government to pass anticompetitive laws, this theory of harm is invalid.[57] If a defendant has no "duty to deal" with rivals, then its refusal to deal is not unlawful even if it leaves the market less competitive.[58] And if a defendant is entitled (say, due to IP) to restrain competition in a certain way, then the plaintiff's theory cannot treat the exercise of that entitlement as an actionable harm.

When the defendant has an entitlement to restrain competition, the plaintiff can still potentially bring a valid challenge, but it will have to allege that the restrictive conduct goes beyond the scope of the entitlement. The plaintiff then challenges only the incremental effects of going beyond what the entitlement permits. For example, if an otherwise-privileged restraint on a patent license persists beyond the patent's expiration, then only the post-expiration portion of the agreement is challengeable.[59] Similarly, if a labor union restrains competition beyond the scope of labor law immunities, that restraint—but not the union itself—is challengeable.[60]

Note that, if a plaintiff's theory is invalid, this does not mean that the plaintiff defined the but-for world incorrectly or that it miscalculated the causal effects. It simply means that the plaintiff's causal effects evidence is irrelevant. If a certain practice is not challengeable as a matter of law, then it does not matter how it affects competition.

2. Counterfactual Conduct Must Be Legal

The law also constrains what the defendant can argue. As already explained, a CAP cannot be relied upon as a defense if it would plausibly be

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[57] Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

[58] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415–16 (2004).

[59] Cf. Kimble v. Marvel Entertainment, LLC, 576 U.S. 446 (2015).

[60] Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

illegal. If this constraint is violated, that does not mean the defendant has necessarily defined the but-for world incorrectly. It simply means that the defendant's causal effects evidence is incognizable: it does not provide a valid legal basis for denying liability, even if it implies the market would be no more competitive in the but-for world.

Notice an important implication of this legal constraint: if the defendant's actual counterfactual conduct cannot be used as an evaluative benchmark (because it might be illegal), then liability will not turn on the actual causal effects of the challenged conduct. Instead, we must impose some artificial counterfactual—one that differs from the "true" but-for world. The most straightforward option is to use baseline competition as the counterfactual benchmark. But it is not the only possible option.

An alternative option is to use the defendant's preferred *clearly lawful* CAP. That could potentially benefit the plaintiff or the defendant, depending on whether that CAP would generate more or less competition than baseline competition. But, by hypothesis, the defendant would not actually have picked this CAP. It thus has the same basic problem as any "could-have" argument.[61] One might argue that baseline competition is equally "wrong" in this situation, so it is arbitrary to prefer it. But, as noted earlier, the virtue of baseline competition is in its austerity.[62] It is just plain vanilla competition. That is why it is routinely employed by default in both economics research and in antitrust litigation. Unless we have good reason to posit a more elaborate counterfactual—which will almost surely make the analysis more speculative and complex—we should not do so.

C. Moderation Misspecifies the But-For World

A moderation counterfactual defines the but-for world around legal thresholds or safe harbors. It imagines moderating the conduct to the level at which its legality becomes secure. This effectively treats the relevant legal threshold as an IP-like entitlement to restrain competition in a particular way. But that is not the case. For example, in an exclusive dealing case, a plaintiff need not treat the presumptive legality of a 15% foreclosure share as an IP-like right to exclude rivals from 15% of relevant trading partners. Thus, as noted above, plaintiffs can and do challenge the totality of the defendant's exclusive dealing, not just the subset of deals that raise the total foreclosure share beyond a lawful moderated level.

As such, a moderation counterfactual is typically inconsistent with the plaintiff's (legally valid) theory of harm. It thus defines the but-for world

[61] See Part I.B-C, supra.

[62] See Part I.A, supra.

incorrectly and, by extension, miscalculates the causal effects of the challenged conduct.

Consider again the predatory pricing example. In economics, predatory pricing is defined as lowering price below the SRPM level to eliminate rivals and thereby reap long-run monopoly profits. This is the strategy identified as anticompetitive by the complaint. The but-for world should therefore be defined so that this strategy is off-limits. That requires removing all below-SRPM prices from the defendant's choice set, implying the defendant could not engage in above-cost predation in the but-for world.[63] Thus, by permitting above-cost predation to remain in the defendant's choice set, the moderation counterfactual misspecifies the but-for world.

Therefore, it would not be correct to say that the defendant "actually would have engaged in above-cost predation in the but-for world." That statement assumes erroneously that the plaintiff is challenging only the incremental effects of reducing the price from the safe-harbor threshold (cost) to the below-cost level that the defendant actually set. But that is not right. So long as the defendant's actual price is below cost, the plaintiff can challenge the totality of the defendant's predatory price cut. This is a valid antitrust challenge, because the safe harbor for above-cost pricing is not an entitlement to exclude rivals through above-cost predation. It is just an administrative screen. And it does not apply when the defendant's actual price level is below cost.

D. CAPs and False Negatives

Some CAPs would be legal only because the legal rules that apply to them are imperfect, allowing some anticompetitive activity to escape liability. For example, consider the example above where a counterfactual horizontal merger would likely be legal (due to the firms having modest market shares) even if it serves no purpose other than to eliminate competition between the defendants.[64]

Unlike the moderation counterfactual, here we cannot argue that the but-for world has been defined incorrectly. If the plaintiff challenges a horizontal contractual restraint, then it is only that restraint—not a counterfactual merger—that should be removed from the defendants' choice set in step 1. Then, so long as we are confident that the defendants would actually choose to merge in step 2, it is the correct specification of the defendants' counterfactual conduct.

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[63] It is possible that setting price at the SRPM level could still result in a less efficient rival going out of business. But, by definition, that is not predation and thus is not actionable.

[64] Part II.A, supra.

However, while the hypothesized merger would likely be legal, the defendants' argument presents largely the same normative concern as if it were unlawful. Taking the argument at face value, the merger's legality would represent a judicial error—a false negative. By all rights, it *should* be illegal. Therefore, it would be inappropriate to let this causal effects evidence excuse the defendant's restraint. That the firms might have escaped justice in the but-for world does not suggest we should let them do so in the real world.

IV. CONCLUSION

This article shows that allowing defendants to rely on counterfactual conduct as an evaluative benchmark can create serious policy concerns in some cases. Courts must therefore be cautious before doing so. This article identifies some key factors that determine whether it is reasonable to rely on counterfactual conduct as a benchmark.

First, in most cases, we must ask not only whether a defendant *could* have adopted a certain practice in the but-for world, but whether it actually would have done so. Second, it is essential to ask not only whether the counterfactual conduct would be legal, but also *why*. Third, it is important to ask whether the counterfactual conduct would even be available to the defendant in the but-for world. A defendant's asserted counterfactual conduct (e.g., above-cost predatory pricing) might appear to be available only because the defendant has incorrectly defined the but-for world around legal rules rather than the plaintiff's theory of harm.