

THE JURISPRUDENCE OF GREED

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Although a reader might arch an eyebrow at Wilkow's strategy, an allegation of greed is not defamatory; sedulous pursuit of self-interest is the engine that propels a market economy. Capitalism certainly does not depend on sharp practices, but neither is an allegation of sharp dealing anything more than an uncharitable opinion. Illinois does not attach damages to name-calling.¹

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Greed—the motive Kumpf attributes to Steinhaus—does not violate a “fundamental and well-defined public policy” of Wisconsin. Greed is the foundation of much economic activity, and Adam Smith told us that each person's pursuit of his own interests drives the economic system to produce more and better goods and services for all.²

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[W]hen a pig becomes a hog it is slaughtered.³

INTRODUCTION

Antonio, the merchant of Venice, is an admirable, or at least unobjectionable, figure.⁴ He cares about his friends and the finer things in life. Although he is a merchant and deals with money, he conducts his trade honorably and discreetly, and his work is not the focus of his life. He is intelligent, generous, and patient—a good fellow on whom his friends can rely.

Shylock, the usurer, cares almost exclusively about making money. When his greed is thwarted, he is consumed by his desire for vengeance. True, he loves his daughter, but moneymaking is the focus of

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¹ Wilkow v. Forbes, Inc., 241 F.3d 552, 557 (7th Cir. 2001) (Easterbrook, J.).

² Kumpf v. Steinhaus, 779 F.2d 1323, 1326 (7th Cir. 1985) (Easterbrook, J.).

³ Dolese v. United States, 605 F.2d 1146, 1154 (10th Cir. 1979).

⁴ See generally WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, for the references to Antonio and the other characters in the play used throughout this Article.

his life and he treats his daughter like a possession. Shylock is not so much intelligent as he is cunning, and in the end his cunning leads to his undoing. He feels no generosity, shows no mercy, and is shameless about his love of money and his hatred of Christians.

Shylock is the personification of greed; that is clear enough. He is supposed to be loathsome, even if he makes some telling arguments on his own behalf and is an object of fascination throughout the play. But when we examine Antonio, and question his motivations and how we should regard them, we are puzzled. Antonio is a wealthy merchant, as much a stock figure of greed as the Jew in Elizabethan and Jacobean drama,⁵ but there is nothing loathsome about him. Indeed, though he has wealth and fine friends, he is slightly pitiable, for he is passive and suffers from a curious lassitude.

To understand Antonio, we must jump forward to the Scottish Enlightenment, which made a sustained effort to address the Elizabethan anxiety about the disorders of capitalism,⁶ a theme reflected in the tensions surrounding Shylock and Antonio. The writings of David Hume and Adam Smith focus on someone who resembles Antonio: a figure of moderate temperament, with some sympathy for friends and other people; far-sighted but not cunning; acquisitive and probably pleasure-loving but not self-indulgent;⁷ and certainly not shameless. This person is not quite as generous as Antonio, nor as moralistic; he is not as heedless of consequences, but is similarly unobjectionable. He is a blank. This person has interests and follows them, but in a way that tends to benefit society rather than hold it hostage. This person, after further pruning over the generations, has come down to us as *Homo economicus*.

⁵ See, e.g., Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 13-14 (1986) (discussing the Jacobean playwright Thomas Dekker, who portrayed merchants as "devious" and unscrupulous).

⁶ Cf. R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 231-53 (1998) (commenting on the Puritanical roots of European anti-capitalist sentiment and the rise of economic thought).

⁷ Because we do not observe Antonio indulging himself in the play like his friends, some scholars see him as a kind of Puritan. But it is clear that Antonio enjoys a close friendship with the heedless and luxury-loving aristocrats like Bassanio, and that they accept him as one of themselves. See E.C. Pettet, *The Merchant of Venice and the Problem of Usury*, in 31 *ESSAYS AND STUDIES BY MEMBERS OF THE ENGLISH ASSOCIATION* 19, 29 (1946) ("Antonio . . . is Bassanio's friend, a gentleman of the same class . . ."). On the other hand, E.C. Pettet describes Antonio as lacking the "ebullient optimism" of the rising bourgeoisie in Shakespeare's time. *Id.* at 23. Perhaps Antonio's personality is too Scottish.

Although the Antonio-like character is present in the writings of Hume and Smith, there is no place for Shylock in either of their theories. Shylock's cunning, greedy, vengeful, and shameless character is pressed to the margins, for while the philosophers acknowledge the existence of these vices, the vices are in tension with the social order built upon reasonable self-interest.⁸ In the lightly regulated market economy, there is no role for Shylock.

Shylock was banished from economic theory but not commerce and society. He reappears even today in the judicial opinions of American courts, causing problems and provoking responses that would be recognizable to his nemesis in the play, Portia. Shylock's reappearances, I will argue, provoke contradictory responses from the courts, which sometimes punish greed because of its destructiveness, and at other times tolerate or even encourage greed because of its role in the market and the legal system.

I. CONCEPTUAL PRELIMINARIES: GREED VERSUS SELF-INTEREST

Shylock embodies greed and plays the crucial role of creditor in commercial Venice. Yet greed has a paradoxical relationship with economics: it is at once a paradigm of the self-interested behavior at the heart of economics and a contradiction of it.

In consumer choice theory, a person has a budget constraint and preferences over outcomes, yielding a choice among the packages of goods and services available in the economy. The theory assumes that preferences have certain characteristics—preferences must, among other things, be consistent and stable over the period of study. Because choosers' preferences are their own rather than someone else's, economists often say that people act in their self-interest. The term "self-interest" is therefore morally neutral within an economic analysis. If one equates self-interest with greed, as Judge Easterbrook does in the first two epigraphs, then greed is made a morally neutral term as well, and greed and self-interest are deprived of separate meaning. If greed and self-interest were the same thing, then the miser and the saint would be greedy because they both seek to satisfy their preferences. For that reason greed has no meaning in economics.

To understand greed, we need to bring in motivations, emotions, and moral judgments, concepts that cannot be incorporated into eco-

⁸ For a survey of the extensive literature on the role of self-interest in economics and social history, see ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS* (1992).

nomics without some violence to the theory.⁹ Greed is at its core a disposition (or motivation): greedy people have certain preferences, very intense preferences for a narrow range of goods and services. But the dispositional sense of greed breaks into two meanings: a hunger for food and other sensuous or material pleasures related to the animal appetites ("carnal greed"); and a narrow urge to accumulate wealth ("social greed"), which is abstract, for money is not an intrinsic pleasure—it is not sought by animals—but has value only from its capacity to purchase other things. Thus, a millionaire who lives plainly and gives away a lot of money, or a rich eccentric who squanders a fortune on an expedition to the North Pole, would not be considered greedy, in part because greed is always relative to a norm. At one extreme of greed are misers who hoard wealth, and at the other extreme are gluttons who gorge themselves on food. An excessive, narrow longing to satisfy bodily appetites or to acquire purchasing power is the hallmark of greed in the dispositional sense.

The *carnal* greed of the glutton is closely related to the emotion of disgust. Greed conjures the image of a person gorging on food to the point of nausea. The greedy person and the observer are both disgusted by the very attempt to satisfy greed. Greed thus denotes not only excessive and narrow preferences; it also implies inconstancy, for the greedy person vacillates between intense longing for an item such as food and intense aversion to it. Greed is myopic, for even the prospect of nauseating engorgement does not deter excessive consumption in the moment of greedy hunger.

The *social* greed of the miser is more abstract, and so is the disgust that the miser excites. People who accumulate wealth but live frugal lives are rarely considered greedy. They are not disgusting people because they work hard and generate a surplus; they do not take more than their fair share. Misers, on the other hand, accumulate wealth by fair means or foul and, because of their pathological obsession with money for its own sake, will not share or show mercy; they are indifferent to the needs of others. Misers, unlike gluttons, do not make us think of saliva, vomit, and other bodily fluids, but they disgust us because misers, like gluttons, consume too much of the social surplus, leaving others with too little.

Thus, greed carries with it a moral charge. In everyday speech, an accusation of greediness is always an accusation of immorality, and

⁹ A helpful discussion of greed can be found in A.F. ROBERTSON, GREED: GUT FEELINGS, GROWTH, AND HISTORY (2001).

there is rarely the ambivalent tinge of admiration associated with similar accusations, such as the charge of pridefulness or ambition. Evolutionary psychologists might conjure up the image of a dominant tribe member consuming most of the hunt, then vomiting. Disgust reflects not just the bodily fluids but the waste and unsatisfied hunger of other members of the tribe. In modern times, charges of greed usually refer to the more abstract notion that greedy people consume too many resources and do not leave enough for others. The visceral reaction, however, might owe something to primal experiences coded in the brain. Greed creates special revulsion because of its openness, its indifference to the feelings of others: Quaker millionaires are discreet; nouveaux riches are disgusting.

Because carnal and social greed are closely related, both connotations usually accompany a charge of greed. When we accuse a tycoon of greed, we do not take care to separate the carnal and social aspects, because the carnal connotations of greed give sting to what is otherwise a contestable moral judgment. Reasonable people disagree about business ethics and the proper distribution of wealth; no one wants to be disgusting. Cartoonists take advantage of these associations when they depict wealthy people as fat and pig-like.

Greed, then, carries with it a heavily laden train of associations. By contrast, as I observed above, self-interest as it operates in textbook economic theory is nearly empty of such associations. It refers to a set of preferences that obey certain formal assumptions and takes no position on the content of these preferences. Yet as we turn from the textbook models to self-interest in applied economics, and especially law and economics, some content is added, necessitated by the need to get the models off the ground. Preferences are well-behaved in certain ways: to be deterrable by sanctions, for example, people must care enough about the future, and have moderate enough preferences. And preferences are understood to fall into certain basic patterns. For example, in the economic analysis of contract law it is assumed that people are interested in making money and that consumers sometimes have special tastes for certain goods and services. It is not assumed, however, that people take idiosyncratic pleasure in violating contracts for their own sake or that they are injured when they observe a contract breach involving others.

Self-interest in law and economics is thus not empty, and yet it is a far cry from greed. Whereas greed either refers to excessive bodily appetites or an excessive longing for purchasing power, self-interest refers to a wider range of moderate desires, both bodily and abstract.

Whereas greed varies in intensity over time as the appetite wakes and slumbers, self-interest's preferences remain stable over time. Whereas greed is often myopic, self-interest balances the demands of present and future. Whereas greed is accompanied by violent longing and disgust, self-interest is emotionally neutral. Whereas greed is a moral evil, self-interest is a matter of indifference, and might indirectly cause good. Whereas greed is shameless, self-interest is discreet. Table 1 summarizes the comparison of the concepts of self-interest and greed in applied economics—a comparison foreshadowed by the contrast between Antonio and Shylock.

Table 1: Self-Interest Versus Greed

Preferences	Self-Interest	Greed
Type	General	Bodily, Narrow
Magnitude	Moderate	Extreme
Stability	Constant	Variable
Time Discounting	Moderate	Myopic
Emotional Valence	None	Disgust
Morality	Neutral	Bad
Candor	Discreet	Shameless

With these distinctions in mind, we can proceed to an examination of the case law. As we will see, judges, like other people, hate greed, and they frequently justify their rulings against people by referring to their greed. Yet judges also understand that a spirit of acquisitiveness is necessary to the market economy and that such spirit is assumed, and indeed exploited, by many of the laws that they are supposed to enforce. Thus, judges find themselves both attacking greed and tolerating it. But we are getting ahead of ourselves. Let us turn to the cases.

II. THE CASE LAW

Judicial opinions referring to greed can be divided into cases in which judges condemn people for being too greedy and cases in which judges condemn people for being insufficiently greedy. In the

first category one finds cases involving (1) extreme indifference to others; (2) calculation; (3) foolishness or compulsiveness; and (4) unprofessional behavior. In the second category one finds those involving (1) ideological or disinterested behavior; (2) malice; and (3) indolence. Before investigating these classes separately, let us look at *Wilkow v. Forbes, Inc.*,¹⁰ which brings to the surface themes that are submerged in the other cases.

A. *The Wilkow Case*

In the first epigraph, Judge Easterbrook praises greed as the “engine that propels a market economy.”¹¹ Yet in the same case, *Wilkow v. Forbes*, he acknowledges that calling someone “greedy” is a form of “name-calling,” and that it is not actionable only because under Illinois law defamation requires more significant harm than name-calling.¹² Still, “name-calling” implies that harm is imposed, but how can it be harmful to accuse someone of having the motivation that propels the market economy?

Wilkow arose when a *Forbes* reporter accused Marc Wilkow, a manager of a real estate partnership that was in bankruptcy, of engaging in “unscrupulous” business practices and “stiffing the creditor.”¹³ The reporter did not actually use the word “greed”; that was the court’s term.¹⁴ The reporter did, however, accuse Wilkow of acting unethically by proposing a bankruptcy plan that would retain a property interest for Wilkow and his partners while failing to pay the full value of a secured claim.¹⁵

Wilkow acted legally in proposing this plan, and at the time that he proposed the plan it had a good chance of success. The plan was approved by the bankruptcy court, the district court, and the court of appeals;¹⁶ the Supreme Court’s reversal resulted from its partial clarification of unsettled doctrine.¹⁷ Bankruptcy law does allow debtors to “stiff” creditors in the sense that the reporter meant, and the reporter

¹⁰ 241 F.3d 552 (7th Cir. 2001).

¹¹ *Id.* at 557.

¹² *Id.*

¹³ *Id.* at 554.

¹⁴ *See id.* at 557 (stating the reporter’s claim and adding “an allegation of greed is not defamatory”).

¹⁵ *Id.* at 554-57.

¹⁶ *Id.* at 554.

¹⁷ *See Bank of Am. Nat’l Trust & Sav. Assoc. v. 203 N. LaSalle St. P’ship*, 526 U.S. 434, 449-50 (1999) (interpreting the absolute priority rule).

took Wilkow to task despite the consistency of his behavior with a reasonable interpretation of the law.¹⁸

It is hard to see what Wilkow's alternative was. He was not acting solely on his own behalf, but on behalf of a partnership. If he had not pursued his Chapter 11 remedy, he would likely have been sued by his partners for failing to act consistently with the interests of the partnership. The creditor, a sophisticated bank, knew when it advanced the loan that secured lending is vulnerable to bankruptcy protection, and the creditor surely accounted for this risk in the interest rate. Giving the asset to the bank would be like giving it a gift rather than complying with a legal obligation. This idiosyncratic behavior would have nothing to recommend it, certainly not business ethics.

Thus, the reporter's charges were unfair, even if not defamatory. Judge Easterbrook, however, interprets them as *praise* for which Wilkow should have been grateful.

Wilkow's current and potential partners would have read this article as an endorsement of Wilkow's strategy; they want to invest with a general partner who drives the hardest possible bargain with lenders. By observing that Wilkow used every opening the courts allowed, *Forbes* may well have improved his standing with investors looking for real estate tax shelters (though surely it did not help his standing with lenders).¹⁹

In the last parenthetical we see the double edge—and that must be why Easterbrook concedes that being called greedy is “name-calling,” that is, a bad thing.²⁰ Greedy people exploit every loophole in the law; therefore, potential business contractors avoid them. Banks do not want to deal with greedy people, nor do potential partners, who will fear that the greedy person will take advantage of them. Wilkow's unhappiness with the *Forbes* article, despite Judge Easterbrook's comments, is easy to understand.

And yet Judge Easterbrook's comments contain a morsel of truth. The partners and the bank depended on Wilkow being sufficiently greedy so that he would work hard in order to make profits and avoid default. If Wilkow were not greedy (did not care much about acquiring money) and instead enjoyed playing golf, or living the good life, or pursuing religious commitments, or enjoying his family, then the lure of profits would not spur him to work hard. If the partners had any doubt about Wilkow's reliability along *this* dimension, then the

¹⁸ See *Wilkow*, 241 F.3d at 557-58 (reprinting the *Forbes* article).

¹⁹ *Id.* at 557.

²⁰ *Id.*

Forbes article might have laid these doubts to rest. Far from being religiously scrupulous, Wilkow plays every card he has at his disposal. Far from being lazy, he looks for every angle. Or so argues Judge Easterbrook.²¹

So which is it? Does the *Forbes* article harm Wilkow or benefit him? The answer depends on the type of person with whom Wilkow needs to associate and what their prior beliefs about him are. If the partners already believe that Wilkow is self-interested and hard working but future creditors and other associates are uncertain about whether he can be trusted, the article would hurt Wilkow. If the partners believe that Wilkow is not hard-nosed enough and the creditors already understand him well, the *Forbes* article could only benefit him—the journalist, more than Wilkow and his friends, is credible. The ideal Wilkow is a mix of self-interest and honesty, all a function of the market in which he works and the information potential associates possess.

A good business reputation places a person midway between *too greedy* and *not greedy enough*. Because defamation law obliges courts to protect reputation, courts must determine whether a journalist portrays a subject at either of those extremes—as a Shylock on the one hand, or as a Falstaff or Hotspur, perhaps,²² on the other. How does the court determine on which side of the line a litigant's behavior lies? Let us turn to the cases.

B. *Too Greedy*

1. Extreme Indifference to Others

Contract disputes are a fecund source for references to greed. In *Tyler, Ullman & Co. v. Western Union Telegraph Co.*, the court refused to enforce a contractual provision that limited Western Union's liability for an erroneously transmitted telegram.²³ The court asserted in passing that the sender "was compelled to submit to such conditions as the company, in their corporate greed, might impose, and sign such a paper as the company might present."²⁴ In *Zim v. Western Publishing Co.*, the court held that an author could not exercise his contractual right

²¹ See *id.* ("Wilkow used every opening the courts allowed . . .").

²² For the characters Falstaff and Hotspur, see WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH*.

²³ 60 Ill. 421, 439-40 (1871).

²⁴ *Id.* at 438.

to approve certain publications in such a way as to hold the publisher "hostage to dilatoriness, obstructionism, or greed."²⁵ One-sided contract provisions are common enough, but one may not exploit them if the motive is greed.²⁶

The aversion to too much money making is also the primitive impulse behind the antitrust laws. In *United States v. Andreas*, the defendants were found guilty of conspiring to fix prices.²⁷ For the court, their greed was too obvious to be worth discussing. "As the government argued, this case is no different from the typical antitrust offense, i.e., several large corporations agreed to inflate prices to make some extra cash to feed their own greed."²⁸ Greedy corporations violate the antitrust laws; nongreedy corporations respect them.

When liability is established, "greed" can make the difference between ordinary damages and punitive damages. In *Landbank Equity*, a case in which defendants engaged in a massive conspiracy to defraud customers and creditors, the court stated: "There exists here a greed for which [the defendants] make no apology. Indeed, it is flaunted. Exemplary damages may teach no such lesson, but it must try."²⁹ In *Sufrin v. Hosier*, a lawyer named Hosier interfered with a contract be-

²⁵ 573 F.2d 1318, 1324 (5th Cir. 1978); see also *Washburn Mill Co. v. Fire Ass'n of Phila.*, 61 N.W. 828, 829 (Minn. 1895) (enforcing an insurance policy even though it was void because the insurer accepted the premium without informing the insured that the policy was void, stating that the law does not "sanction such pernicious greed").

²⁶ There are also a few older cases in which "corporate greed" is a justification for restricting the ability of municipalities to enter into contracts with corporations or to provide corporations with benefits. See, e.g., *Appeal of Freeport Water-Works Co.*, 18 A. 560, 561 (Pa. 1889) (asking whether it was "possible for . . . greed to go further than this" when denying Freeport Water-Works's request to restrain an earlier supplier from continuing his distribution of water because Freeport alleged that it had the exclusive right to supply water); *Philadelphia's Appeal*, 102 Pa. 123, 129 (1883) (holding that a state may revoke a corporate charter supplement at any time absent a new or additional burden on the corporation and stating that "[i]n the present age of corporate greed it would be dangerous to hold the contrary doctrine"); *Cleburne v. Gulf, Colo. & Santa Fe Ry.*, 1 S.W. 342, 342, 343 (Tex. 1886) (voiding a contract between the city and railway company in which the city would either buy the right of way and depot grounds for the railway or refund the money the railway company paid to acquire the land, observing that in the past "corporate greed found local pride and ambition an open way to municipal revenues").

²⁷ No. 96 CR 762, 1999 U.S. Dist. LEXIS 11166, at *4 (N.D. Ill. July 15, 1999).

²⁸ *Id.* at *29.

²⁹ *In re Landbank Equity Corp.*, 83 B.R. 362, 376 (E.D. Va. 1987) (quoting *In re Landbank Equity Corp.*, 66 B.R. 949, 962 (Bankr. E.D. Va. 1986)).

tween a client and the lawyer's ex-partner Sufrin by preventing Sufrin from receiving his portion of a settlement.³⁰ The court commented:

[T]hough absence of financial hardship to Sufrin may have weighed against the award of punitive damages, Hosier's greed weighed in favor of it: here was a lawyer who was receiving hundreds of millions of dollars in attorneys' fees yet thought it appropriate to commit a tort in order to squeeze what to him was an almost nominal amount of money from a former partner.³¹

Hosier was greedy not just because he committed a tort that would get him money; he was greedy because the money was worth a lot more to his partner than to him. And in *Syester v. Banta*, an elderly widow paid a dancing school \$33,497 for 4057 hours of dance instruction (nearly all in advance) after being promised that she would be turned into a professional dancer.³² The court said "the evidence of greed and avariciousness on the part of defendants is shocking to our sense of justice as it obviously was to the jury," and permitted a punitive damages award to stand.³³

Contract, antitrust, and punitive damages cases show, then, that courts will not tolerate greedy behavior. And yet, we know that this cannot be the whole truth.

In contracts cases, courts frequently enforce harsh terms, and they permit one side to exercise rights of approval and do not accuse either side of greed. For example, in *Kumpf v. Steinhaus*, the executive vice-president of Lincoln Life advised the board of directors to approve a merger of a subsidiary, as a result of which Kumpf, the president and CEO of that subsidiary, lost his job.³⁴ Kumpf sued Steinhaus and others for tortious interference with the employment contract between Kumpf and the subsidiary he headed. The district court instructed the jury that Steinhaus could be liable if his actions were "motivated solely by a desire for revenge, ill will or malice, or . . . by personal considerations."³⁵ The court of appeals affirmed the jury's verdict for Steinhaus, despite Kumpf's argument that Steinhaus's real motive was greed (which the court called "self-interest") and that greed could support the tort claim.³⁶

³⁰ 128 F.3d 594, 596 (7th Cir. 1997).

³¹ *Id.* at 599.

³² 133 N.W.2d 666, 669-70 (Iowa 1965).

³³ *Id.* at 676.

³⁴ 779 F.2d 1323, 1324 (7th Cir. 1985).

³⁵ *Id.*

³⁶ *Id.* at 1325. The court added that "[g]reed . . . does not violate a 'fundamental

In antitrust cases, winning defendants are rarely condemned for their greed. On the contrary, courts frequently apologize for the defendants' motives. One court stated: "It must be emphasized that greed may be an unsavory personal characteristic, but it is also at the heart of an active and free market where more disinterested observers might call it 'profit motive.'"³⁷ Another court stated: "High profitability and even greed are not anathema to the American competitive system. Making big profits under our system is as American as apple pie, but the dessert of huge profit cannot be obtained with the recipe of anti-competitive pricing schemes"³⁸ Greed does not taint competitive behavior but is an unfortunate byproduct of the demands of the market.

Courts also frequently refuse to award punitive damages despite the defendant's greed. A typical explanation is that "the conduct of [the defendant] was more greedy, ambitious, and covetous than malicious, fraudulent, deliberate, and willful."³⁹ In *Sweede v. Cigna Healthplan of Delaware, Inc.*, the court held that punitive damages could not be awarded against a doctor who improperly delayed a referral merely because the doctor was paid more by his HMO because of such delay.⁴⁰ The court acknowledged that the doctor might have profited from delay, but said that the evidence was not strong enough to warrant punitive damages.⁴¹

Digging beneath the rhetoric, one surmises that courts measure defendants' behavior against an implicit standard of normal conduct, and only when the behavior deviates too far will courts call a defendant greedy. Seeking profits is not greedy, even if competitors are harmed, as long as contract terms and business practices do not harm consumers, or do not harm them too much. Profiting through vigorous marketing is not greedy, even if some consumers end up purchas-

and well-defined public policy' of Wisconsin [and is actually] the foundation of much economic activity." *Id.* at 1326.

³⁷ *Apex Oil Co. v. DiMauro*, 641 F. Supp. 1246, 1265 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 822 F.2d 246 (2d Cir. 1987); *see also* *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1197 n.10 (D. Kan. 2001) (citing *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989), for the proposition that "a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition").

³⁸ *SmithKline Corp. v. Eli Lilly & Co.*, 427 F. Supp. 1089, 1128 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir. 1978).

³⁹ *Pioneer Hi-Bred Int'l, Inc. v. Holden Found. Seeds, Inc.*, No. 81-60-E, 1991 U.S. Dist. LEXIS 21179, at *16 (S.D. Iowa Dec. 30, 1991), *aff'd*, 35 F.3d 1226 (8th Cir. 1994).

⁴⁰ No. 87C-SE-171-I-CV, 1989 Del. Super. LEXIS 51, at *15 (Feb. 2, 1989).

⁴¹ *Id.* at *14-15.

ing things they do not want, as long as the hard sell does not take excessive advantage of vulnerable people. One is not greedy—or is excusably greedy—if one merely wants more money, but one is greedy—sometimes unlawfully greedy—if one makes too much money, at the expense of too many people, especially if they are consumers rather than business rivals.⁴²

2. Calculation

The individual debtor in bankruptcy is permitted to keep assets that are exempt under state or federal law,⁴³ and in some states exempt assets—a house, usually, but sometimes an insurance policy or other assets—can be worth thousands or millions of dollars. Sophisticated debtors learn about the law from their lawyers and engage in “prebankruptcy planning,” the process of converting non-exempt assets into exempt assets prior to bankruptcy. In *Hanson v. First National Bank*, for example, the debtor, prior to declaring bankruptcy, had sold some vehicles and household furnishings and then used the cash to purchase approximately \$20,000 in life insurance and \$11,000 of equity in his house.⁴⁴ The vehicles and household furnishings would have gone to the creditors under the law, but the life insurance and home equity were exempt. The Bankruptcy Code does not by its terms prohibit this conduct, and the *Hanson* court ruled against a creditor’s fraud claim.⁴⁵

By contrast, in *In re Krantz* the court refused to permit the debtor to exempt hundreds of thousands of dollars worth of insurance policies that he had purchased using proceeds from the sale of non-exempt assets.⁴⁶ Although these insurance policies were exempt un-

⁴² Cases on trusts, gifts, and bequests provide another rich mine for exploring the judicial treatment of greed. The concept arises frequently in cases of undue influence, in which courts refer to greed when annulling the transfer. In such cases, the beneficiary has often received a greater share of the estate or the benefactor’s wealth than the value of any services or reasonable family share would dictate. Compare *Estate of McRae v. Watkins*, 522 So. 2d 731, 737 (Miss. 1988) (voiding the conveyance in order to “frustrate the success of a greed in larcenous form”), with *Estate of Silva v. Miramon*, 462 P.2d 792, 795 (Ariz. 1969) (“Every act of kindness is not necessarily motivated by greed or sinister motive.”).

⁴³ For an overview of the rules of exemption in bankruptcy, see generally 4 COLLIER ON BANKRUPTCY ch. 522 (Alan N. Resnich & Henry J. Sommer eds., 15th rev. ed. 2002).

⁴⁴ 848 F.2d 866, 867 (8th Cir. 1988).

⁴⁵ *Id.* at 869.

⁴⁶ 97 B.R. 514, 531 (Bankr. N.D. Iowa 1989); see also *In re Bowyer*, 916 F.2d 1056, 1059 (5th Cir. 1990) (reversing the bankruptcy court’s decision to allow discharge,

der state law, the court distinguished *Hanson* by arguing that the “modest amounts” involved in that case “reflect not greed and calculation, but an honest attempt to use the state’s exemption laws.”⁴⁷ Krantz, by implication, was greedy and calculating.

One straightforward interpretation of the cases is that Krantz wanted too much, while Hanson wanted a reasonable amount. This interpretation places *Krantz* in the “too greedy” category, with the court defying the legislature because the debtor obtained too much money at the expense of his creditors.⁴⁸

But there is another reason why the court denied Krantz’s exemptions. The court observed that Krantz made all of his objectionable purchases between April 1986 and January 1987, then waited a little more than a year and filed for bankruptcy in April 1988. The court concluded that Krantz made his purchases more than one year prior to bankruptcy in order to avoid Code provisions that forbid preferences and fraudulent transfers within one year.⁴⁹ But Krantz’s purchases were not illegal preferences or transfers; the Code permits conversion of non-exempt assets to exempt assets.⁵⁰ Nevertheless, the court realized that Krantz waited more than a year in order to make the transfers look less suspicious, less like planning in anticipation of bankruptcy. The court denied the exemptions because of his craftiness:

To allow the Debtors to claim that because the transfers took place well before the “eve of bankruptcy” and thus do not indicate fraudulent intent would work a manifest injustice. The length of time between the purchase of the life insurance and the filing of bankruptcy actually indicates a very well thought out and sophisticated scheme on behalf of the Debtors to hinder, delay or defraud the Federal Land Bank. That the Debtors did not do what most unsophisticated debtors seem to do—con-

finding “intent to hinder or delay” a creditor but not “intent to defraud” in a debtor’s conversions, which included the purchase of a greenhouse for his home), *rev’d on reh’g*, 932 F.2d 1100 (5th Cir. 1991).

⁴⁷ *Krantz*, 97 B.R. at 525.

⁴⁸ Compare *Norwest Bank Neb., N.A. v. Tveten*, 848 F.2d 871, 878 (8th Cir. 1988) (Arnold, J., dissenting) (asking, in a case much like *Krantz* but with an opposite result, whether the court would have decided the case differently had the amount of money at stake been \$7000 instead of \$70,000), with *Hanson*, 848 F.2d at 870, 871 (Arnold, J., concurring) (criticizing the result of the *Hanson* and *Tveten* decisions as providing a “license to make distinctions among debtors based on subjective considerations” about the amount of money involved in the case).

⁴⁹ *Krantz*, 97 B.R. at 527-28.

⁵⁰ *Id.* at 521.

vert non-exempt property into exempt property and file bankruptcy a very short time later—only reflects the sophistication of the Debtors.⁵¹

Krantz followed the rules in order to avoid violating the Code, but this just shows how crafty he was in the first place!

Hanson and Krantz both took maximum advantage of the law and their resources. They thus acted in their rational self-interest or, if you prefer, greedily. Krantz, however, had the misfortune of living in a state that allowed his greed greater play and of appearing before a court that disapproved of the state's exemption law. Although the court was bold enough to denounce the law,⁵² it could not express its disapproval by invalidating the law (there were no constitutional grounds for doing so). Instead, it held that the debtor was cunning. The debtor's compliance with the formal requirements of the law showed just how sophisticated he was, and the combination of sophistication and indifference to others was enough to establish fraud. Poor Krantz was like a wealthy taxpayer who is called sophisticated and greedy for taking advantage of a deduction in the tax code and is therefore prosecuted for fraud.⁵³

What is the difference between "greed and calculation" and an "honest attempt to use the state's exemption laws"?⁵⁴ The court in *Krantz* was not bothered by self-interest, without which one would not attempt to use the state's exemption laws, but by "too much" self-interest and "too much" rationality. Krantz was too farsighted, planning his bankruptcy years in advance, and too smart. Like Shylock, he was undone by his own cunning, by a court that, like Portia, was unfraid of employing casuistry for a good cause.

3. Foolishness or Compulsiveness

Krantz's disappointment illustrates a significant feature of greed: that it can be foolish as well as calculating. One court describes vic-

⁵¹ *Id.* at 528.

⁵² By this point, the court's disapproval was largely moot. The Iowa legislature had already reduced the exemption from unlimited to \$10,000, but the reduction did not apply to the debtor in this case. *Id.* at 522 n.3 (citing the amendments to IOWA CODE ANN. § 627.6 (West 1987)).

⁵³ *Cf. Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J.) (agreeing that "a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose[s], to evade, taxation," but nevertheless assessing a deficiency on a clever taxpayer), *aff'd* 293 U.S. 465 (1935).

⁵⁴ *See supra* text accompanying note 47 (quoting *Krantz*).

tims of a fraudulent investment scheme as “would-be investors, driven first by greed that blinds them to the promptings of common sense, and then by fear, when reality inevitably intrudes.”⁵⁵ The con artist’s victim is sometimes “actuated by greed [and] in many instances knows that he is dealing with a crook and would not trust him out of his sight, and yet to him the scheme appears so foolproof that he has ‘confidence’ that this knave will work a fat profit to his advantage.”⁵⁶ In another fraudulent investment scheme, the “plaintiffs profess[ed] their innocence as to exactly what was taking place, [but] it [was] clear that they were motivated in part by greed, and that if they had applied their common sense, they would have had to realize the properties they were buying were grossly overvalued.”⁵⁷ Greedy people are not always predators; they are often victims.

Whereas greedy predators are described as calculating, greedy victims are described as credulous and foolish. What is objectionable about greed is not the core notion of acquisitiveness, but the failure to acquire in the right way. The predators try too hard, think too carefully, harm other people, and are indifferent to morality.⁵⁸ The victims do not try hard enough, reason poorly and myopically, and harm themselves, but they are also indifferent to morality. People who act in their enlightened self-interest do not pose a threat to others, and do not need protection from themselves.

There are other victims who are not so much foolish as compulsive—drug addicts. Like the marks of con artists, drug addicts are both criminals and the dupes of more sophisticated criminals. Addicts frequently try to escape the charge of greed by portraying themselves as victims of impulsiveness and occasionally procure a sentence reduction this way.⁵⁹ For some courts, the greed of addicts is so extreme that greed is no longer the right word, for though addicts are greedy in the motivational and emotional senses (they are often

⁵⁵ United States v. Hornick, 942 F.2d 105, 106 (2d Cir. 1991).

⁵⁶ McBride v. People, 248 P.2d 725, 729 (Colo. 1952); *see also* People v. Williams, 402 N.Y.S.2d 310, 314 (N.Y. Crim. Ct. 1978) (observing that con games “prey on the credulity and/or greed of the victim”).

⁵⁷ Weiss v. Lehman, 713 F. Supp. 489, 504-05 (D.D.C. 1989), *supplemented and amended*, 759 F. Supp. 1 (D.D.C. 1989).

⁵⁸ Even predators can be blinded by greed, of course. *See, e.g.*, United States v. Cardascia, 951 F.2d 474, 477 (2d Cir. 1991) (“Appellants’ greed blinded them to the fact that their grandiose designs were so transparent it was obvious they would be easily seen through.”).

⁵⁹ *See, e.g.*, Huff v. State, 568 P.2d 1014, 1017, 1020 (Alaska 1977) (“[W]here Huff himself suffered from an addiction to heroin and arranged sales solely to satisfy his craving for the drug, eight years is also quite a severe sentence.”).

thought to be disgusting), they escape moral condemnation for their greed because their greed is thought to be the result of disease. Many courts regard addicts with as much distaste as they regard non-addicted drug dealers, however, and deny them sentence reductions.⁶⁰

The foolish, simple-minded greed of the small-time criminal, or the helpless, self-destructive greed of the addict, often seems to be in the back of courts' minds when they condemn more sophisticated criminals. The trial court in *United States v. Velez*, for example, justified the upward departure from sentencing guidelines on the ground that the defendant's immigration fraud, a large-scale operation involving millions of dollars, displayed a "high level of greed."⁶¹ Other cases involving upward departures based on the greed of the defendant include a case in which the defendant fraudulently violated the FDA's drug-testing procedures;⁶² a case in which the defendant was a significant drug dealer;⁶³ and a case in which the defendant set fire to his own business in order to obtain insurance money.⁶⁴

The circuit courts frequently strike down such upward departures. They point out that the sentencing guidelines usually assume that the defendant's motive is greed.⁶⁵ The circuit courts seem to have the better legal argument, and yet they do not really respond to what bothers

⁶⁰ The majority and dissent in *United States v. Borum*, 584 F.2d 424 (D.C. Cir. 1978), offer contrasting views of whether addiction mitigates guilt. The majority indicated that, along with evidence of entrapment, the jury should be advised of defendant's "need to finance a drug habit." *Id.* at 428 n.3. The dissent, on the other hand, did not believe that addiction mitigated guilt. *See id.* at 435 (MacKinnon, J., dissenting) ("While addiction may contribute to one's predisposition to commit crimes, it is not a legal defense to the consequences thereof.").

⁶¹ *See United States v. Velez*, 113 F.3d 1035, 1037 (9th Cir. 1997) (discussing the trial court's decision).

⁶² *See United States v. Chatterji*, 46 F.3d 1336, 1343 (4th Cir. 1995) (describing the district court's imposition of a fine greater than the applicable range because "Chatterji's offense was a 'crime of greed' and . . . the fine imposed [will] 'take some of the profits out of it'").

⁶³ *See United States v. Gray*, 982 F.2d 1020, 1021 (6th Cir. 1993) (quoting the trial court's explanation for its upward departure: "The defendant's involvement in this offense appears to have been motivated purely by greed. . . . The justification for a departure upward . . . is that the guidelines do not adequately take into effect the seriousness of the defendant's involvement nor the seriousness of this offense . . .").

⁶⁴ *See United States v. Ferranti*, 928 F. Supp. 206, 210-11 (E.D.N.Y. 1996) ("Given . . . the need for general deterrence of this greed driven crime, and the danger it poses in our urban society, the financial penalty imposed cannot be deemed unconstitutionally cruel and unusual punishment.").

⁶⁵ *See Gray*, 982 F.2d at 1023 (holding that the district court judge "erred when and to the extent that he considered greed . . . as [a factor] justifying departure from the federal sentencing guidelines").

the district courts. Do the guidelines assume sophisticated greed or foolish greed? If they assume foolish greed, then upward departures might be justified, normatively if not legally, for sophisticated criminals. Greedy drug dealers are more deterrable than ordinary drug dealers because they are motivated by profit and nothing else. They are disciplined and far-sighted. They keep accounts and comply with contracts. Large sanctions might deter greedy drug dealers, but not the compulsive drug user who sells on the side.

Yet we are confronted with a familiar paradox: Punish the greedy more than the nongreedy and, if the system succeeds, the drug trade will be taken over by violent, erratic, compulsive addicts rather than disciplined, far-seeing, rational merchants. Violent struggle rather than peaceful coexistence may ensue. Even if the guidelines assume foolish greed, upward departures may be undesirable because the merchant criminals are not as dangerous as the amateurs.

Criminal defense lawyers understand this problem. If their clients are impulsive, then they are at least not malicious or calculating, but they open themselves to the charge of a greed that overwhelms their rationality.⁶⁶ Judges might respond by throwing up their hands and locking up the defendants, at least when they are otherwise dangerous. If the clients are not impulsive, then they are not "irrationally" greedy, but they might seem even more repulsive—people whose greed is calculating or who are more malicious than greedy. Indeed, in hate crime cases it is better to be greedy than malicious.⁶⁷ Defense lawyers must portray their clients as not too sophisticated, foolish, or compulsive, and as well-meaning but unfortunate, rather than greedy.

4. Lack of Professionalism

In *Raymark Industries, Inc. v. Stemple*, the court said that class action attorneys' solicitation of fraudulent claims was motivated by "greed, which . . . clouded their professional judgment, i.e., their indifference as to whether any of the 6,000 claims [met] professional standards or

⁶⁶ See, e.g., *United States v. Vitale*, 159 F.3d 810, 812 (3d Cir. 1998) (discussing the testimony of the defendant's psychiatrist that the defendant was motivated by an "obsession with antique clocks which overpowered his sense of right and wrong" rather than by greed).

⁶⁷ Cf. *United States v. Price*, 65 F.3d 903, 910 (11th Cir. 1995) (noting that the trial court found that "racial and ethnic prejudice" motivated the defendant's crime in addition to the "two primary motivators . . . [of] greed and business litigation").

not.”⁶⁸ Lawyers are also disciplined when they commit crimes like tax evasion that evidence “deliberate greed and dishonesty.”⁶⁹

Lawyers are held to a professional standard; they are not supposed to seize all opportunities for gain like an ordinary economic agent. They act in their clients’ interests and are permitted a reasonable remuneration. And yet lawyers are supposed to be motivated by money. The law holds out vast rewards for lawyers who shoulder regulatory projects in the form of class actions, and courts have supported this practice with generous restitution doctrines. Damage multipliers, punitive damages, expansive private rights of action, and contingency fees also are intended to induce individuals or their lawyers to shoulder the burdens of regulation. These institutions would be undermined if courts punished the greedy but legally compliant lawyer, and that is why in the cases the greedy lawyer is almost always the lawyer who has violated a law.

What to do, then, about lawyers who accept the invitation to slake their greed through litigation? Courts understand that they must tolerate this behavior as long as the lawyers play by the rules, whatever the risks.⁷⁰ But this understanding is in tension with the image of lawyers as driven by professional concerns rather than greed. The trope that greed “clouds the professional judgment” of lawyers found in violation of the ethics code rhetorically, if not logically, implies that lawyers who do not violate the ethics code are not greedy. The truth is that the government depends on lawyers’ being motivated by money rather than a desire faithfully to serve their clients or society at large.

⁶⁸ No. 88-1014-k, 1990 U.S. Dist. LEXIS 6710, at *38 (D. Kan. May 30, 1990); see also *In re* Petition for Disciplinary Action Against Daffer, 344 N.W.2d 382, 386 (Minn. 1984) (remarking that the respondent, a lawyer, engaged in a “complex criminal scheme” because he was “blinded by greed”).

⁶⁹ *In re* Humphreys, 880 S.W.2d 402, 406-07 (Tex. 1994); see also Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Schatz, 595 N.W.2d 794, 796 (Iowa 1999) (revoking an attorney’s license to practice because of his conviction for two felonies involving “theft and deceit”); *State Bar v. Heard*, 603 S.W.2d 829, 835 (Tex. 1980) (stating that mail fraud is a crime of “moral turpitude” for which a court must suspend an attorney’s license to practice).

⁷⁰ *Cf. Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 466-67 (Miss. 1983) (expressing concern about the effect of punitive damages on the greed of litigants).

C. *Not Greedy Enough*

1. Ideological or Disinterested

In *United States v. Pollard*, the government attempted to persuade the court that Pollard, who was on trial for spying for Israel, was motivated by greed.⁷¹ Pollard's lawyers argued that Pollard was motivated by ideology or a desire to prevent terrorist attacks.⁷² The government's efforts paid off, and Pollard received a life sentence.⁷³

Why did the government believe that Pollard would receive a longer sentence if the court saw him as motivated by greed rather than ideology? The economic theory of criminal deterrence holds that Pollard's sentence should be a function of the social cost of his behavior, the difficulty of catching spies, and the cost of imprisonment.⁷⁴ All of these variables are independent of Pollard's motives.

The government may have believed that a court would throw the book at a greedy spy because greedy people are more deterrable than ideologues. Greedy people want money. If they are caught, their illegal gains will be taken away, and they will be thrown in jail. If they anticipate a high enough sanction, they will not pursue espionage as a profitable activity and will instead obey the law. By contrast, the ideologue does not care about money. Because the ideologue's behavior will be relatively unaffected by the prospect of sanctions, criminal punishments will have little deterrent effect, and judicial resources will be better spent for other purposes.

The contrary view is also plausible, however. Spies are hard to catch. Because a prison term is unlikely, and in any event far in the future, greedy people will discount any term, whether high or low, in which case prison resources are best used for other purposes. Therefore, ideologues are better candidates for prison. They can pursue their ideological ends only if they are free.

A further consideration might therefore account for the government's strategy of portraying spies as greedy rather than ideological. Although both kinds of spy harm the nation, only the greedy spy profits. The ideological spy, no matter how wrongheaded, is perceived to benefit third parties. For this reason only the ideological spy can be-

⁷¹ 959 F.2d 1011, 1017 (D.C. Cir. 1992).

⁷² *Id.*

⁷³ *Id.* at 1017-18.

⁷⁴ For an overview of the economic theory of criminal law, see generally Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

come a martyr.⁷⁵ Greedy spies have no supporters outside their immediate families. A pragmatic reason for the government to portray spies as greedy, and not to punish them as much if this portrayal fails to convince, is to weaken the spy's political support in the first case and to make a concession to political realities in the second.

A different problem of ideology versus greed arises in environmental law. Much law depends on self-serving motives like greed. We see this most clearly in standing doctrine. Under *Lujan v. Defenders of Wildlife*, the person who is not greedy or self-interested—the person who objects to the status quo but will receive no direct, personal gain from changing it—cannot bring a lawsuit to change it.⁷⁶ People who care about wilderness but have no personal stake in a particular wilderness area have no standing to sue in order to obtain enforcement of environmental law.

At the same time, a greedy person is unlikely to care enough about the environment to want to incur the expense of suing on its behalf. The paradox is that the disinterested person does not have standing; the self-interested person will not sue. And those who sue, even if they are relatively disinterested, always risk being accused of greed, in which case the moral quality of their lawsuit is devalued.⁷⁷ The explanation for this state of affairs appears to be that courts think that the adversary system depends on both sides having an interest, and this means something like greed. Greed is pressed into the service of justice, as we saw in our discussion of professionalism and the role of lawyers. But that means that the system is not well suited for cases brought by parties motivated by ideology.

Agency regulation, however, provides a counter-example to the private law form of regulation. Private law litigants are promised damages if they prevail, including sometimes multiple and punitive damages. Class action lawyers are promised a large share of any fund they produce through their litigation. By contrast, agency officials are motivated primarily by their sense of duty, or ideological commitment, and not by greed beyond their desire for continued employ-

⁷⁵ On this problem, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* ch. 6 (2000), which discusses the effect of government shaming policies imposed on members of a hostile subcommunity.

⁷⁶ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992) (rejecting environmental advocates' attempt to enforce the Endangered Species Act on the ground that they had suffered no redressable injury).

⁷⁷ See Ann E. Carlson, *Standing for the Environment*, 45 *UCLA L. REV.* 931, 985-88 (1998) (discussing the ways in which standing doctrine affects the public presentation of environmental lawsuits).

ment and salary. Agency litigation, whether or not it is objectionable on other grounds, escapes the taint of greed.

2. Malicious

When courts tolerate greed, they often do so by contrasting it with malice. In *Embassy/Main Auto Leasing Co. v. C.A.R. Leasing, Inc.*, a business used what it suspected to be the trade secrets of another company.⁷⁸ The court did not award punitive damages against the business because the business was “motivated by corporate greed in a highly competitive business and not by malice.”⁷⁹ In contrast, the court determined that the individual who had actually obtained the secrets and given them to the business could be forced to pay punitive damages.⁸⁰ But, as another court stated in a similar case involving trade secrets, “the conduct of [the business] was more greedy, ambitious, and covetous than malicious, fraudulent, deliberate, and willful.”⁸¹

In *Kumpf*, the court made the claim quoted at the start of this Article: “greed . . . does not violate a fundamental and well-defined public policy.”⁸² Revenge, malice, and ill will do. But why is this the case? Because a capitalist economy needs greedy people; it does not need malicious and vengeful people.⁸³ Courts adopting an approach similar to that taken in *Kumpf* do not want to punish people who try to acquire wealth legally.

Courts also see greed as irrelevant in abuse of process claims. If a claim is valid, then any motive is permitted; if invalid, then, though a bad motive may be inferred, the motive does not drive the outcome. For this reason, courts say that the allegation that someone sued out of greed is insufficient for an abuse of process claim. Malice or animus must be shown.⁸⁴

⁷⁸ 508 N.E.2d 331, 334 (Ill. App. Ct. 1987).

⁷⁹ *Id.*

⁸⁰ *Id.* at 335.

⁸¹ *Pioneer Hi-Bred Int'l, Inc. v. Holden Found. Seeds, Inc.*, No. 81-60-E, 1991 U.S. Dist. LEXIS 21179, at *16 (S.D. Iowa Dec. 30, 1991).

⁸² *Kumpf v. Steinhaus*, 779 F.2d 1323, 1326 (7th Cir. 1985).

⁸³ *But see* Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 221 (2002) (arguing that enmity is “not always a bad thing”).

⁸⁴ *See, e.g., Pankratz v. Willis*, 744 P.2d 1182, 1196 (Ariz. Ct. App. 1987) (explaining that “an ulterior motive, usually extortionate in nature” is needed to state an abuse of process claim and that “incidental motives of spite or greed are not actionable”).

In *Steele v. Bunten*, the plaintiffs sued a car dealer for fraudulently altering financing documents.⁸⁵ The court rejected the civil rights claim (plaintiffs belonged to a minority group) on the ground that they had not produced evidence of animus.⁸⁶ The court observed:

In paragraph 5 of the complaint plaintiffs claim that the acts of defendants were “motivated by the inordinate greed for financial gain.” This is a plausible, indeed logical, explanation for the acts of defendants if they indeed occurred. We are satisfied that Congress in enacting the statutes here invoked did not intend to provide a federal forum, and special cause of action, for members of minority groups who have suffered as individuals wrongs no different in nature, quality, or motivation from those suffered every day by members of the populace at large.⁸⁷

Greed is a defense against the charge of illegal discrimination: a person motivated by money is not motivated by discriminatory animus.⁸⁸

Why should the malicious person be punished more severely than the greedy person? The theory of deterrence implies the opposite, for a malicious person would seem less sensitive to sanctions than the greedy person. But the problem with punishing greed is that greed is important to the legal system and the economy. The person who is not greedy enough can be more dangerous than the person who is greedy.

3. Indolent

Another way of being insufficiently greedy is being too lazy. In *Zim v. Western Publishing Co.*, a case in which an author refused to approve publication of his work, the court held that Zim could not hold the publisher “hostage to dilatoriness, obstructionism, or greed.”⁸⁹ Al-

⁸⁵ No. 77-4152, 1977 U.S. Dist. LEXIS 13632, at *1 (D. Kan. Oct. 4, 1977).

⁸⁶ *Id.* at *6-7.

⁸⁷ *Id.* at *5. Consider *Healy v. CTP, Inc.*, in which the court stated:

Healy argues that the real reason she was fired was that Heppner was jealous of her success and wanted to reap the benefits that accrued from her securing the Ford account. However, if Healy is correct, then the personality-conflict issue was a pretext—not for sex discrimination—but rather for greed and jealousy. This line of argument avails Healy nothing in her effort to [establish a sex discrimination claim].

No. 93 C 1727, 1995 U.S. Dist. LEXIS 136, at *7-8 (N.D. Ill. Jan. 9, 1995).

⁸⁸ Compare *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988), in which female employees were paid less than men because they were not greedy enough—they declined to take risky commission positions.

⁸⁹ 573 F.2d 1318, 1324 (5th Cir. 1978); see also *Washburn Mill Co. v. Fire Ass’n of Phila.*, 61 N.W. 828, 829 (Minn. 1895) (enforcing a void insurance policy because the

though dilatoriness is not the same as laziness, it is clear that the court feared that Zim would not bother to approve publication because he was disorganized and sloppy, not necessarily because he was greedy and opportunistic.

In *Wilkow*, Judge Easterbrook believed that Wilkow could benefit from an article that described him as greedy because the partners had designed a contract that harnessed Wilkow's greed by giving him a share of the partnership's profits.⁹⁰ A greedy Wilkow would acquire business from people who want to make money; a lazy Wilkow would not. Wilkow would probably have suffered more harm if the *Forbes* article had described him as lazy rather than greedy.

Finally, in an old case granting title through adverse possession, the court justified the harsh result (the loss of title) in this way:

The burdens of government must be met; its educational interests provided for; its judicial, legislative, and executive functions maintained; and to do this our real property must be made productive, to the end, among other things, that taxes may be raised and paid from land not subject to continual litigation, but the titles thereto quieted. If the selfish, the indolent, and the negligent will not do this, there is no more merit in their claim than that of the adverse possessor, who does so, whatever may be said of the harshness of the statute of limitation. The settlement and improvement of the country, with its consequent prosperity, should be superior and paramount to the speculative rights of the land grabber, or selfish greed of those who seek large gains through the toil, labor, and improvements of others.⁹¹

Indolence and greed embrace. The original owner of the land was indolent because he did not improve it, but greedy because he hoped to take advantage of the work of someone who did. The desire for too much money and the desire for too much leisure belong to the same category—motives inconsistent with social needs, in this case the development of real estate and the prosperity of the country.

insurer accepted the premium without informing the insured that the policy was void "and made no effort to return it, or repudiate the insurance contract").

⁹⁰ See *supra* Part II.A for a discussion of *Wilkow v. Forbes, Inc.*, 241 F.3d 552 (7th Cir. 2001).

⁹¹ *Dean v. Goddard*, 56 N.W. 1060, 1062-63 (Minn. 1893).

III. THE JURISPRUDENCE OF GREED

A. *Some Themes*

Greed is narrow, not general. Pollard's espionage was motivated only by money, not by an ideology within which the oppression of one group justifies the betrayal of another. The arsonist Ferranti cared only about insurance proceeds, and was not driven by a mania or desperate circumstances. Unlike the self-interested agent in economic and liberal theory, the greedy person does not have the normal range of human motivations.

Greed is excessive. Stemple, the class action lawyer, had already earned hundreds of millions of dollars in fees, yet he engaged in fraud to obtain still more. Krantz put millions into exempt property; Hanson put in only thousands. The greedy person pushes things too far, works too hard; the person of ordinary self-interest pulls back at the precipice.

Greed is impulsive and myopic, and yet cunning. Weiss, the victim of a fraudulent investment scheme, had common sense and could usually manage his affairs, but he was carried away by the prospect of an immense fortune.⁹² The con artist's calculated greed defeats the mark's blind greed, but even so, the con artist fails to fully appreciate the risk in totality, which lands him in court. Greed is a searchlight that illuminates the object brightly but obscures the periphery. The self-interested person surveys the whole terrain but misses some treasure chests.

Greed is disgusting and immoral. Greedy drug dealers profit in a market that causes great misery. Greedy corporations treat human lives like statistics, force onerous terms on customers, nitpick contractual clauses to their advantage, fix prices, and prey on rivals. Even so, greed is not as destructive as malice, and does much indirect good. Self-interest is the engine of the market economy. It is the basis of order, enforced by the adversarial system in law.

Greed is shameless. The defendants in *Landbank Equity* not only engaged in a ridiculously fraudulent investment scheme, but they also refused to acknowledge the harm that they caused and showed no remorse. They "flaunted" their greed. Wilkow might not have been

⁹² Cf. *Farry v. Ward*, 512 N.Y.S.2d 39, 45 (N.Y. App. Div. 1987) (describing a witness as "governed . . . by what can only be characterized as unreflective, and pathologically informed greed"), *rev'd sub nom.* *Berenhaus v. Ward*, 522 N.Y.S.2d 478 (N.Y. App. Div. 1987).

defamed when *Forbes* suggested that he was greedy, but he surely was injured. Yet his motivation and Landbank Equity's motivation were the same—to make money. The person of ordinary self-interest might rejoice in a windfall but does not do so extravagantly. Self-interest is greed kept discreet.

Greed is a problem for the state because greedy people are too hard to control. Greedy individuals are either so myopic and extreme that they do not care about legal sanctions, or they are so cold and calculating that they exploit all legal loopholes to their own benefit and to the harm of others. The person of moderate and enlightened self-interest is the ideal object of the law, for this person is rational enough to respond to sanctions but not so rational as to circumvent them.

B. *Two Dimensions of Greed in the Cases*

We can bring order to the cases by examining greed along two dimensions. The first, which combines the motivational and emotional elements of greed, is the dimension of self-control. A crack addict is not quite greedy because the charge of greed conveys moral condemnation and thus assumes free choice, whereas the addict is seen as someone whose impulsiveness is out of control, a disease. A millionaire who accumulates wealth but dissipates it on eccentric projects or worthy political ideals is not really greedy either. Greed assumes enough self-control to make moral choices but also insufficient self-control to stop accumulating when one's needs are met.

The second dimension is moral. Many people do bad things without being greedy: there are murderous ascetics, for example. There are also acquisitive people who do not seem to harm society, but indeed benefit it in the Smithian/Easterbrookian sense: the sober banker, for example. The greedy person acquires money or goods in a way that harms people. Moderately greedy people take most or all of the surplus that they generate; these hard bargainers are resented by their customers and partners. Very greedy people might produce a net social loss, for their gain is offset by the harm to the institutions they undermine and the people they exploit. This is roughly the distinction between tough business people and criminals; the robber barons posed new dilemmas for moralists because they simultaneously created vast benefits for consumers and undermined valuable institutions.

The self-control dimension creates problems for judges because the usual legal sanctions can deter neither people who have no self-control nor people who have too much self-control. Greed here iden-

tifies people who are a threat to the legal system because their characters resist control. Highly dangerous people of this type are simply locked up; the criminal law is used to incapacitate them and deterrence is no longer a question. But there are many greedy people who are too meek to cause physical harm to anyone. They do not pose a danger to society that justifies incarceration, but they do cause social harm and create frustration for judges who do not have any legal tools for adequately dealing with them.

Nevertheless, judges do have a response, an extralegal weapon, and they reach for it instinctively: they try to stigmatize the individual with the rough, visceral rhetoric of greed. I do not want to claim that being called "greedy" by a judge is necessarily, or even usually, a significant sanction. It seems, on the contrary, quite feeble: most of the people embroiled in the lawsuits we have been discussing have little reputation left to lose. But I do think that publicly calling a bad person greedy is emotionally satisfying for judges, and when legal remedies are exhausted, the easy availability of this extra-legal remedy is reason enough to use it.

One court made this plain: "There exists here a greed for which [the defendants] make no apology. Indeed, it is flaunted. Exemplary damages may teach [such people no] lesson, but it must try."⁹³ The defendants, like so many litigants, are not only greedy, but they do not even seem to be aware of their own greed. Indeed, they seem so crazed by greed as to fail to realize that the court would treat them more gently if they were less brazen about it. How could such people be deterrable? Perhaps courts can make examples of them—call them greedy and others might hesitate to follow in their footsteps.

But there is a problem with calling people greedy, and it relates to the moral dimension of greed. America's economic and legal institutions attempt to harness greed for desirable ends. The law steers the greedy toward activities that benefit society, activities including entrepreneurship, investment, hard work, and litigation on behalf of the public. Standing doctrine is exemplary here: only the greedy are invited to enforce laws that have public benefits, for the legal system, with all its provisions for rewarding attorneys, is built on the notion that the conflict of greed against greed produces good outcomes.⁹⁴ If judges acquire the habit of condemning litigants as greedy, then they

⁹³ *In re Landbank Equity Corp.*, 83 B.R. 362, 376 (E.D. Va. 1987) (quoting *In re Landbank Equity Corp.*, 66 B.R. 949, 962 (Bankr. E.D. Va. 1986)).

⁹⁴ See *supra* text accompanying notes 76-77 (considering standing doctrine's requirement that only self-interested plaintiffs may sue).

run the risk of condemning people for taking advantage of the legal institutions the judges are supposed to enforce.

And yet another force pulls in the opposite direction. Institutions are not perfect, and greedy people can exploit them in a way that harms others. Calculating, far-sighted greed seeks out the inevitable loopholes of the law and exploits them to the detriment of society. Judges must decide whether they can punish harmful greed interstitially while permitting it free reign when the law channels it correctly. Legal sanctions can work here, but they must be used creatively, almost extralegally, for the judge's problem is the calculating greedy person who exploits loopholes in existing legislation.

Judges soon find themselves both punishing greed and tolerating greed, and punishing people for being both too greedy and not greedy enough. The ideal person of enlightened self-interest is neither compulsive nor calculating, neither amoral nor altruistic. Now we enter more difficult terrain.

C. *Influencing Character*

A harmful act is harmful regardless of the motive of the actor. A greedy act, by contrast, is greedy only if the actor is motivated by greed. Because the word "greed" refers to a motivation or disposition, one might think that judges who condemn greed are not interested in deterring a particular type of behavior, but in influencing the motives or dispositions that people have—in a word, their *characters*.

The discussion so far has revealed the kind of character of which judges approve: the person of enlightened self-interest, that is, the person who is neither too greedy nor insufficiently greedy. This person is most likely to escape legal punishment or moral condemnation because she has no desire to hold up contracting partners or deceive elderly widows. She is too concerned about her reputation and future payoffs.

How do courts influence character to promote the ideal of self-interest? One answer is that courts seek to give people incentives to develop or "invest" in the right kind of character. If people at some early stage in their lives know that they are more likely to be sanctioned if they have the wrong character, then they will take steps to "improve" their characters.

Such an ambition is possible in theory. Some people have relatively stable, bourgeois preferences. They might think of these preferences as their "own" and have no desire to change them, but also

know that under stress their preferences change in predictable ways. Let "character" refer to the common elements in the set of predictable changes. For example, greedy people become especially acquisitive and myopic when they feel stress in their lives; indolent people become especially passive; and so forth. People can invest in improving their characters so that the stress is less likely to change their preferences; they do this by joining religious groups, reading self-improvement books, exercising, acquiring educations, modifying routines that produce conflicts, and so forth. The prospect of a judicial sanction if they do not change their characters and act rashly under stress adds to existing incentives and might encourage people to invest more in character formation than they otherwise would.⁹⁵ In this way, judicial sanctions against people whose bad acts flow from bad characters might influence their incentives to invest in their characters *ex ante*.⁹⁶

But this ambition faces obstacles. If judges punish people for having greedy characters, then people may become complacent and indolent. Worse, with the fading of greed, the nonacquisitive vices such as malice and revenge may come to center stage.⁹⁷ One is reminded of Becker's argument that market competition penalizes employers who practice racial discrimination.⁹⁸ If there are not enough greedy employers to produce a market, the racist employers will not be driven out of business. If the market depends on sufficient greed, and the law itself attempts to harness greed, then judicial inroads on the greedy character can have only destructive consequences.

Yet if judges punish people for being insufficiently greedy, then people may become too greedy. They may become too preoccupied with acquiring goods and too little interested in social constraints and the spirit of the law. The future becomes less important, so legal sanctions become less terrifying. If the market and the legal system depend on there being not too much greed, then judicial tolerance or encouragement of greed can have only destructive consequences.⁹⁹

⁹⁵ For a discussion, see Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1984-94 (2001).

⁹⁶ For a similar claim about the role of criminal law in preference formation, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 30-32.

⁹⁷ This concern of the Enlightenment thinkers is discussed *supra* notes 6-8 and accompanying text.

⁹⁸ GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 32-37 (2d ed. 1962).

⁹⁹ This tension is evident in *EEOC v. Sears, Roebuck & Co.*, where the question was, as the dissent put it, whether Sears should be permitted to pay women less because

Under these dueling constraints, the most serious problem for judges is not the person with moderate preferences who occasionally acts rashly and would like to avoid such acts; it is the person who starts with extreme preferences and has no desire to change them. Such a person is unresponsive to incentives, especially the remote sanctions that judges can impose. Greedy people are too greedy to want to change their characters; they would rather direct their energies toward the acquisition of wealth. And insufficiently greedy people are too indifferent to want to change their characters; they see no benefit from doing so because they do not care about profit. Threatening these people with punishments, or bribing them with rewards, is unlikely to affect their character formation and might tax people who are already bourgeois but who occasionally lapse. Punishments large enough to encourage character formation would be excessive for the person already responsive to sanctions, and could end up as a tax on the character that the government wants people to develop.

For these reasons, it is doubtful that judges can affect people's characters. This is partly a claim about the disadvantages of their institutional position; judges are passive, called upon only to render a judgment on marginal behavior, and unable to demand a large audience for their ringing denunciations.¹⁰⁰ I would not make this claim about other instruments available to the state—education, indoctrination of soldiers during their training, propaganda, control of the media, and so forth.¹⁰¹ But focusing on judges, we must conclude that the language of greed in the cases is unlikely to have much effect: it is unlikely to deter bad behavior, and it is unlikely to influence the development of character. To understand why judges use the rhetoric of greed, we must focus more on the rhetorical aspects of their opinions.

they are less greedy (as the majority assumed) or should be forced to encourage women to become greedy. 839 F.2d 302, 360-61 (7th Cir. 1988) (Cudahy, J., concurring in part and dissenting in part).

¹⁰⁰ Cf. Edward Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1100-04 (1997) (arguing that moralistic language in opinions can influence behavior because it is directed not at managers and other insiders, who care more about money, but to independent directors, who do not have strong financial motives to breach their duties and therefore will place more weight on their reputations).

¹⁰¹ Cf. Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 60, 84-95 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (arguing that constitutional free speech protections promote good character in citizens).

D. *The Rhetoric of Greed in the Cases*

Let us start with an interesting passage from a judicial opinion, worth quoting at length:

In passing upon whether these additional requirements are to be imported into the proceedings, the court at the outset must be wary of acting precipitously to upset a procedure which has been given express legislative sanction because of an emotional reaction or instinctive predisposition to sympathetic presentation. Skill in choosing appropriate semantic labels may foreshadow the outcome. The claim of "freeze-out" by a predatory majority using their power as insiders to mulct corporate funds and to overreach in order to unjustly enrich themselves tends to lead a sympathetic court to look indulgently upon extrastatutory remedies.¹⁰²

See, for example, the majority opinion in [*Green v. Santa Fe Indus.*, 533 F.2d 1283 (2d Cir. 1976),] . . . which referred throughout to "squeeze out", "mulcting", "breach of fiduciary duty", "majority enrichment", "cunning and guile", "sophisticated artifices", "manipulative and deceptive devices", "extinction of minority shareholders' interest", "feeding the pocket books of controlling shareholders", "unilateral action", "abuse of insider's position", "bad smell", "perversion", "self-dealing", "grossly inadequate consideration", and the like.¹⁰³

The obverse of the minority claim, however, may well be that an obdurate and obstructionist minority is engaged in a "hold-up" of legitimate majority desires, motivated solely by greed for the top dollar obtainable. The crime of "self-interest" is always attributable to the other side. How the court reacts emotionally to a linguistic barrage or to a sympathetic factual presentation should not be the determinant. Objective adherence to the law should avoid both the "creative" distortion of remedies and the automatic stamp of approval of that which is manifestly inequitable. Whether a picture is presented of malevolent piracy or of beneficent paternalism must be decided on the facts of each case, and not on the ready application of labels.¹⁰⁴

Accusations of greed have special rhetorical power because they infuse a complex moral-legal judgment—having to do with the obligations that our institutions impose on people and whether people take too large a share of the surplus that their behavior generates—with carnal flavor. In the court's view, the rhetoric of greed does not shed light; it obfuscates. The rhetoric provokes judges to an instinctive aversion to the defendant, interfering with their duty to evaluate the

¹⁰² *Tanzer Econ. Assocs., Inc., Profit Sharing Plan v. Universal Food Specialties, Inc.*, 383 N.Y.S.2d 472, 478-79 (N.Y. Sup. Ct. 1976).

¹⁰³ *Id.* at 479 n.1.

¹⁰⁴ *Id.* at 479.

defendant's conduct dispassionately and in accordance with the rule of law.¹⁰⁵

The court's skepticism about the rhetorical uses of greed can be contrasted with the view that people's experiences with carnal greed give them special moral insight. The anthropologist A.F. Robertson argues that "greed has the power to drag distant persons, categories, and events down to familiar human proportions *because* its meaning is rooted in visceral feelings, in alimentary and genital processes, in the material and moral transactions of everyday life, and in the subjective experience of growth and reproductive relations."¹⁰⁶ Greed pierces complex institutional arrangements and reveals the unfairness concealed underneath. As Robertson demonstrates, the corporation can be used as a metaphor to divert attention away from its managers, and yet the metaphorical nature of the corporation does not, in the end, protect it and its managers from the charge of corporate greed.¹⁰⁷

The judicial opinions we have examined, however, favor the skeptical view of the court, not the optimistic view of the anthropologist. In the contract cases, for example, the concept of greed obscured rather than sharpened the grounds of decision. The court approved of the greed in *Kumpf* because firing the superfluous Kumpf was not objectionable on policy grounds, yet it rejected the greed in *Zim*, because holding up the publisher was. If the courts were right, then Kumpf's or Zim's greed cannot have relevance but can only obscure the underlying policy question regarding proper contractual behavior.

¹⁰⁵ Portia anticipated this danger: "The brain may devise laws for the blood, but a hot temper leaps o'er a cold decree, such a hare is madness the youth to skip o'er the meshes of good counsel the cripple." WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 1, sc. 2, lines 17-20 (Signet Classic 1987); see also John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 STAN. L. REV. 825, 828 (1987) (indicating that Portia's statement "gives us the bald truth about legal method" that "[p]assion overcomes reason" and therefore it is "better to know the judge than the law"). Compare *Parenteau v. Jacobson*, 586 N.E.2d 15, 16 (Mass. App. Ct. 1992) ("[A] judge [must] consult first his own emotions and conscience to ascertain if he is free from disabling bias or prejudice." (alterations in original) (internal quotation marks omitted)), with *Ferguson v. United States*, 447 F. Supp. 1213, 1218 (S.D.N.Y. 1978) (noting that "[t]he law does not require a judge to anesthetize his emotional reflexes," and adding that "[o]nly death yields complete dispassionateness, for such dispassionateness signifies utter indifference. . . . Much harm is done by the myth that, merely by putting on a black robe . . . a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine" (quoting *In re Linahan*, 138 F.2d 650, 652-53 (2d Cir. 1943) (first omission in the original))).

¹⁰⁶ ROBERTSON, *supra* note 9, at 138-39. This is similar to William Miller's argument about the moral power of disgust. WILLIAM MILLER, *THE ANATOMY OF DISGUST* 179-205 (1997).

¹⁰⁷ ROBERTSON, *supra* note 9, at 217.

The punitive damages cases are similar. In those cases, defendants were found liable, and courts awarded punitive damages if the conduct was harmful enough. Again, policy judgments must be made. Rather than make the hard argument that some behavior *X* was worse for society than some other behavior *Y*, or adopt a deterrence theory of punitive damages that is at odds with the moralistic language in the precedents, the courts call the defendant “greedy” if the conduct is, in their view, sufficiently bad. Unless it can be agreed that punitive damages should be awarded in all cases, courts cannot be blamed for suppressing their objections to the greedy conduct of defendants who do no serious harm from a policy standpoint.

In the bankruptcy planning cases, courts have adopted policies at odds with state legislatures. The legislatures permit wealthy people to exempt valuable assets from collection. The courts object, but, unable to find constitutional problems with the statutes, they rely on casuistical extensions of fraud doctrine and loudly proclaim the debtor’s greed.

As these cases illustrate, the charge of greed conceals the policy judgment rather than illuminating it or clarifying the moral stakes of the dispute. Markets, the adversarial legal system, and many other valuable institutions depend on some level of greed, so when courts criticize people for being greedy they implicitly criticize these institutions that they would otherwise support and fail to give reasons for distinguishing “good” institutions from “bad” ones. Criminal defendants are sometimes more dangerous and sometimes less dangerous because of their greed, so adverting to their greed to justify increasing (or reducing) their punishment cuts off needed analysis of the harms that are at stake. The “greedy corporation” is an unhelpful epithet because beneficial and harmful corporations differ not according to the motives of their managers but according to the market they supply and the regulatory environment in which they act.

In some ways, this is an old story. Scholars since legal realism have accused judges of concealing policy judgments.¹⁰⁸ The usual story is that judges conceal policy judgments under formalistic distinctions. For instance, they ask whether a contract is supported by “consideration” rather than whether it is the result of deception or is intrinsically oppressive. This story was always vulnerable to the reply that formalism ensures predictability and supports other rule of law values. What

¹⁰⁸ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (favoring a functional approach over formalism).

is special about the greed jurisprudence is judges' use of an emotionally significant term, not so much as part of the formal resolution of the case but as a substantive reason for the formalistic distinctions that the law makes—a reason that is in tension with the goals of the market and the liberal institutions that judges are supposed to defend.

Because its impact flows from its carnal origins, greed does no analytic work in legal discourse and cannot make sense of the complex institutional arrangements that both take advantage of and remain vulnerable to it. It is for this reason that judicial condemnation of greed can shade into condemnation of basic legal and market arrangements—the liberal institutions of which judges are the putative guardians. To understand how judges could end up in such an awkward position, we must explore their intellectual inheritance.

E. *Confusions from Intellectual History*

Most judges are not candid about their use of emotional rhetoric and seem to be unaware of the inconsistencies in how they use it. When they say that behavior is illegal because of the defendant's greed, they are vengeful moralists. When they say that behavior is legal despite the defendant's greed, they are institutional pragmatists or Smithian economists. One might ask how these judges can carry both attitudes in their heads at the same time. We find a clue in intellectual history.

Let us go back to our epigraphs. Judge Easterbrook's statements are striking not because they invoke the logic of capitalism in a judicial opinion; this is common enough, especially in commercial law cases. The statements are striking because Judge Easterbrook refers to greed, a word that Smith avoided in his writings on political economy,¹⁰⁹ as the basis of Smithian market economics.¹¹⁰

Smith and his intellectual descendants instead relied on the concept of interest.¹¹¹ This was no accident of linguistic slippage. Prior thinkers, including Bernard Mandeville, optimistically described greed as a passion that counteracts more destructive passions, like the desire for military glory or religious conformity.¹¹² But passions are by

¹⁰⁹ See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* 108-13 (1977).

¹¹⁰ *Kumpf v. Steinhaus*, 779 F.2d 1323, 1326 (7th Cir. 1985).

¹¹¹ See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 42-43 (1995) (discussing the view of liberal economic theorists that people pursue their self-interest).

¹¹² See generally BERNARD MANDEVILLE, *THE FABLE OF THE BEES* (1723), reprinted in *THE FABLE OF THE BEES AND OTHER WRITINGS* 19 (E.J. Hundert ed. 1997).

nature not easily susceptible to legal control, and thinkers who hoped that the state could manipulate people, in order to turn them away from violence and toward more peaceful pursuits, needed a concept that domesticated greed. From greed, then, was extracted the idea of "interest," and henceforth interest would be contrasted with passion.¹¹³

The question of what makes up interest has never been answered. The circular answer, and perhaps the one assumed by Smith and others, was that interest is that set of motivations sufficient to lead to peaceful market activity in a lightly regulated state. Interest is what is left after passion has been filtered from greed, perhaps consisting of the following: preferences for goods and services that are not intrinsically harmful to others (excluding sadism, for example); preferences that are moderate rather than excessive (and thus insensitive to legal sanctions); preferences that are constant rather than variable (so that legal sanctions do not need to be constantly revised); preferences that resemble other people's preferences (so that legal sanctions can be standardized); and time preferences that reflect the long term rather than myopia.¹¹⁴

One might ask whether governments have ever been so impractical as to regulate on the assumption of an ideal type of person who does not exist. Although some authors are confident that the answer is yes,¹¹⁵ this seems doubtful. If the Smithian concept of self-interest is close enough to average behavior, government regulation on that basis is justified. And if people's characters are amenable to shaping by the government, then governments are likely to shape them in the direction of Smithian self-interest, using all their educational, rehabilitative, and propagandistic resources.

Returning to the judicial arena, Smith and his descendants bequeathed modern judges powerful but perplexed assumptions about

¹¹³ HIRSCHMAN, *supra* note 109, at 110-13.

¹¹⁴ When modern institutionalism grew out of neoclassical economics, economists needed a term to refer to incentives to engage in behavior that is not socially valuable—for which institutions are necessary. One would think that "self-interest" would do. In neoclassical economics, however, that term had become disassociated with bad behavior; market structure alone determines whether the economic outcome is good or bad. Oliver Williamson thus used the term "opportunism," which he defined as "self-interest . . . with guile." OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTION OF CAPITALISM* 30 (1985). But what is self-interest without guile?

¹¹⁵ Some authors cannot resist blaming modern ills on the methodological innovations of Smith and subsequent economists and liberal philosophers. *E.g.*, ROBERTSON, *supra* note 9, at 52-57. There is also a much longer tradition that argues that capitalism undermines the moral virtues that are necessary to it. *See* HIRSCHMAN, *supra* note 109, at 9.

self-interest that are in tension with commonsense moral views about greed. Judges understand that acquisitiveness is not only assumed, but harnessed and depended on by the laws they are supposed to enforce. They also sense that the laws cannot handle people who are greedy, or too greedy—who are self-interested in the wrong way. Sometimes judges make the complex moral-political judgment about which self-interested behavior is socially valuable and which is not, and they condemn as greedy that behavior that violates their own theories and has an acquisitive (as opposed to malicious or ideological) component. In doing so, they maintain the illusion of the lightly regulated society—only those already inclined to peaceful acquisitiveness are lightly regulated, while the greedy are sanctioned heavily—and of the passive judiciary that can avoid aggressive moral and institutional judgments. Perhaps they also encourage people to invest in the ideal bourgeois character.

At other times, as Portia warned,¹¹⁶ judges allow their instinctive aversion to greed to get the better of them, and they end up condemning behavior that is socially valuable if unsavory from the perspective of commonsense morality. When judges do this, they sow confusion for litigants and the public, but they also reveal the distance that market and political institutions have traveled from instinctive morality.

CONCLUSION

Far from being the representative capitalist, as Ruskin and his successors have argued,¹¹⁷ Shylock is a threat to capitalism. Capitalism needs moderation, not excess; far-sightedness, not cunning; self-interest, not greed. *The Merchant of Venice* posed the question of how the creatures of the market can be kept from undermining it, for recall that Shylock's remedy would spell the end of the merchant of Venice. The answer, for dramatic purposes anyway, lay in the law, albeit in the bizarre legal formalism of Portia. This formalism, though a satire, foreshadowed the practices of modern judges, who must draw on legal resources to produce just or preferred outcomes. The use of emotional language in addition to formalistic language is an over-

¹¹⁶ See *supra* note 105 (referring to Portia's warning that man's passions may overtake his deliberate reasoning).

¹¹⁷ E.g., JOSEPH SHATZMILLER, *SHYLOCK RECONSIDERED: JEWS, MONEYLENDING, AND MEDIEVAL SOCIETY* (1990). This is the position of RICHARD POSNER, *LAW AND LITERATURE* 107 (rev. ed., 1998), who refers to Shylock as embodying "the commercial ethic" and as "economic man."

looked aspect of this tradition, and the tensions it produces are condensed in the concept of greed, which is both the basis of and threatening to the institutions that judges are supposed to defend.

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