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Reinvigorating Criminal Antitrust?

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REINVIGORATING CRIMINAL ANTITRUST?

D. DANIEL SOKOL*

ABSTRACT

Contemporary rhetoric surrounding antitrust in an age of populism has potential implications with regard to criminal antitrust enforcement. In areas such as resale price maintenance, monopolization, and Robinson-Patman violations, antitrust criminalization remains the law on the books. Antitrust populists and traditional antitrust thinkers who embrace a singular economic goal of antitrust push to enforce antitrust law that is already “on the books.” A natural extension of enforcement by the antitrust populists would be to advocate the use of criminal sanctions, outside of collusion, for various antitrust violations which are “on the books” but have not been used in over a generation.

A return of criminalization for noncollusion related antitrust abuses presents potential legal problems. Current antitrust jurisprudence and policy make a return to criminalization of various practices not merely problematic as a matter of optimal deterrence, but also unconstitutional as a matter of law. The antitrust policy of today bears little resemblance to that of the earlier era of criminalization for a wider variety of antitrust violations. The first issue is one of time. It has been at least a generation since antitrust criminal cases have been brought for noncollusion based cases. The nature of antitrust violations is also different today. Antitrust criminal cases of the earlier era that included criminal enforcement for noncollusive activity were misdemeanors rather than felonies. Further, antitrust economics has pushed antitrust case law to its current state based on

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a goal of consumer welfare, which weighs the potential procompetitive benefit as a justification to pursue certain behavior. That is, behavior that was once per se illegal is now governed by a rule of reason that weighs both the pro- and anticompetitive effects regarding civil liability. An economically informed rule of reason makes the use of criminal sanctions problematic.

These changes to antitrust policy in the past forty-plus years create the basis for a challenge to the reintroduction of criminal penalties for noncollusion antitrust cases. First, this Article introduces the criminal antitrust regime and places it in historical context. Then, the Article explores the transformation of antitrust policy starting from the 1970s, which shifted antitrust policy towards a singular efficiency based goal. This focus on economic effects has significant repercussions for criminal antitrust enforcement, as it limits the possible use of criminal sanctions for Sherman Act § 1 and § 2 violations as well as the Robinson-Patman Act. These limitations apply only in situations where there is no ambiguity that the restraints in question are clearly anticompetitive. In practice, this means that only express collusion is such a situation.

Criminal enforcement of noncollusive antitrust activity that is per se illegal creates two potential constitutional law problems, which the next part of the Article explores. The first is a desuetude problem, and the second is a void for vagueness problem. As a matter of constitutional law, these two doctrines limit possible overreach by antitrust populists inclined to use existing law to “get tough” on antitrust violations. The final part offers concluding thoughts on how antitrust must promote consumer welfare and how law enforcement must bring cases that optimally deter anticompetitive conduct but must not bring cases that inhibit the sort of business risk taking that promotes consumer welfare.

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INTRODUCTION

Antitrust is under populist attack by politicians, media, academics, and think tanks. Even the current antitrust discussion in the mainstream press has taken on a populist tone. For example, the *Wall Street Journal*, *Economist*, and *Financial Times*—which more instinctively tend to take a laissez faire economic approach—have pushed for more aggressive antitrust enforcement.¹ The critics of the current antitrust approach that has lasted for forty-plus years² make antitrust the causal factor for such things as a loss of democracy,³ deteriorating healthcare,⁴ income inequality,⁵ and labor force issues,⁶ among others. Some Democrats in Congress have called for a fundamental rethinking of antitrust, called “A Better Deal: Cracking Down on Corporate Monopolies and the Abuse of

1. See Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, WALL STREET J. (Oct. 18, 2015, 10:55 PM), <https://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306> [<https://perma.cc/YJ4T-Q6W7>]; Sebastian Payne, *Time to Rethink Antitrust?*, FIN. TIMES (June 25, 2018), <https://www.ft.com/content/72d9a1e0-7824-11e8-bc55-50daf11b720d> [<https://perma.cc/R2VH-DUW4>]; see also *America's Antitrust Apparatus Prepares to Act Against Big Tech*, ECONOMIST: SCHUMPETER BLOG (Apr. 26, 2018), <https://www.economist.com/business/2018/04/26/americas-antitrust-apparatus-prepares-to-act-against-big-tech> [<https://perma.cc/5HHC-MWQ3>].

2. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1211-12 (2008); William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 464-66 (2003); Robert T. Pitofsky, *Antitrust at the Turn of the Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 583 (2002).

3. See Spencer Weber Waller, *Antitrust and Democracy*, 45 FLA. ST. U. L. REV. (forthcoming 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086260 [<https://perma.cc/7TG6-X8G2>].

4. Cory Capps et al., *Physician Practice Consolidation Driven by Small Acquisitions, so Antitrust Agencies Have Few Tools to Intervene*, 36 HEALTH AFF. 1556, 1556 (2017).

5. Eduardo Porter, *With Competition in Tatters, the Rip of Inequality Widens*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/business/economy/antitrust-competition-inequality.html> [<https://perma.cc/8F5G-MC9M>]; see also *America's Antitrust Apparatus Prepares to Act Against Big Tech*, *supra* note 1.

6. See ALAN B. KRUEGER & ERIC A. POSNER, THE HAMILTON PROJECT, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION 1, 4 (2018), http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf [<https://perma.cc/KU67-BDBW>].

Economic and Political Power.”⁷ A series of policy-oriented books also sound the alarm of bigness.⁸

Such populists actively hearken back to the Brandeisian concern regarding “bigness.”⁹ Indeed, Carl Shapiro notes, “[n]ot since 1912, when Teddy Roosevelt ran for President emphasizing the need to control corporate power, have antitrust issues had such political salience.”¹⁰ For some critics, the growing concentration of American power is nothing less than a threat to American democracy.¹¹ However, the populist resurgence in antitrust, taken to its logical conclusion, would be to “reinvigorate” antitrust law with criminal prosecutions for conduct via statutory antitrust law that is already available and which technically still remains good law.¹²

I. ANTITRUST AND DETERRENCE

The basis of antitrust enforcement derives from models of optimal deterrence.¹³ Under an optimal deterrence antitrust framework, a firm or individual will be deterred in situations where the expected costs of illegal activity exceed the expected benefits of such activity

7. A BETTER DEAL: CRACKING DOWN ON CORPORATE MONOPOLIES AND THE ABUSE OF ECONOMIC AND POLITICAL POWER 1, <https://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf> [<https://perma.cc/5GYY-YVLN>].

8. See, e.g., TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); FRANKLIN FOER, WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH (2017); SCOTT GALLOWAY, THE FOUR: THE HIDDEN DNA OF AMAZON, APPLE, FACEBOOK, AND GOOGLE (2017); JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (1st ed. 2017).

9. See Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY., Jan. 10, 1914, at 18; MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 300-26 (2009) (discussing Brandeis and big business); Jonathan Sallet, *Louis Brandeis: A Man for this Season*, 16 COLO. TECH. L.J. 365, 367 (2018). Bigness has remained a fascination within antitrust more generally since the time of Brandeis. See Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 439 (2012) (“The American antitrust discipline might owe its birth to the fear of size, but thus far it has not acquired enough energy to recover from this fear.”).

10. Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS. ORG. 1, 2 (2018).

11. See, e.g., ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 15-16 (2014); LUIGI ZINGALES, A CAPITALISM FOR THE PEOPLE ix, 16-17 (2012).

12. See, e.g., 15 U.S.C. §§ 1-2, 13, 13a (2012); see also *infra* Parts IV.B.1-2 (discussing the limited criminal enforcement under the Sherman Act and the Robinson-Patman Act).

13. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 198-99 (1968).

due to a calculation of the probability and magnitude of the penalties.¹⁴

Criminalization in antitrust has been based on the idea that criminalization leads policy closer to optimal deterrence because it increases the severity of penalties.¹⁵ Criminalization has been pushed globally in the area of cartels,¹⁶ where detection has proven difficult and where civil fines against firms may underdeter.¹⁷ However, unlike collusion, which is done in secret because such agreements are illegal,¹⁸ other forms of antitrust conduct covered by the Sherman Act are not done in secret, such as traditional pricing-related practices including exclusive dealing, tying, and bundling.¹⁹

Antitrust law contains a mix of criminal and civil penalties to deter cartel formation and cartel activity at both the organizational and individual levels under § 1 of the Sherman Act.²⁰ The basis for holding both individuals and firms accountable is that, by doing so, antitrust is better able to address what may be different organizational and individual incentives and motivations.²¹ Thus, incentives for both organizational and individual compliance potentially bring

14. See Michael Kent Block et al., *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 430-31 (1981); Robert M. Feinberg, *Antitrust Enforcement and Subsequent Price Behavior*, 62 REV. ECON. & STAT. 609, 611 (1980); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 657 (1983).

15. See D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 235-36 (2012) (conducting a practitioner survey that finds that “cartelists are more concerned with incarceration than corporate fines”). This empirical finding contrasts with earlier theoretical work positing that incarceration is less efficient than financial penalties. See RICHARD A. POSNER, *ANTITRUST LAW* 270-71 (2d ed. 2001); Becker, *supra* note 13, at 198-99; Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980) [hereinafter *Optimal Sentences*].

16. See Caron Beaton-Wells, *Leniency Policies: Revolution or Religion?*, in *ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE* 3, 3-4 (Caron Beaton-Wells & Christopher Tran eds., 2015).

17. See D. Daniel Sokol, *Antitrust Compliance*, in *THE OXFORD HANDBOOK OF STRATEGY IMPLEMENTATION* 155, 157-58 (Michael A. Hitt et al. eds., 2017) (providing a review of the literature).

18. See Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-2 (2012).

19. See POSNER, *supra* note 15, at 40-42, 193. For an analysis of criminalization in a European context, see Peter Whelan, *Legal Certainty and Cartel Criminalisation Within the EU Member States*, 71 CAMBRIDGE L.J. 677 (2012).

20. See Sokol, *supra* note 15, at 204-06.

21. See Sokol, *supra* note 17, at 155-56.

antitrust closer to optimal deterrence.²² That is, criminalization creates potential risks for firms in terms of stock market return-based penalties, reputational penalties, debarment, and government fines.²³ These potential criminal sanctions and repercussions from criminal sanctions create incentives for firms to monitor their agents to ensure some level of antitrust compliance.²⁴ However, because of agency cost problems, the firm and its agents' incentives may be different.²⁵ Hence, criminal penalties for individuals may be appropriate in such settings.²⁶

Many antitrust scholars propose that increased amounts of fines and jail time bring antitrust closer to optimal deterrence for cartel-related behavior.²⁷ Criminal sanctions reduce cartel formation and encourage firms and individuals to defect from existing cartels.²⁸ This defection (via a leniency program) is important for purposes of gathering information about the cartel for prosecution of other cartel members.²⁹ Without leniency and the threat of criminal sanctions, it would be difficult to gather information about what are secret and illegal contracts.³⁰ Gary Becker and Richard Posner take a different view with regard to cartels, in which they believe that fines alone would be better than incarceration for what is an economic act.³¹

In areas of traditional antitrust civil enforcement (for example, bundling, exclusive dealing, tying, resale price maintenance (RPM), nonprice restraints, et cetera), the case for incarceration is weaker

22. *Id.*

23. *See id.* at 165-66.

24. *See id.* at 157.

25. *See id.*

26. *See* Donald I. Baker & Barbara A. Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 621 (1977); Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19, 31-33 (2009). *But see* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 430, 476 (2012) (showing the limits of criminal antitrust jail sentences).

27. *See, e.g.*, Vivek Ghosal & D. Daniel Sokol, *Policy Innovations, Political Preferences, and Cartel Prosecutions*, 48 REV. INDUS. ORG. 405, 408 (2016); Werden, *supra* note 26, at 28, 32.

28. *See* D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 818 (2013).

29. *See* Paolo Buccirossi & Giancarlo Spagnolo, *Optimal Fines in the Era of Whistleblowers. Should Price Fixers Still Go to Prison?*, in 282 THE POLITICAL ECONOMY OF ANTITRUST 81, 107-08 (Vivek Ghosal & Johan Stenmek eds., 2007).

30. *See generally* Sokol, *supra* note 28.

31. *See* Becker, *supra* note 13, at 198-99; *Optimal Sentences*, *supra* note 15, at 410.

because these are not hidden agreements and the behavior is well known by others in the marketplace.³² Thus, detection is not as much of a concern. Further, in the case of behavior that might have some offsetting procompetitive justifications generally, but not in that particular case, monetary fines do not create significant costs to society and serve to compensate victims.³³ A large-enough fine would therefore serve to deter future illegal behavior.³⁴ In contrast, locking up individuals for antitrust violations that are based on exclusion or predation would lead to incarceration of individuals who otherwise would be productive to society.³⁵

Criminalization of traditional business behavior creates additional problems. In noncollusion cases, criminalization might deter the very sort of risk taking that should be rewarded in a market economy.³⁶ As the Supreme Court explained in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.³⁷

Without the ability to undertake business practices that may increase consumer welfare but which may be legally risky, firms do not have a sufficient incentive to undertake investments in new product or service offerings because of the fear of jail time.³⁸

32. See POSNER, *supra* note 15, at 40-42, 259-60.

33. See Becker, *supra* note 13, at 198-99.

34. See *id.* at 199.

35. See POSNER, *supra* note 15, at 270-71; *infra* notes 381-83 and accompanying text.

36. See Sokol, *supra* note 28, at 804.

37. 540 U.S. 398, 407 (2004).

38. See *supra* notes 36-37 and accompanying text. This Article does not include private enforcement of antitrust as part of optimal deterrence for purposes of a discussion on criminal enforcement. There is a rich literature on private enforcement. See, e.g., Jonathan B. Baker, *Private Information and the Deterrent Effect of Antitrust Damage Remedies*, 4 J.L. ECON. & ORG. 385, 385-86 (1988); David Besanko & Daniel F. Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 AM. ECON. REV. 870, 883 (1990); Stephen W. Salant, *Treble Damage Awards in Private Lawsuits for Price Fixing*, 95 J. POL. ECON. 1326, 1327 (1987). The problem with private enforcement is that it merely compensates victims of potential antitrust abuses. Roger D. Blair, *Antitrust Penalties:*

Coming from a different intellectual tradition, professors of jurisprudence have also thought about the optimal criminal system.³⁹ Professors of jurisprudence lament that there has been a tendency toward overcriminalization, especially for types of conduct that should not be considered criminal.⁴⁰ This concern of overcriminalization has been pronounced in the works of important criminal law theorists such as R. A. Duff,⁴¹ Sanford Kadish,⁴² Andrew Ashworth,⁴³ and Douglas Husak.⁴⁴ Overall, one concern is that criminalization should be reserved for only the most serious crimes.⁴⁵ From the standpoint of antitrust, the most serious crime is the one that is not at all ambiguous in terms of the harm—collusion.⁴⁶ For this reason, the Supreme Court refers to collusion as “the supreme evil of antitrust.”⁴⁷ The clear harm that collusion creates has meant that for thousands of years collusion has been viewed as

Deterrence and Compensation, 1980 UTAH L. REV. 57, 57, 69-72. It is not helpful in terms of punishing individuals, except perhaps indirectly. *See id.* at 57.

39. However, professors of jurisprudence typically do not necessarily focus on utilitarian arguments.

40. *See* R. A. DUFF, *THE REALM OF CRIMINAL LAW* 1 (1st ed. 2018).

41. *See id.*

42. *See* SANFORD H. KADISH, *More on Overcriminalization*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 36, 37 (1987) (“[H]ave you considered how the inevitable process of actual enforcement of such laws (a) so poorly serves the objectives you have in mind, and (b) in any event produces a variety of substantial costs, including adverse consequences for the effective enforcement of the criminal law generally? These practical considerations are so great that they should persuade you to decriminalize the law in these areas.”).

43. Andrew Ashworth, *Conceptions of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407, 408 (2008) (“The criminal law, however, carries with it greater social and moral significance. Conviction of an offense tends to be regarded as something distinctive; it differs from an adverse civil judgment or an adverse regulatory decision in that it involves public censure for wrongdoing. The link between criminal law and punishment is therefore crucial; punishment, in the sense of the imposition of hard treatment, requires justification, which includes, as a necessary condition, the commission of a crime. This argument can and should be taken further; insofar as the punishment involves restrictions on liberty, and certainly if it involves a deprivation of liberty (e.g., imprisonment), only serious wrongdoing can be a sufficient justification for this.”).

44. *See generally* DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

45. *See* Ashworth, *supra* note 43, at 408. H. L. A. Hart similarly advocates for a “moral gradation of punishment.” *See* H. L. A. HART, *LAW, LIBERTY AND MORALITY* 34 (1963). From the utilitarian economic approach that yields the same result, see George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 531 (1970).

46. *See* Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917, 924 (1987).

47. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

a serious moral concern, from the Babylonian Talmud⁴⁸ and Christian Scriptures⁴⁹ to Adam Smith.⁵⁰

The discussion about optimal deterrence and antitrust provides a framework for understanding the development of the criminal antitrust regime from its origins to the present. The next Part explores this antitrust history, which provides the necessary background to understand how criminal antitrust enforcement of collusion is different from criminal antitrust enforcement of other types of behavior, all of which have fallen out of use in the modern era.

II. CRIMINAL ANTITRUST THEN AND NOW

A. *Early Criminal Antitrust*

Originally, under the Sherman Act as enacted in 1890, all antitrust criminal offenses were misdemeanors rather than felonies.⁵¹ The classification of a misdemeanor meant that unlawful conduct could result in criminal penalties of incarceration for a period of time for one year or under for a violation of the Sherman Act.⁵² In early antitrust history, jail time was not a preferred penalty.⁵³ Even

48. See Babylonian Talmud, Tractate Bava Batra 9a (“There were two butchers who made an agreement with one another that if either killed on the other’s day, the skin of his beast should be torn up. One of them actually did kill on the other’s day, and the other went and tore up the skin.... [T]he towns-people may inflict penalties for breach of their regulations.... [T]hey certainly have not the power to make such stipulations.”); see also Babylonian Talmud, Tractate Bava Batra 21a (in which competition via entry is allowed). *But see* Dennis W. Carlton & Avi Weiss, *The Economics of Religion, Jewish Survival, and Jewish Attitudes Toward Competition in Torah Education*, 30 J. LEGAL STUD. 253, 269 (2001) (noting that some subsequent Rabbinical commentary was not procompetitive).

49. Kenneth Elzinga & Daniel A. Crane, *Christianity and Antitrust*, in CHRISTIANITY AND ECONOMIC REGULATION (Daniel A. Crane & Samuel Gregg, eds.) (forthcoming Cambridge University Press).

50. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. I, at 200 (9th ed. 1979) (“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”).

51. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2012)).

52. *Id.*

53. See Gregory J. Werden, *Individual Accountability Under the Sherman Act: The Early Years*, 31 ANTITRUST 100, 100 (2017).

for cartels, criminal enforcement of antitrust was quite rare.⁵⁴ Members of cartels were incarcerated once in 1921,⁵⁵ but not again until 1959.⁵⁶ Criminal offenses by companies also were not significant in antitrust law relative to civil cases.⁵⁷ There was some criminal enforcement of non “hard core” collusion prior to World War II (WWII), with infrequent jail time, mostly dealing with organized labor.⁵⁸ When there was significant criminal enforcement for non-cartel matters, particularly during the largest period of antitrust criminal enforcement during the tenure of Thurman Arnold as head of the DOJ Antitrust Division, the criminal penalties were fines rather than jail time and the severity of the penalties were rather weak.⁵⁹

B. The Rise of Modern Criminal Enforcement

The rise of criminal antitrust enforcement in the 1970s provides some background as to the current state of criminal enforcement of U.S. antitrust law. The Antitrust Procedures and Penalties Act (APPA) increased criminal penalties.⁶⁰ Congress transformed antitrust criminal penalties from misdemeanors to felonies.⁶¹ It also increased the maximum term of imprisonment for antitrust conduct from one year to three years.⁶²

54. See Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 695 (2001).

55. See *United States v. Alexander & Reid Co.*, 280 F. 924, 927 (S.D.N.Y. 1922).

56. *United States v. McDonough Co.*, 180 F. Supp. 511, 514 (S.D. Ohio 1959).

57. See Werden, *supra* note 53; Richard A. Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 984-85 (1961) (appendix).

58. See Werden, *supra* note 53.

59. *Id.* at 102.

60. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (codified as amended at 15 U.S.C. § 16 (2012)).

61. *Id.*

62. *Id.* Earlier models and empirical work suggested that if penalties go up and there are multiple dimensions of responses by actual and potential defendants, then one gets: (1) greater deterrence, (2) greater defensive efforts “in disguising their actions” if firms do engage in wrongdoing, (3) greater defensive efforts to steer clear of the grey area to avoid false charges, and (4) conditional on indictments, greater efforts to defend against charges. See Edward A. Snyder, *The Effect of Higher Criminal Penalties on Antitrust Enforcement*, 33 J.L. & ECON. 439, 443 (1990). With a longer time series, the empirical results do not follow the theory.

Increased vigor by the Department of Justice (DOJ) Antitrust Division to prosecute collusion with higher sentences, including incarceration, matched Congress's decision to increase criminal penalties.⁶³ In 1977, the DOJ promulgated guidelines that pushed for higher jail terms for antitrust offenses.⁶⁴ The DOJ's focus was on cartel enforcement and was based on a sense that antitrust penalties did not sufficiently deter wrongdoing.⁶⁵ It still took a number of years for the new maximum criminal penalties to be used, as 1981 was the first time that courts imposed the maximum prison term of three years as a penalty for a collusion case.⁶⁶

Penalties have not remained static since the 1970s. Rather, there has been an incremental increase in both fines and criminalization with regard to collusion.⁶⁷ In 1987, the U.S. Sentencing Commission applied the U.S. Sentencing Guidelines (passed in 1984) to cartel offenses.⁶⁸ Further, in 1990, the Antitrust Amendments Act of 1990 increased the potential monetary penalties for violations of the Sherman Act.⁶⁹ Congress increased penal terms again in 2004 under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), this time to a maximum of ten years.⁷⁰

These financial penalties for firms are costly and therefore impact firm decision making with regard to antitrust related risk.⁷¹ A meta-analysis of cartel scholarship concludes that "at a fundamental level, the most important result [of the academic literature] is that high fines are a crucially important element of deterrence."⁷²

63. See generally Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978) (providing an overview of this transformation).

64. See Ghosal & Sokol, *supra* note 27, at 410-11.

65. See *id.*; Vivek Ghosal & D. Daniel Sokol, *The Evolution of U.S. Cartel Enforcement*, 57 J.L. & ECON. S51 (2014).

66. See Baker, *supra* note 54 (discussing the evolution of criminal antitrust).

67. See generally *id.*

68. U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 (U.S. SENTENCING COMM'N 2016). For an argument for the increases in sanctions in the Sentencing Guidelines for hard-core antitrust crimes, see generally Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Cost?*, 27 AM. CRIM. L. REV. 331 (1989).

69. Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4, 104 Stat. 2879, 2880.

70. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 661, 668.

71. See, e.g., Baker, *supra* note 54, at 712.

72. OFFICE OF FAIR TRADING, AN ASSESSMENT OF DISCRETIONARY PENALTY REGIMES 1, 8 (2009), <https://londonconomics.co.uk/wp-content/uploads/2011/09/30-An-assessment-of-the>

The record of enforcement of criminal cases outside of explicit collusion has been limited since WWII.⁷³ More than a generation has passed since there have been any criminal indictments, let alone jail time, for § 1 and § 2 noncollusion cases. The DOJ has brought a single criminal noncollusion antitrust case since the introduction of the felony penalties.

C. The Judicial Structure of Antitrust Law and Its Implications on Criminal Enforcement

Even though antitrust is based on statute, it has a common-law style of development.⁷⁴ In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Supreme Court made this explicit, stating “[f]rom the beginning the Court has treated the Sherman Act as a common-law statute.”⁷⁵ However, the Court had regularly made statements as to the common-law nature of the Sherman Act in prior cases.⁷⁶

Even though antitrust is commonlaw-like in its application, it works differently than other types of common law. There is a significant history to antitrust shifting with time, thereby limiting stare decisis. In *Appalachian Coals, Inc. v. United States*, the Court explained:

UK-Discretionary-Penalties-Regime.pdf [https://perma.cc/TVP4-AVPH].

73. Indictments for monopolization include: *United States v. Gen. Motors Corp.*, 11 Trade Reg. Rep. (CCH) ¶ 45,061, at 52,424 (Apr. 12, 1961) (reporting the indictment for monopolization of the manufacture and sale of railroad locomotives); *United States v. United Fruit Co.*, 11 Trade Reg. Rep. (CCH) ¶ 45,063, at 52,528 (July 16, 1963) (reporting the indictment for monopolization of the banana market in seven states). These cases did not end up as anything more than just indictments. For cases with jail time, see *infra* Part IV.B.1; see also *United States v. Dunham Concrete Prods., Inc.*, 475 F.2d 1241, 1242-43 (5th Cir. 1973). This was the year before antitrust violations became a felony. See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (codified as amended at 15 U.S.C. § 16 (2012)).

74. See William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 TEX. L. REV. 661, 633 (1982); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1275 (2001); Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1480 (2000). But see Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 270 (1986).

75. 551 U.S. 877, 899 (2007).

76. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act.”).

As a charter of [economic] freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.⁷⁷

More recently, in *Kimble v. Marvel Entertainment, LLC*, the Court concluded, “[w]e have therefore felt relatively free to revise our legal analysis as economic understanding evolves and ... to reverse anti-trust precedents that misperceived a practice’s competitive consequences.”⁷⁸

This conceptualization by the Court of a consumer welfare-based singular goal for antitrust has existed only for a generation.⁷⁹ In its earlier years, the Court found ways to allow certain criminal behavior due to multiple goals, and also encouraged behavior that was not consumer welfare enhancing.⁸⁰

III. ANTITRUST AND GOALS

In a world with multiple goals of antitrust that included the protection of small businesses against competition, the case for criminal enforcement of noncollusion behavior may have had some justification (even if it was misguided).⁸¹ However, once the goals changed to a singular goal that was based on economic analysis in which efficiencies were welcomed, this changed the moral and legal basis for business practices.⁸² The idea that efficiency was somehow immoral was laid to rest, and instead morality focused on the importance of lower prices, increased quality, and increased innovation for consumers.⁸³ Similarly, a change from per se illegality

77. 288 U.S. 344, 359-60 (1933).

78. 135 S. Ct. 2401, 2412-13 (2015).

79. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 464 (2003).

80. See *infra* notes 91-100 and accompanying text.

81. See William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1428-30 (1990).

82. See generally Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

83. See *infra* note 88 and accompanying text.

to a rule of reason made criminal enforcement problematic as it set a much lower standard for incarceration for individuals than other criminal statutes.⁸⁴

Antitrust in the premodern era, and in particular, the late 1940s to the early 1970s, was an area of antitrust populism that embraced multiple goals both by the antitrust agencies⁸⁵ and the Supreme Court.⁸⁶ Antitrust populism manifested itself in Supreme Court rulings that opened up antitrust liability both criminally and civilly for all sorts of price and nonprice offenses and rejected outright efficiencies as irrelevant for mergers.⁸⁷ These other goals included the protection from competition of small and inefficient businesses over competitors who would lower prices, improve quality, and/or increase innovation.⁸⁸

Several cases embody the tradition of noneconomic goals. In *United States v. Aluminum Co. of America*, the Second Circuit noted that “one of [antitrust’s] purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.”⁸⁹ Similarly, the Court in *Brown Shoe Co. v. United States* cautioned that “we cannot fail to recognize Congress[s] desire to promote competition through the protection of viable, small, locally

84. See *infra* notes 224-26 and accompanying text.

85. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 4 (1978); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105 (1989); William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085 (2015); Kovacic, *supra* note 79.

86. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606 (1972); *Albrecht v. Herald Co.*, 390 U.S. 145, 151-54 (1968); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578-79 (1967); *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685, 703 (1967); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Int'l Salt Co. v. United States*, 332 U.S. 392, 395-96 (1947); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). For a defense of this tradition, see, for example, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979).

87. See *Procter & Gamble Co.*, 386 U.S. at 580 (“Possible economies cannot be used as a defense to illegality.”).

88. See, e.g., *Brown Shoe Co.*, 370 U.S. at 344; Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 28-29 (1989).

89. 148 F.2d 416, 429 (2d Cir. 1945).

owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”⁹⁰ This populist impulse in antitrust that did not place economic analysis in the forefront (and indeed shifting trends in antitrust economics) meant that, the Supreme Court and lower courts oftentimes ruled in ways that go against sound economics by the standard we use today. This period from the late 1940s to late 1970s is what Professor Donald Turner termed antitrust’s “inhospitality tradition.”⁹¹

The inhospitality tradition was one in which antitrust courts created doctrines that were not based solely on industrial organization economic considerations as we understand them today.⁹² As a result, there were a number of goals in antitrust that harmed consumers.⁹³ For example, courts were concerned about competitors (even inefficient ones) rather than consumers in mergers,⁹⁴ ignored merger efficiencies and treated them as unlawful,⁹⁵ found various marketing practices for vertical price and nonprice restraints to be per se illegal,⁹⁶ significantly limited unilateral refusals to deal,⁹⁷ limited intellectual property rights,⁹⁸ were overinclusive in their

90. 370 U.S. at 344.

91. See Alan J. Meese, *The Market Power Model of Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291, 1322 & n.124 (2013). The original citation is to Turner’s speech to the Antitrust Section of the New York State Bar Association in which Turner said, “I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust.” See *id.* (citing Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. ST. B. ASS’N ANTITRUST L. SYMP. 1, 1-2); see also Oliver E. Williamson, *Mergers, Acquisitions, and Leveraged Buyouts: An Efficiency Assessment*, in CORPORATE LAW AND ECONOMIC ANALYSIS 1, 21 n.24 (Lucian Arye Bebchuk ed., 1990).

92. See Meese, *supra* note 91, at 1324-25, 1331-32, 1370.

93. See *id.* at 1322-23, 1334.

94. See *Brown Shoe Co.*, 370 U.S. at 345-46; *Aluminum Co. of Am.*, 148 F.2d at 428 (“[G]reat industrial consolidations are inherently undesirable, regardless of their economic results.”).

95. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (“Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.”).

96. See *Albrecht v. Herald Co.*, 390 U.S. 145, 151-54 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408-09 (1911).

97. See *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

98. See Bruce B. Wilson, *Patent and Know-How License Agreements: Field of Use*,

approach to ancillary restraints,⁹⁹ and took a view that efficient price discrimination that lowers prices for consumers should be per se illegal.¹⁰⁰

Multiple goals also muddled earlier antitrust cases, including those addressing collusion. For example, during the period of the Great Depression, courts did not strictly enforce criminal antitrust laws.¹⁰¹ As Professors William Kovacic and Carl Shapiro note, “in the depths of the Depression, even the Court’s stand against naked horizontal output restrictions wavered.”¹⁰² In *Appalachian Coals, Inc. v. United States*, the Court found that a conspiracy that allowed for output restriction of uniform pricing by coal producers did not violate the Sherman Act.¹⁰³ Such a case, if brought today with a singular goal of consumer welfare, would have come out the opposite way.

This tradition of economic folly gave way to a singular goal based on economic effects. As such, in conduct cases via a rule of reason and in mergers based on economically guided merger guidelines, an economics-based approach is not criminally enforced but, in fact, more generally, it is civilly subject to a weighing of pro- and anti-competitive harms.¹⁰⁴ Though antitrust has always been subject to the economics of its time,¹⁰⁵ economic analysis took a more central

Territorial, Price and Quantity Restrictions, in ANTITRUST PRIMER: PATENTS, FRANCHISING, TREBLE DAMAGE SUITS 11, 11-14 (Sara-Ann Sanders ed., 1970).

99. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972).

100. See *Utah Pie Co. v. Cont’l Baking Co.*, 386 U.S. 685, 702 (1967); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

101. See William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 46-49 (2000).

102. See *id.* at 47.

103. 288 U.S. 344, 376 (1933).

104. See Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2506-07 (2013); Kovacic & Shapiro, *supra* note 101; *Acting Assistant Attorney General Andrew Finch Delivers Remarks at Global Antitrust Enforcement Symposium*, U.S. DEP’T OF JUST. (Sept. 12, 2017), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust> [<https://perma.cc/LMT2-4LDF>] (“Economics has played, and will continue to play, a fundamental role in antitrust enforcement.”). *But see* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 268 (1991) (“One of the great myths about American antitrust policy is that courts began to adopt an ‘economic approach’ to antitrust problems only in the 1970’s. At most, this ‘revolution’ in antitrust policy represented a change in economic models. Antitrust policy has been forged by economic ideology since its inception.”).

105. See HOVENKAMP, *supra* note 104, at 268.

role in the mid-1970s as a result of shifts in academic thinking that began in the 1950s and 1960s.¹⁰⁶

The notion that antitrust should be based on a consumer-welfare calculation (though not always clear as to what the Court meant by consumer welfare)¹⁰⁷ soon followed from *Continental T. V., Inc. v. GTE Sylvania, Inc.*¹⁰⁸ In *Reiter v. Sonotone Corp.*, the Supreme Court articulated, “[The Congressional floor debates] suggest that Congress designed the Sherman Act as a ‘consumer welfare prescription.’”¹⁰⁹ A few years later, the Supreme Court returned to goals of antitrust in *NCAA v. Board of Regents of the University of Oklahoma* when it noted that “[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this *fundamental* goal of antitrust law.”¹¹⁰

In those areas in which the academic consensus on economic practices has developed, the Supreme Court has shifted to rule of reason from per se illegality.¹¹¹ This is perhaps clearest in *Leegin*. There, the Court stated:

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance....

106. See, e.g., Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, in *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* (Robert Pitofsky ed., 2008); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (analyzing the fusion of Chicago and Harvard traditions); see also Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965); Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 290 (1957); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 143-67 (1958).

107. Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

108. 433 U.S. 36 (1977).

109. 442 U.S. 330, 343 (1979).

110. 468 U.S. 85, 107 (1984) (emphasis added).

111. See Kovacic & Shapiro, *supra* note 101, at 58 (“Today, the links between economics and law have been institutionalized with increasing presence of an economic perspective in law schools, extensive and explicit judicial reliance on economic theory, and with the substantial presence of economists in the government antitrust agencies.”).

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance “always or almost always tend[s] to restrict competition and decrease output.”

Were the Court now to conclude that vertical price restraints should be *per se* illegal based on administrative costs, we would undermine, if not overrule, the traditional “demanding standards” for adopting *per se* rules.¹¹²

Leegin involved a shift from *per se* illegality to the rule of reason.¹¹³ While *Standard Oil Co. of New Jersey v. United States* first introduced the rule of reason,¹¹⁴ the rule of reason has been better defined over the last thirty years.¹¹⁵ However, full blown rule of reason cases decided on the merits are rare.¹¹⁶ As a consequence, a number of areas of antitrust law in the area of vertical restraints, if anything, has moved to *de facto per se* legality.¹¹⁷ As a result of the current antitrust paradigm, notice and consistency currently exists in court cases because of the economic basis of such cases.¹¹⁸ As the next Part suggests, a shift to more criminal enforcement of such cases threaten both notice and consistency.

The above review of shifts in antitrust doctrinal development as well as policy thinking sets up the next part of the Article. Because the current antitrust regime is fundamentally different than a generation ago, a return to certain forms of antitrust in the criminal area creates potentially troubling constitutional concerns with regard to both desuetude and void for vagueness.

112. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889, 894-95 (2007) (alteration in original) (citations omitted).

113. *Id.* at 882.

114. 221 U.S. 1, 61-62 (1911).

115. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 733-34 (2012).

116. See Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268; Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009).

117. See D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1008 (2013).

118. See Kovacic & Shapiro, *supra* note 101, at 51-52.

IV. DESUETUDE

A. *Desuetude and Its Meaning*

Desuetude is a concept where a practice that has been fixed by law loses its authority due to a lack of usage.¹¹⁹ When this lack of usage has been long enough, a “negative custom” of nonusage replaces the usage of the law.¹²⁰ Nonusage for a lengthy period of time suggests either that the legal practice is obsolete or was never legitimate in the first place.¹²¹

The basis of desuetude originated during the Roman Empire and from the work of Emperors Julian and Justinian.¹²² The desuetude idea has been continuously recognized in Western civilization since that time.¹²³

There is a temporal element to desuetude. As Richard Albert explains, “[s]tatutory desuetude occurs when some combination of the sustained non-application of a law, contrary practice over a significant duration of time, official disregard and the tacit consent of public and political actors leads to the implicit repeal of that law.”¹²⁴ That is, lack of use of the statute is not enough.¹²⁵ Desuetude is a function of the amount of time since the government enforced the statute.¹²⁶

The types of cases that often get brought up in the context of desuetude are ones that address issues of morality: “Most unenforced

119. See Cory R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 449.

120. John F. Stinneford, *Death Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 537 (2014).

121. *Id.*

122. *Id.* at 565-66 n.159.

123. *Id.* at 566.

124. Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 643 (2014); see also Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81 (1976) (“‘Desuetude’ is the ancient doctrine that long and continuous failure to enforce a statute, coupled with open and widespread violation of it by the populace, is tantamount to repeal of the statute.” (footnote omitted)).

125. See Allen, *supra* note 124, at 81-82 (quoting *State v. Egan*, 287 So. 2d 1, 7 (Fla. 1973)).

126. See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961).

criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.¹²⁷ Issues that once caused moral outrage but are no longer viewed that way under contemporary communal standards are desuete.¹²⁸ The fairness-related issue regarding morality is best summed up by Arthur Bonfield:

First, a very long-continued and well-settled failure to enforce a widely-ignored statute is as much a positive expression of public policy as would be its express legislative abrogation. The reason for this is that such a protracted course of administrative conduct must at least reflect the electorate's acquiescence to the provision's demise as effective law. Otherwise, the politically responsive administrators of our penal laws would have suffered—over such an appreciable period—the consequences of their long disregard of public preference. Second, when the community has acquiesced in an enactment's long-continued administrative nullification by not terminating it, the provision disappears as law in any meaningful sense. It is neither observed nor enforced, and is virtually eradicated from the legal consciousness of the body politic.¹²⁹

It is only in the criminal context that statutes would fall in disuse.¹³⁰ In the civil context, potential private plaintiffs that find statutes potentially advantageous are likely to use them for settling or winning a case.¹³¹ However, repealing criminal laws are more difficult.¹³² William Stuntz notes,

[t]here is good reason to believe that the level of legislative inertia in such cases—the cost of undoing that which would not be done today—is higher for criminal statutes than for other

127. THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 160 (1935).

128. See Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 *IOWA L. REV.* 389, 395 (1964).

129. *Id.* at 391 (footnotes omitted).

130. See Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 *YALE L. & POL'Y REV.* 169, 173 (1997).

131. See *id.*

132. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 591 (2001).

sorts of legislation. Which means that the statute books contain a host of crimes that are not crimes at all in terms of popular understandings.¹³³

Thus, unlike civil laws, criminal laws fall into disuse rather than being repealed.

Desuetude has an important function in understanding types of conduct. In her analysis of desuetude, Hillary Greene explains that “[t]he true significance of nonenforcement becomes clearer when one stops to consider what it means to make something a crime.”¹³⁴ That is, a crime is an action taken that society is willing to enforce.¹³⁵ As a consequence, the lack of enforcement of such a crime suggests that society may not really want to enforce the statute.¹³⁶ Greene explains that “[n]onenforcement of a criminal statute could, in short, effectively decriminalize the conduct prescribed by the statute.”¹³⁷

Nonenforcement of a statute suggests that the risk of prosecution is zero, or close to it.¹³⁸ Thus, to overturn a criminal statute that is unenforced creates problems of standing.¹³⁹ When there is no enforcement, it is difficult to challenge the constitutionality of the law.¹⁴⁰ Thus, the sudden enforcement of obsolete statutes creates due process concerns because the statutes can be used in a discriminatory manner.¹⁴¹ Further desuete statutes also create problems of notice. Both commentators and courts have identified that the

133. *Id.* (footnote omitted).

134. Greene, *supra* note 130, at 182.

135. *See id.*

136. Stuntz, *supra* note 132, at 592 (“Crimes that go unenforced for a substantial period of time should no longer be treated as crimes. Lack of enforcement constitutes fairly strong evidence for the proposition that the crime would not be a crime if the issue were to be resolved by majoritarian politics today.”); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 30 (“[A] criminal law cannot be enforced if it has lost public support.”).

137. Greene, *supra* note 130, at 183.

138. *See id.* at 187.

139. *See id.*

140. *Id.*; *see also* Bonfield, *supra* note 128, at 390.

141. *See* Bonfield, *supra* note 128, at 410; *see also* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 154 (2d ed. 1986).

enforcement of obsolete statutes creates problems of fair notice.¹⁴² This in turn creates due process concerns.¹⁴³

The primary basis for desuetude as a doctrine is the concept that the long nonusage of the law, despite numerous opportunities to do so, creates negative customs.¹⁴⁴ These negative customs in turn prohibit the subsequent reinforcement of the statute.¹⁴⁵ The common-law tradition, as a tradition of custom and long usage, is the basis for law.¹⁴⁶ Likewise, nonuse creates the basis for not enforcing the law.¹⁴⁷

What exactly constitutes long use (or disuse) is not totally clear. For example, Scottish law considered fifty years sufficient for a law to fall into disuse.¹⁴⁸ In contrast, Spanish law required only ten years for a law to fall in disuse for purposes of desuetude.¹⁴⁹ Other lengths of time vary from one hundred years to forty years to the discretion of the judge.¹⁵⁰

Not all scholars believe the desuetude is a viable legal theory in practice.¹⁵¹ A number of legal commentators suggest that desuetude is not recognized by American law.¹⁵² However, the basis of

142. See *Hill v. Smith*, 1 Morris 95, 107 (Iowa 1840) (arguing that it is “contrary to the spirit of that Anglo-Saxon liberty ... to revive, without notice, an obsolete statute, one in relation to which long disuse and a contrary policy had induced a reasonable belief that it was no longer in force”); Stuntz, *supra* note 132, at 592. *But see* Stinneford, *supra* note 120, at 567 (“[N]otice ... has not historically been the primary justification for the doctrine of desuetude.”).

143. Bonfield, *supra* note 128, at 415-18.

144. See Stinneford, *supra* note 120, at 565.

145. See, e.g., 1 JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND bk. I, at 18 (James Ivory ed., 1824) (“[A]s a posterior statute may repeal or derogate from a prior, so a posterior custom may repeal or derogate from a prior statute, even though that prior statute should contain a clause forbidding all usages that might tend to weaken it: For the contrary immemorial custom sufficiently presumes the will of the community to alter the law in all its clauses, and particularly in that which was intended to secure it against alteration; and this presumed will of the people operates as strongly as their express declaration.”).

146. Stinneford, *supra* note 120, at 561.

147. See *id.* at 569.

148. DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES FROM MAGNA CHARTA TO THE TWENTY-FIRST OF JAMES I CAP. XXVII 39 (3d ed. 1769).

149. *Adams v. Norris*, 64 U.S. (23 How.) 353, 364 (1859).

150. 1 FRIEDRICH CARL VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 138-39 (William Holloway trans., 1867).

151. See Bonfield, *supra* note 128, at 394, 396.

152. See, e.g., Albert, *supra* note 124, at 652 (“Nor does the United States recognize desuetude.”); Allen, *supra* note 124, at 81-82; Chivers, *supra* note 119, at 449; Note, *Desuetude*, 119 HARV. L. REV. 2209, 2211 (2006) (“What of those American jurisdictions that have accepted the doctrine? Little effort is needed to canvass the relevant case law, given that

desuetude—which as common law is based on custom over time—has a deep philosophical basis in the writings of Anglo-American thinkers such as Edward Coke, William Blackstone, John Adams, and James Wilson.¹⁵³ Desuetude has also appealed to more modern thinkers such as Alexander Bickel,¹⁵⁴ Guido Calabresi,¹⁵⁵ and Cass Sunstein.¹⁵⁶

Doubters of an American doctrine of desuetude point to the Supreme Court decision in *District of Columbia v. John R. Thompson Co.*¹⁵⁷ However, that case's facts are highly specific, which suggests the Court's rejection of the doctrine specifically in those circumstances.¹⁵⁸ This narrow reading of *Thompson* is justified given the facts of the case. *Thompson* regarded a law that prohibited racial discrimination in the food service industry based on the local Washington Acts of 1872 and 1873.¹⁵⁹ The case did not totally rule

West Virginia alone recognizes desuetude as a valid defense.... Earlier decisions in other state courts recognizing the doctrine have been overturned, leaving West Virginia as an outlier in this field." (footnote omitted)). But some federal cases acknowledge desuetude. See *Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury*, 912 F.2d 897, 906 (7th Cir. 1990); *United States v. Jones*, 347 F. Supp. 2d 626, 628-29 (E.D. Wis. 2004); *United States v. Elliott*, 266 F. Supp. 318, 325-26 (S.D.N.Y. 1967). One could even argue that the Supreme Court at least implicitly has recognized desuetude in dicta. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv. (TOC), Inc.*, 528 U.S. 167, 203 (2000) ("Although the Court in *Linda R.S.* recited the 'logical nexus' analysis of *Flast v. Cohen*, 392 U.S. 83, ... (1968), which has since fallen into desuetude, 'it is clear that standing was denied ... because of the unlikelihood that the relief requested would redress appellant's claimed injury.'" (citing *Duke Power Co. v. Carolina Env'tl. Study Grp., Inc.*, 438 U.S. 59, 79 n.24 (1978))).

153. Stinneford, *supra* note 120, at 562; see also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 64 (1799) (explaining that common law is custom that enjoys "long and immemorial usage" and "universal reception throughout the kingdom"); EDWARD COKE, THE COMPLEAT COPYHOLDER (1630), reprinted in 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 563, 563 (Steve Sheppard ed., 2003) ("Customs are defined to be a Law, or Right not written, which being established by long use, and the consent of our Ancestors, hath been, and is daily practised."); 1 THE WORKS OF JAMES WILSON 453 (James DeWitt Andrews ed., Chicago, Callaghan & Co., 1896) ("It is the characteristic of a system of common law that it be accommodated to the circumstances, the exigencies, and the conveniences of the people, by whom it is appointed.").

154. See generally Bickel, *supra* note 141.

155. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-66 (1982).

156. See generally Sunstein, *supra* note 136.

157. 346 U.S. 100 (1953).

158. See Greene, *supra* note 130, at 192.

159. *Thompson*, 346 U.S. at 102-03.

out judicial discretion regarding desuetude.¹⁶⁰ Rather, the Court left open this possibility, though it did not articulate the specific situations in which desuetude would occur.¹⁶¹ As the Court stated, “[c]ases of hardship are put where criminal laws so long in disuse as to be no longer known to exist are enforced against innocent parties. But that condition does not bear on the continuing validity of the law; it is only an ameliorating factor in enforcement.”¹⁶² Examining the ameliorating factor in *Thompson*, the prosecutions that served as the basis of the case did not come as a surprise.¹⁶³ Rather, prosecutors warned of their intention to prosecute violations.¹⁶⁴

B. Desuetude in Antitrust

Having provided an overview of desuetude, this Part applies the doctrine of desuetude to antitrust. The case for applying desuetude to both Sherman Act cases and Robinson-Patman cases is strong. There has been no criminal indictment of any Sherman Act non-collusion offenses since the 1970s¹⁶⁵ and no Robinson-Patman criminal indictment cases since the late 1950s.¹⁶⁶ During this period, the moral perception of antitrust criminality changed in the antitrust agencies, the antitrust bar, and academics.¹⁶⁷ The only discussion of criminal penalties of the current antitrust era has been reserved for collusion.¹⁶⁸

160. *See id.* at 117; *see also* Greene, *supra* note 130, at 191.

161. *See Thompson*, 346 U.S. at 117; *see also* Greene, *supra* note 130, at 191-92.

162. *Thompson*, 346 U.S. at 117.

163. *See* Greene, *supra* note 130, at 191.

164. *Id.*; *see also* Bonfield, *supra* note 128, at 431.

165. *See infra* notes 171-81 and accompanying text. *See, e.g., In re Grand Jury Investigation of Cuisinarts, Inc.*, 516 F. Supp. 1008 (D. Conn. 1981), *aff'd*, 665 F.2d 24 (2d Cir. 1981).

166. *See infra* notes 194-96 and accompanying text.

167. *See, e.g., infra* notes 186-92 and accompanying text.

168. *See, e.g.,* ABA, ANTITRUST LAW DEVELOPMENTS (Eighth) (2018), <https://www.justice.gov/atr/criminal-enforcement>.

1. *Sherman Act Criminal Enforcement Outside of Explicit Collusion*

Sherman Act criminal enforcement outside of cartels has been historically very rare.¹⁶⁹ This is particularly true outside of the collusion context for practices involving Sherman § 1. It is even more rare for criminal enforcement of Sherman § 2 activity.¹⁷⁰ Professors William Breit and Kenneth Elzinga summarize the DOJ's criminal enforcement as follows:

During the first fifty years of antitrust enforcement under the Sherman Act, of 252 criminal prosecutions only twenty-four resulted in jail sentences, and only eleven of those involved businessmen (the rest were trade-union leaders). Moreover, ten of the eleven cases involved acts of violence, threats, and other forms of intimidation, and the remaining jail sentence was suspended. From 1940 to 1955 only eleven prison sentences were imposed, and in almost every case the sentences were suspended. It was not until 1959 that a prison sentence was imposed for price-fixing alone, in which no acts of violence or union misconduct were involved. In that case the court imposed a ninety-day prison term on four individuals and fined each \$5,000.¹⁷¹

The nature of criminal enforcement also changed between the early period of enforcement to the start of the famous heavy electric equipment cartel cases of the late 1950s¹⁷² through the renewed emphasis on criminal cartel enforcement in the late 1970s.¹⁷³ According to empirical work by Joseph Gallo and his coauthors, incarceration was very rare in the pre-1963 antitrust era, in which prison was imposed in only 24 of 463 criminal convictions (5.1 percent).¹⁷⁴ Similarly, during the 1963 to 1973 period, 4.8 percent of criminal

169. See Baker, *supra* note 54, at 695.

170. See *id.*

171. WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM 52 (1986).

172. Wayne E. Baker & Robert R. Faulkner, *The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry*, 58 AM. SOC. REV. 837, 838 (1993).

173. See generally Joseph C. Gallo et al., *Guess Who Came to Dinner: An Empirical Study of Federal Antitrust Enforcement for the Period 1963-1984*, 2 REV. INDUS. ORG. 106 (1985).

174. *Id.* at 121.

convictions resulted in incarceration.¹⁷⁵ The APPA changed the nature of enforcement.¹⁷⁶ Since its passage through 1984 (the end of the Reagan administration's first term), 20 percent of criminal convictions resulted in incarceration.¹⁷⁷ All of these convictions and jail sentences were for collusion, except for monopolization convictions in 1969 (six months in jail) and 1973 (thirty days in jail).¹⁷⁸ None of these jail sentences for monopolization occurred after antitrust offenses became felonies.¹⁷⁹

There is some discrepancy between Gallo's work and Posner's 1970 paper that statistically examines antitrust enforcement.¹⁸⁰ According to Posner, who based his data on the Commerce Clearing House "Bluebook" summaries of DOJ Antitrust cases,¹⁸¹ the only criminal monopolization jail sentences were between 1925 and 1929, which included a conviction for violence, and a noncriminal monopolization conviction in 1969.¹⁸² Even if both Posner and Gallo are together both correct about the total number of criminal monopolization convictions that resulted in incarceration, the total number of incarcerations for monopolization in the history of the Sherman Act is incredibly rare and has not been a part of antitrust life for more than a generation.¹⁸³

The most recent criminal action against a noncollusion case is instructive of how far things have changed in terms of thinking about antitrust. In 1978, the DOJ indicted a firm for criminal RPM, which resulted in a *nolo contendere* plea and a fine.¹⁸⁴ The ability to threaten criminal sanctions for behavior that is not typically used to extract harsher penalties otherwise is the type of due process concern that animates the support for desuetude from thinkers such

175. *Id.*

176. *See id.*; *see also* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (codified as amended at 15 U.S.C. § 16 (2012)).

177. Gallo et al., *supra* note 173, at 121.

178. *Id.* at 122.

179. *See* Antitrust Procedures and Penalties Act, § 3, 88 Stat. at 1708 (1974).

180. *Compare* Gallo et al., *supra* note 173, at 121 (explaining infrequent conviction), *with* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366-67 (1970).

181. *See* Posner, *supra* note 180, at 366-67.

182. *Id.* at 391.

183. *See* Baker, *supra* note 54, at 695.

184. *In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1009-10 (D. Conn. 1981), *aff'd*, 665 F.2d 24 (2d Cir. 1981).

as Bickel and Sunstein.¹⁸⁵ Even today, forty years after the indictment, desuetude via nonenforcement of criminal RPM could create negative custom to prevent its current application.¹⁸⁶ Given changes in RPM policy moving it from per se to rule of reason, which itself is based on an economic consensus that there may be procompetitive effects to RPM,¹⁸⁷ such an indictment today would be highly unlikely and may even violate the void for vagueness doctrine as discussed further in the next Part.¹⁸⁸

Notice in antitrust regarding nonenforcement of criminal Sherman Act activity is problematic.¹⁸⁹ The DOJ has shown prosecutorial discretion not merely by not bringing such challenges, but also by making clear that criminal enforcement is reserved for cartels.¹⁹⁰ Guidance from the DOJ provides notice for naked restraints that are per se illegal.¹⁹¹ Yet, the Antitrust Enforcement Guidelines for International Operations,¹⁹² Antitrust Guidance for Human Resource Professionals,¹⁹³ Antitrust Guidelines for Collaborations Among Competitors,¹⁹⁴ and the DOJ Antitrust Division Manual¹⁹⁵ are silent regarding criminal prosecution for other sorts of violations. The lack of discussion of criminal sanctions for other sorts of antitrust conduct strengthens the sense that the norm for enforcement has

185. See generally Bickell, *supra* note 141; Sunstein, *supra* note 136.

186. See generally Stinneford, *supra* note 120.

187. Francine Lafontaine & Margaret E. Slade, *Franchising and Exclusive Distribution: Adaptation and Antitrust*, in 2 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 387, 408 (Roger D. Blair & D. Daniel Sokol eds., 2015); James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 648-49 (2005).

188. See *infra* Part V.

189. See Bonfield, *supra* note 128, at 415-18 (discussing fair notice problems outside of antitrust).

190. See generally U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL OPERATIONS 2 (1995).

191. See *id.* ("Conduct that the Department prosecutes criminally is limited to traditional *per se* offenses of the law, which typically involve price-fixing, customer allocation, [and] bid-rigging.").

192. *Id.*

193. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016) ("Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements.").

194. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000) ("The Department of Justice prosecutes participants in hard-core cartel agreements criminally.").

195. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-8 (5th ed. 2017) (identifying only price fixing, bid rigging, and market allocation schemes).

shifted to one of criminal nonenforcement for noncollusive conduct. Thus, a revival of criminal enforcement for Sherman Act violations that are noncollusive are desuete and not valid as statutes for further criminal enforcement.

2. Enforcement of Robinson-Patman

The Robinson-Patman Act was passed as a statute to protect small retailers against larger and more efficient retailers.¹⁹⁶ The FTC aggressively enforced civil Robinson-Patman cases in the 1950s and 1960s.¹⁹⁷ From an economic standpoint, Robinson-Patman enforcement is retrograde and hurts the most vulnerable consumers by having them pay higher prices than they should for various goods and for retarding necessary economies of scale.¹⁹⁸

Though rare, there have been criminal cases brought by the DOJ under the Robinson-Patman Act.¹⁹⁹ Yet, Robinson-Patman enforcement is particularly problematic regarding desuetude from the standpoint of both notice and duration. This is both true of criminal and civil Robinson-Patman cases brought by the DOJ and the Federal Trade Commission (FTC).²⁰⁰ There has been only a single government enforcement action of Robinson-Patman since the George H.W. Bush administration (and an odd case at that), and no criminal enforcement since the late 1950s.²⁰¹

a. DOJ Enforcement of Robinson-Patman

In the 1970s, the DOJ unilaterally stopped its Robinson-Patman enforcement, which meant an end to the possibility of criminal enforcement.²⁰² In the 1977 Report on the Robinson-Patman Act, the

196. D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2069-70 (2015).

197. *Id.* at 2071 (“In the first thirty-four years of the Act (1937-71), the FTC issued almost 1400 Robinson-Patman complaints.”).

198. Lamentably, the current wave of antitrust populism wants to hurt consumers through higher prices.

199. *See, e.g.*, *United States v. Md. & Va. Milk Producers Ass’n*, 151 F. Supp. 438, 439 (D.D.C. 1957); *United States v. Bowman Dairy Co.*, 89 F. Supp. 112, 113 (N.D. Ill. 1949).

200. *See generally* Sokol, *supra* note 196.

201. *See id.* at 2071-75.

202. *See id.* at 2075.

DOJ called the Act “protectionist” and economic legislation that had “deleterious impact upon competition.”²⁰³ The DOJ also suggested that “serious consideration” should be given to the repeal of the Robinson-Patman Act.²⁰⁴

b. FTC Enforcement of Robinson-Patman

The FTC has been the sole enforcer of Robinson-Patman (civilly) since the 1950s.²⁰⁵ During 1965 to 1968, the period of its most significant enforcement, the FTC averaged ninety-seven new Robinson-Patman investigations per year.²⁰⁶ Of these investigations, the FTC averaged twenty-seven complaints annually.²⁰⁷ A number of these investigations resulted in decided cases, which were pro-plaintiff.²⁰⁸ Such case law had significant repercussions. The nadir of such cases were *Utah Pie Co. v. Continental Baking Co.*²⁰⁹ and *FTC v. Morton Salt Co.*²¹⁰

The FTC by the late 1970s had significantly curtailed its Robinson-Patman civil enforcement.²¹¹ In 1975, the House Small Business Committee held hearings regarding Robinson-Patman enforcement.²¹² During the hearings, the FTC Bureau of Economics

203. U.S. DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 250 (1977).

204. *Id.* at 260-63.

205. ERNEST GELLHORN & WILLIAM E. KOVACIC, FED. TRADE COMM'N, ANALYTICAL APPROACHES AND INSTITUTIONAL PROCESSES FOR IMPLEMENTING COMPETITION POLICY REFORMS BY THE FEDERAL TRADE COMMISSION, (1995), https://www.ftc.gov/system/files/documents/public_statements/418071/951212compolicy.pdf [<https://perma.cc/QQ2K-UUDB>].

206. Sokol, *supra* note 196, at 2073.

207. *Id.*

208. See *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

209. 386 U.S. 685 (1967); see BORK, *supra* note 85, at 387 (“There is no economic theory worthy of the name that could find an injury to competition on the facts of the case. Defendants were convicted not of injuring competition but, quite simply, of competing.”); Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 70 (1967).

210. 334 U.S. 37 (1948); see Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 125 (2001) (“The secondary-line provisions of the Robinson-Patman Act are irritating to almost anyone who is serious about antitrust.”).

211. See Sokol, *supra* note 196, at 2071-75.

212. See *Recent Efforts to Amend or Repeal the Robinson-Patman Act—Part 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of*

Director, Professor F. M. Scherer, testified regarding Robinson-Patman enforcement.²¹³ Scherer's congressional testimony illustrated the anticompetitive effect of Robinson-Patman enforcement.²¹⁴ This testimony reflected how in the 1970s the FTC brought fewer Robinson-Patman cases because such cases hurt consumers and helped small and inefficient competitors.²¹⁵

By the mid-1970s, enforcement was down considerably as the FTC initiated four Robinson-Patman investigations and three complaints per annum.²¹⁶ On the civil enforcement side, the FTC has brought only a single Robinson-Patman case since the end of the George H.W. Bush era.²¹⁷

3. *The Overall View of Robinson-Patman*

Government action, or lack thereof, reflects a broader societal understanding of Robinson-Patman. Robert Bork, who shaped modern antitrust law more than any other thinker, called Robinson-Patman "antitrust's least glorious hour" in 1978.²¹⁸ Richard Posner authored a monograph attacking Robinson-Patman in 1976.²¹⁹ Among more modern thinkers, the most celebrated living professor of antitrust, Herbert Hovenkamp, laments that Robinson-Patman has "all but evaded the economic revolution in antitrust."²²⁰ This academic consensus on the Robinson-Patman Act is also shared by the practitioner community.²²¹ The congressionally appointed Antitrust Modernization Commission in 2007 called for the repeal of the Robinson-Patman Act.²²²

the H. Comm. on Small Bus., 94th Cong. (1975) [hereinafter *Recent Efforts*].

213. *Id.* (statement of Frederic M. Scherer, Director, Bureau of Economics, Federal Trade Commission).

214. *See id.*; *see also* Sokol, *supra* note 196, at 2075.

215. *See Recent Efforts*, *supra* note 212, at 141-44; Sokol, *supra* note 196, at 2075.

216. Sokol, *supra* note 196, at 2075.

217. *Id.* at 2072.

218. BORK, *supra* note 85, at 382.

219. *See generally* RICHARD A. POSNER, *THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES* (1976).

220. Hovenkamp, *supra* note 210, at 125.

221. *See, e.g.*, ANTITRUST MODERNIZATION COMM'N, *REPORT AND RECOMMENDATIONS* (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [<https://perma.cc/M9Q5-P7ZL>].

222. *Id.* at 312.

Given that the last criminal Robinson-Patman case is from the late 1950s (reaching the Supreme Court in the early 1960s) with no subsequent cases since that time,²²³ unilateral nonenforcement of the criminal statutes from the DOJ in the late 1970s,²²⁴ and no federal civil enforcement of any sort of Robinson-Patman cases by the FTC,²²⁵ along with academic and bipartisan support for major modification or repeal of the statute,²²⁶ any criminal Robinson-Patman enforcement would today be subject to the doctrine of desuetude.

V. VOID FOR VAGUENESS

Desuetude is not the only means by which to attack the potential reuse of a criminal antitrust aspect to noncollusion based conduct that has fallen in disuse. One could make an argument that the void for vagueness doctrine applies with regard to the Sherman Act for noncollusion criminal enforcement.²²⁷ Void for vagueness is a doctrine where the law in question is too vague to provide notice of the type of conduct that is to be deemed illegal.²²⁸ The linkage between desuetude and vagueness is that “[a] penal enactment which is linguistically clear, but has been notoriously ignored by both its administrators and the community for an unduly extended period, imparts no more fair notice of its proscriptions than a statute which is phrased in vague terms.”²²⁹

The rule of reason for Sherman Act § 1 and § 2 cases complicates the ability to bring criminal penalties, such as incarceration, to antitrust for cases that would fall under this legal doctrine. Rule of reason liability in practice means that any prosecution would necessarily have a proof beyond a reasonable doubt standard that seems inapplicable to conduct that may have a procompetitive effect.²³⁰

223. *See id.*

224. *See* Sokol, *supra* note 196, at 2071-75.

225. *See supra* notes 211-17 and accompanying text.

226. *See supra* notes 218-22 and accompanying text.

227. *See infra* Part V.B.

228. *See* Linda Rogers & William Rogers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 19 (1966).

229. Bonfield, *supra* note 128, at 416.

230. *See infra* Part V.B.2.a.

A defendant could raise a void for vagueness claim in such circumstances. That is, when the government charges price-fixing, the clarity of the prohibition and the long line of cases have permitted courts to overlook what is a federal common law prohibition in a regime where there is supposedly no federal common law of crime.²³¹ The nature of the rule of reason inquiry does not easily lend itself to this criminal standard. Going beyond this core prohibition would raise grave (and probably winning) due process challenges under the void for vagueness doctrine.²³²

A. Background on the Void for Vagueness Doctrine

Void for vagueness as a doctrine is itself a rather indeterminate concept because of the doctrine's broad language.²³³ Doctrinally, John Calvin Jeffries notes, "[t]he inquiry is evaluative rather than mechanistic; it calls for a judgment concerning not merely the degree of indeterminacy, but also the acceptability of indeterminacy in particular contexts."²³⁴ This indeterminacy manifests itself across Supreme Court cases, particularly with regard to what an ordinary person might think, as does fair notice.²³⁵

The Supreme Court has explained the doctrine in the following terms:

[T]he terms of a penal statute ... must be sufficiently explicit to inform those who are subject to it what conduct on their part

231. See Kovacic & Shapiro, *supra* note 101, at 47; see also Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 777, 783 (1965).

232. Bork's writing on void for vagueness in antitrust suggests that any standard other than consumer welfare would be vagueness. See BORK, *supra* note 85, at 82-83. For a modern explanation of Bork and his antitrust jurisprudence on void for vagueness, see Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 844 (2013).

233. See Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2052 (2015); see also Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923) (providing an early analysis of the Supreme Court's void for vagueness doctrine).

234. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985).

235. See Low & Johnson, *supra* note 233, at 2052-53; see also *United States v. Williams*, 553 U.S. 285, 304 (2008); *Lanzetta v. State of N.J.* 306 U.S. 451, 453 (1939).

will render them liable to its penalties.... And a statute which either forbids or requires the doing of an act ... so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.²³⁶

The classic paper on the vagueness doctrine, by Anthony Amsterdam, explains that the “doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases involving regulatory or economic-control legislation.”²³⁷ Antitrust falls within the economic-control and regulatory sphere.²³⁸

Peter Low and Joel Johnson make a critical insight into vagueness. They note:

Necessarily, it puts two issues to a federal court. The first is a construction of the text of the law. The federal court must determine what the federal law means, and may of course do so in a manner that avoids the vagueness problem. Or, for one reason or another, it may feel required to read the federal law in a manner that brings constitutional vagueness principles into play.²³⁹

Low and Johnson claim that to establish a vagueness claim, first, there needs to be conduct.²⁴⁰ Conduct is not at question for antitrust violations under the rule of reason.²⁴¹ Next, the law needs to have been predictable.²⁴² The problematic situations are those in which the behavior in question is based on law that one should have understood would be included in the prohibition.²⁴³ A statute that is too vague often is standardless. The concern is that a particular

236. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

237. Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 74 n.38 (1960).

238. *See id.*

239. Low & Johnson, *supra* note 233, at 2059.

240. *Id.* at 2060.

241. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978) (“The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes.”).

242. Low & Johnson, *supra* note 233, at 2053.

243. *See id.* at 2065.

statute “is so standardless that it authorizes or encourages seriously discriminatory enforcement.”²⁴⁴

B. Antitrust and Void for Vagueness

Antitrust potentially may fall into a void for vagueness problem.²⁴⁵ This is not to suggest that all of antitrust is void for vagueness,²⁴⁶ or that all per se criminal antitrust is unconstitutional.²⁴⁷ Rather, there is a case to be made, given that for antitrust restraints are based on a rule of reason approach, that any attempt to criminalize such behavior again might also lead to a challenge based on a void for vagueness argument.²⁴⁸

On its face, the Sherman Act appears vague. One can begin with the words of the Sherman Act itself.²⁴⁹ Section 1 of the Sherman Act explains that “[e]very contract, combination ... or conspiracy, in restraint of trade or commerce ... is declared to be illegal.”²⁵⁰ Section 2 of the Sherman Act states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce ... shall be deemed guilty.”²⁵¹ However, case law has filled in the

244. *Williams*, supra note 235. For a recent analysis of vagueness in the white collar crime context, see David Kwok, *Is Vagueness Choking the White Collar Statute*, GEORGIA L. REV. (forthcoming).

245. See Baker, supra note 54, at 694-95 (“By modern standards, the Sherman Act could well have been too vague to be accepted as constitutional on due process grounds. Over time, however, the DOJ, and more importantly the courts, gradually developed distinguishing lines between the kinds of anticompetitive conduct that should be punished criminally and the remaining conduct, which would only be subject to civil injunctions by the government and private damage cases by injured victims.”); see also James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 541-52 (1987) (offering an analysis of the early antitrust state and federal void for vagueness cases).

246. Contra Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, FLA. ST. U. L. REV. (forthcoming) (manuscript at 14), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2968933 [<https://perma.cc/8LR2-Z2ZP>] (making such a claim).

247. Charles D. Weller, *The End of Criminal Antitrust's Per Se Conclusive Presumptions*, 58 ANTITRUST BULL. 665, 668 (2013).

248. See Sipe, supra note 246 (manuscript at 22-24).

249. See *id.* (manuscript at 14).

250. 15 U.S.C. § 1 (2012).

251. *Id.* § 2.

gaps as to what sort of limits exist for the Sherman Act and similar state antitrust laws.²⁵²

One might argue that if a current court had the inclination, it could sustain a broad variety of criminal antitrust prosecutions by citing *United States v. Lanier*, where the criminal civil rights statute was upheld regarding sexual assault cases.²⁵³ In *Lanier*, the U.S. Supreme Court offered guidance as to the “three related manifestations of the fair warning requirement” that are required whether or not a criminal statute may be unconstitutionally vague.²⁵⁴ These include: (1) the vagueness doctrine, (2) the rule of lenity, and (3) retroactive application of a new construction of the statute.²⁵⁵ The purpose of the fair warning requirements is to ensure that the “statute, either standing alone or as construed, ma[k]e it reasonably clear at the relevant time that the defendant’s conduct was criminal.”²⁵⁶ The vagueness manifestation may be at play in the antitrust context.

1. *The Void for Vagueness Sherman Act Cases*

The most important federal antitrust void for vagueness Supreme Court decision is *Nash v. United States*.²⁵⁷ To understand *Nash*, one must first understand its context in terms of Justice Holmes’s prior dissent in *Northern Securities Co. v. United States*.²⁵⁸ Justice Holmes did not believe in competitive effects; he rejected this approach in both *Northern Securities* and *Nash*.²⁵⁹ Justice Holmes argued, “[t]he act says nothing about competition.”²⁶⁰ Instead, the act was based on prior common law.²⁶¹

252. See *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Int’l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216 (1914); *Nash v. United States*, 229 U.S. 373 (1913); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909).

253. 520 U.S. 259, 261 (1997).

254. *Id.* at 266.

255. *Id.*

256. *Id.* at 267.

257. 229 U.S. 373 (1913).

258. 193 U.S. 197 (1904) (Holmes, J., dissenting).

259. See *Nash*, 229 U.S. at 378; *N. Sec.*, 193 U.S. at 403-05 (Holmes, J., dissenting).

260. *N. Sec.*, 193 U.S. at 403 (Holmes, J., dissenting).

261. *Id.* at 404.

In *Northern Securities*, Justice Holmes laid out how criminal use of § 2 of the Sherman Act was to be conceptualized.²⁶² He explained, “that whatever is criminal when done by way of combination is equally criminal if done by a single man.”²⁶³ The Court picked up this language of the ultimate goal of Sherman Act § 1 and § 2 being the same in other cases, most notably in *Standard Oil Co. of New Jersey v. United States*.²⁶⁴

In *Standard Oil*, the Court explained the prohibitions in § 2 were meant simply to complement § 1:

[T]o make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section ... even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section.²⁶⁵

The Court again picked up this language in later cases, such as *Klor's, Inc. v. Broadway-Hale Stores, Inc.*²⁶⁶ In *Klor's*, the Court explained that the goal of the prohibitions of both § 1 and § 2 of the Sherman Act “was to adopt the common-law proscription of all ‘contracts or acts which it was considered had a monopolistic tendency ...’ and which interfered with the ‘natural flow’ of an appreciable amount of interstate commerce.”²⁶⁷ Thus, what is criminal in a § 1 setting potentially could be equally applicable in a § 2 setting.

Such an understanding is not without critique. There have been a few cases that have attacked the Sherman Act on vagueness grounds. Some attacks were based on state antitrust cases and others were based on federal cases.²⁶⁸ One issue that complicated

262. *See id.*

263. *Id.*

264. 221 U.S. 1 (1911). Of note, *Standard Oil* accepted the results of prior common law railroad cases even if the reasoning was not explicitly articulated. *See id.* at 64-68 (discussing previous railroad cases, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) and *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898)); *see also* Bork, *supra* note 231, at 793-94.

265. *Standard Oil*, 221 U.S. at 61; *see also* *United States v. Am. Tobacco Co.*, 221 U.S. 106, 181 (1911).

266. 359 U.S. 207 (1959).

267. *Id.* at 211.

268. *See* May, *supra* note 245, at 542.

federal antitrust law for some time were the early rule of reason cases, *Standard Oil*²⁶⁹ and *United States v. American Tobacco Co.*,²⁷⁰ under which it was not clear when the rule of reason would apply vis-à-vis per se illegality. The first such case to test the limits of *Standard Oil* was *Nash*, where a defendant claimed that the term “restraint of trade,” in the Sherman Act was not clear.²⁷¹ The Court, however, rejected the void for vagueness claim, although the statute did not effectively lay out the elements that must be proven in a successful criminal action.²⁷² Since *Nash*, no party has successfully brought a void for vagueness federal antitrust case.²⁷³ Yet, the limits of *Nash* and other cases suggest that certain Sherman Act cases today might be viewed as vague.²⁷⁴

Supreme Court cases have made certain antitrust doctrines clearly not void for vagueness. The easiest such case involved price-fixing, which the Supreme Court continues to find per se illegal.²⁷⁵ In *United States v. Trenton Potteries Co.*, the Court articulated:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making

269. 221 U.S. 1 (1911).

270. 221 U.S. 106.

271. 229 U.S. 373, 376-77 (1913).

272. *See id.* at 378.

273. *Cf. Sipe, supra* note 246 (manuscript at 28).

274. *See id.* (manuscript at 29).

275. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 394, 400-01 (1927).

the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.²⁷⁶

What this decision makes clear is that the nature of inquiry (per se illegality) matters for a void for vagueness claim, as does the fact that the economics of the conduct in question clearly suggest that the practice is anticompetitive.²⁷⁷ Similarly, in *United States v. Socony-Vacuum Oil Co.*, the Court stated that when the per se rule applies, the reasonableness of the activity is irrelevant, noting, “[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.”²⁷⁸ This approach has been blessed by the leading antitrust treatise.²⁷⁹ These cases suggest that antitrust is not vague when the conduct being undertaken is clearly illegal and where this is well understood.²⁸⁰

2. Changing Antitrust Thinking and Its Implications on Void for Vagueness Arguments

The vague prohibitions in antitrust laws suggest that parties should raise constitutional questions when enforcement posture is changing based on economics that may or may not violate antitrust laws.

a. Rule of Reason

Understanding the rule of reason helps to conceptualize the limits to criminal rule of reason Sherman Act enforcement that may potentially lead to vagueness concerns. The full rule of reason inquiry

276. *Id.* at 397-98.

277. *See id.* at 397-401.

278. 310 U.S. 150, 224-26 n.59 (1940).

279. PHILLIP E. AREEDA & HERBERT HOVENKAMP, 7 ANTITRUST LAW ¶ 1508, at 403 (1986) (“[P]er se condemnation is appropriate for restraints that are properly classified as ‘naked.’”).

280. Thus, there is notice as required under more recent vagueness cases. *See supra* note 236 and accompanying text.

is open ended.²⁸¹ This has led to some academic criticism of the rule of reason.²⁸² Nevertheless it has some structure. As the Supreme Court discussed in *Leegin*:

The rule of reason is designed and used to eliminate anti-competitive transactions from the market.... As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.²⁸³

This type of rule of analysis is longstanding, although the specific contours of the rule of reason have changed over time. The Court reserves per se liability for those agreements that are “so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.”²⁸⁴ The economic presumptions about when a rule is better set as per se versus rule of reason also finds support in the leading antitrust treatise²⁸⁵ and from the most-cited and influential antitrust scholar²⁸⁶ of this generation.²⁸⁷

More generally, the push to rule of reason is a function of a concern that an overinclusive rule would chill procompetitive

281. See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1379 (2009).

282. See Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 338 (2000); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147-48 (2005).

283. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898-99 (2007).

284. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

285. See 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1508, at 474 (4th ed. 2017).

286. Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1920 (2015); Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2040 (2015).

287. Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 137 (2018) (“Per se illegality is appropriate if judicial experience indicates that a particular class of restraints rarely has any effect but to reduce output and increase price.”).

behavior.²⁸⁸ Though antitrust jurisprudence on this issue is modern, the very first rule of reason case, *Standard Oil*, articulated this concern by noting that not all restraints are problematic under the Sherman Act, only unreasonable restraints.²⁸⁹ Similarly, Justice Brandeis's opinion in *Board of Trade of Chicago v. United States*, explained the basis of the rule of reason as follows:

But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.²⁹⁰

This basis for the rule of reason helped lay the foundation for subsequent rule of reason cases.²⁹¹

Rule of reason analysis is linked to the void for vagueness doctrine.²⁹² In *Cline v. Frink Dairy Co.*, a vagueness case involving

288. See *Leegin*, 551 U.S. at 895 (advocating that courts ought not to increase “the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage”); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“[T]his Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.” (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983))).

289. *Standard Oil of N.J. Co. v. United States*, 221 U.S. 1, 60 (1911).

290. 246 U.S. 231, 238 (1918).

291. See Gavil, *supra* note 115, at 742.

292. See Bork, *supra* note 231, at 792.

Colorado's antitrust law, the Court articulated that the Sherman Act cannot be considered vague when the restraints in question had procompetitive effects and were not per se illegal because the anti-competitive effects were outweighed by the procompetitive effects.²⁹³ The Court stated:

[T]hat it was recognized in their text that there were incidental restraints of trade that the statute was not intended to cover.... where the language of the federal statute was read in the light of the common law, and in accordance with its reason, and was construed not to penalize such partial restraints of trade as at common law were not only permitted but were promoted in the interest of the freedom of trade itself.²⁹⁴

A rule of reason burden-shifting approach in antitrust looks very different from the approach taken under criminal law with regard to burdens. As Lawrence Solan explains, “[p]roof beyond a reasonable doubt has been the government’s burden in criminal cases for virtually this country’s entire history.”²⁹⁵ By its definition, the rule of reason is anything but beyond a reasonable doubt. Rather, the rule of reason in operation is based on doubt, due to shifting burdens of proof for the plaintiff and defendant.²⁹⁶ The purpose of the rule of reason is to “distinguish[] between restraints with anti-competitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”²⁹⁷

The rule of reason inquiry under black-letter law is relatively clear.²⁹⁸ There is a three-step process of burden shifting.²⁹⁹ First, the plaintiff has the burden to allege and provide that there is sufficient evidence that the defendant has sufficient market power to undertake an anticompetitive restraint,³⁰⁰ and that the defendant has

293. 274 U.S. 445, 461 (1927).

294. *Id.* at 461.

295. Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 105 (1999).

296. See Hovenkamp, *supra* note 287, at 101-04.

297. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

298. See generally Hovenkamp, *supra* note 287, at 101-04.

299. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* § 15.02[B], at 15-17 (4th ed. Supp. 2018).

300. See *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d

imposed such a restraint.³⁰¹ Next, if the plaintiff can meet this burden and establish a prima facie case of anticompetitive harm, the burden then shifts to the defendant.³⁰² The defendant must show a procompetitive justification for the restraint.³⁰³ If the defendant provides sufficient evidence of a procompetitive justification for the restraint, the burden shifts back to the plaintiff.³⁰⁴ The plaintiff then may show that the same restraint could have been achieved through a less restrictive alternative.³⁰⁵

Given how infrequently the Supreme Court hears antitrust cases, let alone full-blown rule of reason cases, the lack of developed antitrust case law as to the rule of reason amplifies the potential vagueness of the application of criminal sanctions in cases decided under the rule of reason.³⁰⁶ This is especially problematic given how antitrust per se conduct has narrowed over time.³⁰⁷

The rule of reason presents potential problems for purposes of criminal enforcement. Even the dissent in *Leegin* questions the use of criminal penalties for rule of reason cases.³⁰⁸ Justice Breyer asked, “[a]re there special advantages to a bright-line rule? Without

1400, 1405 (9th Cir. 1986) (quoting *Calculators Hawaii, Inc., v. Brandt, Inc.*, 724 F.2d 1332, 1338 (9th Cir. 1983)) (“Proof that defendant’s activities had an impact upon competition in the relevant market is ‘an absolutely essential element of the rule of reason case.’”).

301. *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 (1984) (“Because it restrains price and output, the NCAA’s television plan has a significant potential for anticompetitive effects.”).

302. *Am. Express*, 138 S. Ct. at 2284 (“If the plaintiff carries its burden, then the burden shifts to the defendant.”).

303. *Id.* (stating that the defendant must “show a procompetitive rationale for the restraint”); *Bd. of Regents*, 468 U.S. at 113 (“Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.”).

304. *Am. Express*, 138 S. Ct. at 2284.

305. *Id.* (“If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.”). *See generally* *United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993); C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).

306. *See generally* Arthur, *supra* note 282; Stucke, *supra* note 281.

307. *See* Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 BUS. LAW. 435, 436 (2011) (“The Supreme Court has ... continually narrowed the types of conduct subject to per se condemnation.”).

308. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 917 (2007) (Breyer, J., dissenting).

such a rule, it is often unfair ... for enforcement officials to bring criminal proceedings.”³⁰⁹ The concern for overreach of criminal penalties for business behavior that might fall under the rule of reason has been articulated in other decisions.³¹⁰ For example, the fear of criminal conduct for what should not be per se prohibitions, but a rule of reason animates the Court in non per se Sherman Act conduct cases.³¹¹ In *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court explained, “[m]anufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties.”³¹² The Court made this statement when a dealer who sold calculators brought a claim regarding termination by the supplier.³¹³ At issue was whether or not such behavior was a per se violation.³¹⁴ The Court held that such a vertical restraint was not per se illegal under § 1 of the Sherman Act except in a situation where the restraint included an agreement of price or price levels.³¹⁵ Understanding the quotation in the context of the broader case, the Court seems to suggest that criminal sanctions are only possible in a per se world rather than that of the rule of reason.

b. Court as Regulator

The Court articulated a concern in *United States v. United States Gypsum Co.* that criminal convictions should not be within the Court’s toolkit where courts would serve as regulators.³¹⁶ The Court observed:

The criminal sanctions would be used, not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken. While in certain cases we have imputed a regulatory purpose to Congress in

309. *Id.*

310. *See, e.g.*, *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

311. *See, e.g., id.* at 727-28.

312. *Id.* at 728.

313. *Id.* at 721.

314. *Id.*

315. *Id.* at 735-36.

316. *See* 438 U.S. 422, 435-36 (1978).

choosing to employ criminal sanctions ... the availability of a range of nonpenal alternatives to the criminal sanctions of the Sherman Act negates the imputation of any such purpose to Congress in the instant context.³¹⁷

This type of concern regarding criminal penalties for Sherman Act violations clarifies the purpose and basis of antitrust.³¹⁸ The Court further explained, “[s]imply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a ‘generality and adaptability comparable to that found to be desirable in constitutional provisions.’”³¹⁹ As a result, the Court noted that it is not the case that “judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the ‘rule of reason’ have been applied to broad classes of conduct falling within the purview of the Act’s general provisions.”³²⁰ These types of conduct lead to potential problems with regard to criminality. The Court explained, “[w]ith certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anti-competitive effects ... the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.”³²¹

More recent cases also make clear the Court’s deep reluctance to have antitrust law serve as a price regulator. In *Trinko*, the Court articulated a concern that antitrust courts, as an institutional matter, are not well suited “to act as central planners, identifying the proper price, quantity, and other terms of dealing.”³²² The Court reiterated this institutional concern in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*³²³

The Court has rejected void for vagueness concerns in a number of areas of law that require rate regulation or concerns of price-

317. *Id.* at 442 (internal citation omitted).

318. *See id.* at 435-36.

319. *Id.* at 439 (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1993)).

320. *Id.* at 438.

321. *Id.* at 440-41 (internal citation omitted).

322. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

323. *See* 555 U.S. 438, 452-55 (2009).

related conduct, such as railroads³²⁴ or antitrust.³²⁵ However, the types of concerns regarding these earlier cases are different than the specific vagueness concerns that are raised with regard to a rule of reason approach. Let us begin with *Nash*, the first attack on the Sherman Act on vagueness grounds.³²⁶ At issue, in part, was whether or not criminal sanctions under the Sherman Act for an agreement to fix bids based on vertical and predatory behavior were void for vagueness.³²⁷ The Court held that the Sherman Act was not void because a “prudent man” would understand the clarity required to undertake such an agreement.³²⁸

3. Intent

Intent plays a role outside of per se cases, which makes it more difficult to prove. This has mitigated vagueness concerns for the Sherman Act.³²⁹ However, it also sets a very high bar for potential criminal enforcement of noncollusion based Sherman Act crimes.³³⁰ *United States v. Gypsum Co.* was an information exchange case outside of the traditional per se boundaries.³³¹ The underlying conduct was defendants that would telephone their competitors in order to verify prices to avoid liability under Robinson-Patman by establishing a meeting-competition defense.³³² The defendants denied that they had intended to engage in illegal activity.³³³ The Court addressed this criminal case by applying a rule of reason analysis.³³⁴

In *Gypsum*, the Court held that intent could not be presumed in rule of reason cases.³³⁵ The Supreme Court articulated that intent

324. See R.R. Comm'n Cases, 116 U.S. 307, 336 (1886).

325. See *Nash v. United States*, 229 U.S. 373, 376 (1913).

326. See generally *id.*

327. See *id.* at 376-77.

328. *Id.* at 377.

329. See Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 666 (2001).

330. See Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. UNIV. L. REV. 151, 153 (2004).

331. See 438 U.S. 422 (1978).

332. *Id.* at 429.

333. *Id.*

334. *Id.* at 438.

335. *Id.* at 435-36.

was a critical part of criminal enforcement.³³⁶ A defendant needed to have “undertaken with knowledge of its probable consequences and hav[e] the requisite anticompetitive effects”³³⁷ or alternatively be “undertaken with the purpose of producing anticompetitive effects ... even if such effects [do] not come to pass.”³³⁸

Post-*Gypsum*, lower courts have held that intent exists when the government can prove that a defendant has knowledge that he participated in a cartel.³³⁹ Thus, under per se criminal § 1 antitrust, criminal intent is not an element of the criminal violation.³⁴⁰ However, under the rule of reason, it is an inference.³⁴¹ This inference seems rather significant since the rule of reason normally requires a more significant analysis.³⁴² Nevertheless, the intent requirement creates a potential void for vagueness problem as the shortcut which prevents judges or juries from deciding the reasonableness of the restraint,³⁴³ which goes to the issue of effect.

Intent has been read into § 2 of the Sherman Act (although typically to show effect for monopolization cases).³⁴⁴ The same concerns of intent also play a role in attempted monopolization cases.³⁴⁵ This

336. *Id.* at 435.

337. *Id.* at 444.

338. *Id.* at 444 n.21.

339. *See, e.g.*, *United States v. Rose*, 449 F.3d 627, 630 (5th Cir. 2006); *United States v. Brown*, 936 F.2d 1042, 1046-47 (9th Cir. 1991); *United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir. 1981); *United States v. Cont'l Grp., Inc.*, 603 F.2d 444, 461-62 (3d Cir. 1979).

340. *See United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995); *United States v. All Star Indus.*, 962 F.2d 465, 474 (5th Cir. 1992); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1231, 1234-35 (8th Cir. 1992); *Brown*, 936 F.2d at 1046; *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988).

341. *See Gypsum*, 438 U.S. at 435, 446.

342. *See supra* notes 298-305 and accompanying text (describing the rule of reason analysis).

343. *See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island*, 239 F. Supp. 2d 180, 189 (D.R.I. 2003) (“While motive is a relevant consideration in determining whether concerted actions violate the Sherman Act, the ultimate question is whether the challenged conduct unreasonably restrains trade.”); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir.1993) (“Motive can ... be a guide to expected effects, but effects are still the central concern of the antitrust laws, and motive is mainly a clue.”).

344. *See Cass & Hylton, supra* note 329, at 658-59; *Lao, supra* note 330, at 154.

345. 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 307 (6th ed. 2007) (“The same principles used in the monopolization context to distinguish aggressive competition from anticompetitive exclusion thus apply in attempt cases.”); *see also Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595-96 (7th Cir. 1989) (“We attach rather little weight to internal company documents used to show anticompetitive intent, because, though they sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable competitive effect.”).

reading in of intent is perhaps even more problematic because of the difficulty of understanding the difference between the intent to partake in procompetitive versus anticompetitive activity.³⁴⁶ Courts have considered intent in Supreme Court cases such as *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*³⁴⁷ and *Eastman Kodak Co. v. Image Technical Services, Inc.*,³⁴⁸ and important circuit court cases, such as *United States v. Microsoft Corp.*³⁴⁹ and *LePage's Inc. v. 3M*.³⁵⁰ However, *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* mentions with disfavor that “[t]raipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions,”³⁵¹ and *California Dental Ass’n v. FTC* casts doubt on the use of intent altogether.³⁵² Nevertheless, intent plays a limited role in § 2 cases. The same concerns of intent also play a role in attempted monopolization cases.³⁵³

Intent is problematic from the standpoint of current cases in part because it distracts from the economic evidence that an effects-based antitrust requires.³⁵⁴ However, as a criminal matter, proving intent would be necessary for a criminal conduct case, and the level of intent would be a higher level than that required civilly.³⁵⁵ Given the conceptual difficulty in some courts and in the leading treatise on intent even in civil noncollusion conduct cases,³⁵⁶ proving intent

346. Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1039 (2000).

347. 472 U.S. 585 (1985).

348. 504 U.S. 451 (1992).

349. 253 F.3d 34, 59 (D.C. Cir. 2001) (“[O]ur focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent that it helps us understand the likely effect of the monopolist’s conduct.”).

350. 324 F.3d 141, 158 (3d Cir. 2003).

351. 881 F.2d 1396, 1402 (7th Cir. 1989).

352. 224 F.3d 942, 948 (9th Cir. 2000).

353. 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 307 (6th ed. 2007) (“The same principles used in the monopolization context to distinguish aggressive competition from anticompetitive exclusion thus apply in attempt cases.”); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 448 (1993) (“However, intent alone is insufficient to establish the dangerous probability of success.”).

354. See *A.A. Poultry Farms*, 881 F.2d at 1402; Hovenkamp, *supra* note 346, at 1039 (“[T]he ‘intent’ to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.”).

355. See Lao, *supra* note 330, at 152 n.1, 201.

356. See 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 805a, at 339-40,

criminally, where intent has been read into the statute, may lead to a void for vagueness problem.³⁵⁷

4. *Severity of Punishment and Void for Vagueness*

Severity of punishment is an important factor in vagueness considerations.³⁵⁸ Whereas the old antitrust void for vagueness cases were decided during an era in which an antitrust crimes were misdemeanors, the current antitrust criminal structure has significant potential jail time.³⁵⁹ Severity of punishment is a factor for the Court in vagueness analysis.³⁶⁰ In *Johnson v. United States*, the Court found a provision of the Armed Career Criminal Act that defined a violent felony to be void for vagueness based on language that a felony “otherwise involves conduct that presents a serious potential risk of physical injury to another.”³⁶¹ In *Johnson*, the penalty was a mandatory minimum sentence of fifteen years.³⁶² As a result, vagueness concerns “appl[ied] not only to statutes defining elements of crimes, but also to statutes fixing sentences.”³⁶³

The more serious the penalties for a criminal statute, the more important vagueness concerns become.³⁶⁴ Thus, there is legitimate concern that high prison sentences for monopolization or noncartel conduct would be unproportional. Price fixing typically averages three years in prison per conviction.³⁶⁵ However, unlike areas of clear wrongdoing such as collusion, sentences that would be as long

¶ 805b2, at 342 (2d ed. 2002).

357. See BORK, *supra* note 85, at 57 (“The bare language of the Sherman Act conveys little.”); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1623 (2005) (“Over its 114-year history, Section Two of the Sherman Act has been a source of puzzlement to lawyers, judges and scholars, a puzzlement derived in large part from the statute’s extraordinary brevity.” (footnote omitted)).

358. Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1142 (2016).

359. See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974) (codified as amended at 15 U.S.C. § 16 (2012)).

360. See Hessick, *supra* note 358, at 1142.

361. 135 S. Ct. 2551, 2257 (2015).

362. *Id.* at 2555.

363. *Id.* at 2557.

364. See *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.”).

365. Vivek Ghosal & D. Daniel Sokol, *The Rise and (Potential) Fall of U.S. Cartel Enforcement* at 8 (Apr. 14, 2018) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3162867 [<https://perma.cc/2C5W-KN26>].

(if not longer) for noncollusive criminal conduct begin to look potentially excessive. This could be in violation of the Eighth Amendment.³⁶⁶

The concern about proportionality has been articulated in the antitrust context for over one hundred years.³⁶⁷ Certainly, the concern of proportionality would be at issue with regard to Sherman Act rule of reason cases where the statutory maximum is significant, with increasing criminal penalties for individuals and corporations.³⁶⁸

Without a clear and objective standard for what criminal enforcement would look like for noncollusion cases under the Sherman Act, antitrust may have a void for vagueness problem. Such a result would also threaten the clarity that has emerged after a shift in case law and agency practice, which has provided guidance as to the difference between criminal and civil enforcement by the Antitrust Division for certain forms of conduct.³⁶⁹ The increase in criminal fines for what is clearly per se illegal antitrust conduct in terms of collusion is inappropriate in cases where there is a procompetitive rationale for the behavior under the rule of reason.³⁷⁰

5. Void for Vagueness for Robinson-Patman Criminal Violations

Antitrust vagueness has been attacked not merely in the Sherman Act but also in the Robinson-Patman Act. In *United States v.*

366. See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 727-30 (2005).

367. See *Nash v. United States*, 229 U.S. 373, 377 (1913) (“[T]he law is full of instances where a man’s fate depends on his estimating rightly ... some matter of degree. If his judgment is wrong ... he may incur the penalty of death.”).

368. Ghosal & Sokol, *supra* note 365, manuscript at 3, 7. This concern is not unique to the United States. See generally Florian Wagner-von Papp, *Compliance and Individual Sanctions in the Enforcement of Competition Law*, in COMPETITION LAW COMPLIANCE PROGRAMMES 135 (Johannes Paha ed., 2016). In Ireland, hard core offenses were moved to be decriminalized because of nonuse of these penalties but “its Attorney General advised that substantial civil fines could raise constitutional concerns under Article 38 of the Irish Constitution.” See *id.* at 165 n.50.

369. See, e.g., HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE* 305 (2005) (detailing the doctrinal shift).

370. See Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CALIF. L. REV. 959, 961 (1987).

National Dairy Products Corp., the Supreme Court held that pricing below cost was not void for vagueness under the Robinson-Patman Act.³⁷¹ This case and holding are technically still good case law.³⁷² However, the Court has also made it clear that due to the Sherman Act's lack of detail and specificity, the Act more generally has not been interpreted "as if it were primarily a criminal statute."³⁷³ This lack of specificity is a concern based on vagueness.

However, a number of things set the Robinson-Patman Act apart for void for vagueness arguments made under the Sherman Act. First, the Robinson-Patman Act is not decided under the rule of reason.³⁷⁴ Rather, a Section 2(a) claim under the Act requires, "(1) A difference in price, (2) in reasonably contemporaneous sales of two buyers purchasing from a single seller, (3) involving commodities, (4) of like grade and quality (5) that may injure competition."³⁷⁵ Even if the elements of a violation are made, there are affirmative defenses, such as under Section 2(b) of the Act.

Second, the rationale in *National Dairy* was due to conduct that involved below-cost pricing.³⁷⁶ By today's standard for below-cost pricing, the conduct would not only not be criminal, it would also not be a violation of the Act, which the Court now treats akin to the Sherman Act in terms of economic analysis for predatory pricing under § 2, and requires recoupment.³⁷⁷ By focusing on per se conduct, not only is there a notice with regard to desuetude, as discussed earlier, but also with regard to vagueness because of the notice problem.

The Court also made a distinction in *National Dairy* that seems less appropriate today. It articulated that First Amendment vague-

371. 372 U.S. 29, 37 (1963).

372. *See id.* at 33.

373. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978).

374. *See Sokol, supra* note 196, at 2080-81, 2096-97.

375. Steven J. Cernak, *ANTITRUST IN DISTRIBUTION AND FRANCHISING* 88 (2015).

376. 372 U.S. at 29, 36.

377. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221-22, 224 (1993). Technically, *Brook Group* addressed only primary-line competitive injury. *Id.* at 220-21. However, the Court provides dicta explaining that the purpose of Robinson-Patman is no different from that of the other antitrust statutes. *Id.* at 220. In practice, this means that Robinson-Patman is guided by economic analysis in which the competitive effects play a role. *Id.* ("Thus, 'the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'" (quoting *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979))).

ness cases are different from those cases that purely address economic issues and that the concern of the latter is less important.³⁷⁸ However, the Court has found statutes void for vagueness in other types of economic crimes, most notably in *Skilling v. United States* (involving misrepresentation of the financial performance of Enron).³⁷⁹ The Court was concerned about whether the scope of the setting standards of disclosure for corporate executives was appropriate as a delegation between the courts and the DOJ in light of the of the institutional complexity and heavy potential jail time for individuals.³⁸⁰ The open-ended nature of mail fraud created the possibility of “a wider range of offensive conduct ... [that] would raise the due process concerns underlying the vagueness doctrine.”³⁸¹ This type of concern, if applied to Robinson-Patman, may suggest a case for void for vagueness in the criminal context.

CONCLUSION

This Article has examined how the common law doctrine of desuetude would prevent punishment that is unduly harsh, such as criminalization, because such punishment has fallen out of use.³⁸² This can be applied to antitrust for both Sherman Act and Robinson-Patman Act claims. Further, this Article has addressed how criminalization for antitrust violations that have moved from per se illegality to rule of reason creates a potential void for vagueness problem due to a lack of notice and disproportionate enforcement.³⁸³ This is because antitrust criminal liability (including incarceration) for pricing-related practices that are rule of reason based have a lower standard (akin to preponderance of the evidence) than do traditional felonies that require a standard of beyond a reasonable doubt.³⁸⁴ Thus, while criminal antitrust for noncollusion crimes technically remains good law, it may be unconstitutional.

378. *Nat'l Dairy*, 372 U.S. at 36-37.

379. 561 U.S. 358, 368-69, 404 (2010).

380. See Low & Johnson, *supra* note 233, at 2089.

381. *Skilling*, 561 U.S. at 408.

382. See *supra* Part IV.B.

383. See *supra* Part V.B.

384. See *supra* Part V.B.2.a.

As a matter of antitrust policy, antitrust is better functioning now as to both procedure and substance than it was during its nadir of the 1950s and 1960s.³⁸⁵ This is not to say that the current institutional structure and case outcomes of antitrust are perfect—far from it. Rather, antitrust has a workable institutional structure, a singular goal that allows for a more even application of law as to both process and substance.³⁸⁶ Criminal enforcement for a generation has been limited to those cases that involve “naked” collusion—the so called “hard-core” cartels where there is direct evidence of illegal activity.³⁸⁷ Violators of Sherman § 1 for collusion regularly go to jail, as they should.³⁸⁸ However, the changing institutional structure of antitrust towards a more populist approach suffers from a “nirvana fallacy” under which feasible policies, as compared to ideal normative policies, are viewed as inherently inefficient because of their various imperfections.³⁸⁹

Antitrust has pushed back from criminal penalties for other types of conduct that are part of daily business behavior and that might chill procompetitive business behavior.³⁹⁰ Where there are concerns of exclusion or predation, often these cases are ones in which the balance between anticompetitive effects and procompetitive justifications are complex and require a rule of reason analysis.³⁹¹ To criminalize behavior that has the potential to be efficient under a rule of reason analysis returns antitrust to an era of business inhospitability. Such an enforcement regime would chill business risk taking, precisely the sort of risk taking that the Supreme Court has stated to be the very purpose of competition which antitrust is to protect.³⁹² Worse, after more than a generation of nonenforcement, such enforcement would violate the doctrine of desuetude

385. *See supra* Part III.

386. *See supra* notes 104-06 and accompanying text.

387. *See supra* note 191.

388. Ghosal & Sokol, *supra* note 365, manuscript at 7, 11.

389. *See generally* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1-4 (1969).

390. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007).

391. *See supra* Part V.B.2.a.

392. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (“The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”).

and present a void for vagueness problem. As such, a return to a more populist antitrust that would recriminalize many forms of business conduct not only presents constitutional problems, but also retards innovation and chills business decision making that may in fact serve to enhance consumer welfare.³⁹³ The potential for jail for practices that have procompetitive behavior would damper such practices, which in turn would hurt consumers. Enhancing consumer welfare is exactly what the antitrust laws are supposed to do.³⁹⁴

393. See FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 1 (2003), <https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf> [<https://perma.cc/6G76-P63A>] ("Innovation benefits consumers through the development of new and improved goods, services, and processes. An economy's capacity for invention and innovation helps drive its economic growth and the degree to which standards of living increase. Technological breakthroughs such as automobiles, airplanes, the personal computer, the Internet, television, telephones, and modern pharmaceuticals illustrate the power of innovation to increase prosperity and improve the quality of our lives." (footnote omitted)).

394. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 114b, at 151-53 (4th ed. 2013).