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## The Section 2 Debate: Should Lenity Play a Role?

**ABSTRACT.** The Supreme Court's recent decision in *Illinois Tool Works*, by invoking the Rule of Lenity in construing the Sherman Act in a civil setting, raises a fundamental question concerning that statute: Should the theoretical possibility of criminal sanctions for monopolization offenses (Section 2 of the Sherman Act) narrow the Sherman Act in civil actions? Commentators have suggested that the answer might be yes. This Essay disagrees, and argues that lenity properly plays no role in judicial elaboration of the Sherman Act. Although the Supreme Court's insistence that a statute with both civil and criminal applications must mean the same thing regardless of enforcement setting appears to preclude different constructions of the Sherman Act depending on the selected enforcement tool, that merely raises the more fundamental issue of whether the Sherman Act is ambiguous in a lenity-triggering sense. The Essay demonstrates both that the Sherman Act's underlying Rule of Reason standard does not trigger the Rule of Lenity and that applying lenity to narrow the Sherman Act would not serve any of the Rule of Lenity's asserted purposes.

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## INTRODUCTION

In its 2006 *Illinois Tool Works*<sup>1</sup> decision, the Supreme Court overturned the presumption of market power in antitrust patent tying cases. The result in *Illinois Tool Works* was widely expected. What the antitrust community did not expect, and what one notable antitrust Supreme Court practitioner called “striking,”<sup>2</sup> was the Court’s invocation of “the rule of lenity that is applied in criminal cases” in civil *Illinois Tool Works*.<sup>3</sup> The Rule of Lenity, a “basic axiom of federal criminal jurisprudence,” provides “that a court should adopt the harsher of two rational readings of a criminal statute only when Congress has spoken in clear and definite language.”<sup>4</sup> In abrogating what it termed “a rule of severity for a special category of antitrust cases,” the Court drew a contrast with “the normal rule of lenity that is applied in criminal cases”<sup>5</sup> and emphasized that the same statutory text that establishes civil Sherman Act liability “makes the conduct at issue a federal crime.”<sup>6</sup>

By citing lenity in a civil setting in narrowing the conduct the Sherman Act condemns, *Illinois Tool Works* raises a fundamental methodological question concerning judicial elaboration of Sections 1 and 2 of the Sherman Act<sup>7</sup>: Does the Sherman Act’s criminalization of conduct have implications for the statute’s construction in civil cases,

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<sup>1</sup> *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 46 (2006).

<sup>2</sup> Richard G. Taranto, *Illinois Tool Works v. Independent Ink: A Lawyer’s Take on Ending Special Suspicion of Patent Tying*, 2 COMPETITION POLICY INT’L 169, 178 (2006).

<sup>3</sup> *Illinois Tool Works*, 547 U.S. at 45.

<sup>4</sup> Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345, 345 (internal quotations omitted).

<sup>5</sup> *Illinois Tool Works*, 547 U.S. at 45.

<sup>6</sup> *Id.* at 42.

<sup>7</sup> 15 U.S.C. §§ 1-2.

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particularly where the Act’s application is unsettled?

Much might turn on the answer to this seemingly arcane question. According to one commentator, *Illinois Tool Works’* “invocation of the rule of lenity” is “of potentially quite general importance in the task of construing the Sherman Act, suggesting that doubts go against antitrust intervention in market activities.”<sup>8</sup> In other words, it is suggested, the Rule of Lenity might provide antitrust defendants with yet another weapon to argue for antitrust legal tests that tilt the scales against liability. Antitrust defendants might invoke lenity-based “doubts” to argue, *inter alia*, for safe harbors when Section 2 liability is unsettled, for exacting proof to demonstrate monopoly power, or even for an exacting default or baseline Section 2 legal test.

Whether lenity properly informs the Sherman Act’s scope – and more particularly, whether it supports a presumption of non-intervention – is made particularly relevant by the continuing debate over the principles that inform judicial elaboration of Section 2 of the Sherman Act, a debate sparked by the government’s case against Microsoft. A 2008 Department of Justice Report, according to its detractors, suggested an underlying framework for Section 2 that placed a thumb on the scale in favor of non-intervention. In withdrawing the Section 2 Report, the Obama-appointed head of the Antitrust Division specifically repudiated any such non-intervention presumption. Moreover, although the Supreme Court has clarified Section 2’s reach in limited situations post-*Microsoft*,<sup>9</sup> disagreement persists as to even the most basic questions concerning Section 2’s

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<sup>8</sup> Taranto, *supra* note 2, at 178.

<sup>9</sup> See *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 129 S. Ct. 1109 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

underlying legal test and appropriate principles for its elaboration.<sup>10</sup> If, as some suggest, the Rule of Lenity creates a presumption against antitrust enforcement in a civil setting, that “basic axiom of federal criminal jurisprudence” could play an important role in resolving what some have called an “exclusionary conduct ‘definition’ war,”<sup>11</sup> perhaps tipping the scales toward non-intervention in many areas where Section 2’s application is uncertain.

My purpose here is to explore the argument for applying the Rule of Lenity in resolving uncertainty concerning Section 2’s substantive reach. Perhaps surprisingly, the invariably civil nature of modern Section 2 enforcement does not *per force* foreclose the Rule of Lenity. The reason is that criminal and civil liability spring from the same operative statutory language. As Justice Holmes observed a century ago, “the words cannot be read one way in a suit which is to end in fine and imprisonment and in another way in one which seeks an injunction.”<sup>12</sup> If the Rule of Lenity informs Section 2’s substantive reach, that canon of construction likely applies even when that statute is enforced in a civil action. Whether lenity informs Section 2 legal tests therefore must be confronted directly.

I conclude that lenity has no proper place in resolving the continuing debate over Section 2. The Rule of Lenity is a canon of last resort, one that “comes into operation at the end of the process of construing what Congress has expressed” and “not at the beginning as an overriding consideration of being lenient to wrongdoers.”<sup>13</sup> Because

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<sup>10</sup> See generally Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006).

<sup>11</sup> Andrew I. Gavil, *Exclusionary Distribution Strategies By Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 5 (2005).

<sup>12</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

<sup>13</sup> *E.g.*, *Russello v. United States*, 464 U.S. 16, 29 (1983) (internal quotations omitted).

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the Sherman Act is judicially construed to codify a standard of reasonableness (the Rule of Reason), and because Congress expected the courts to elaborate the Sherman Act in a common-law fashion, the Sherman Act – at least as a formal matter – arguably does not present a circumstance where courts “are left with an ambiguous statute.”<sup>14</sup>

The poor fit between the lenity canon’s asserted purposes and the Sherman Act reinforces the formal argument for elaborating Section 2 without regard to lenity. The Rule of Lenity, it is said, protects against unintended delegations of criminal law-making power from Congress to the courts. But construction of the Sherman Act to embody a rule of reasonableness that Congress expected courts to develop in a common-law fashion makes the Sherman Act an example of intended (even if implicit) delegation. Unless and until implicit delegation through case-by-case elaboration is deemed constitutionally impermissible, the Rule of Lenity is not properly deployed to police against it. Lenity purportedly helps constrain undesirable prosecutorial discretion. But the lack of any realistic threat of criminal Section 2 enforcement renders that concern inapplicable. Lenity assertedly helps ensure fair notice of what the law condemns. But if, as the Supreme Court has held, the Sherman Act’s Rule of Reason provides constitutionally sufficient notice to defeat void for vagueness invalidity, fair notice concerns do not support invoking lenity to construe Section 2 narrowly.

Perhaps the most compelling rationale for lenity is that it helps ensure that criminal liability for so-called “regulatory” or *malum prohibita* crimes is confined to wrongful conduct; that is, absent unambiguous direction from Congress, statutes ought not be read to criminalize mere “errors” of judgment. But this concern, too, provides no warrant for applying the Rule of Lenity when determining Section 2’s substantive reach. The *mens rea* element mandated by *United States v. United States Gypsum Co.*<sup>15</sup> confines criminal prosecution

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<sup>14</sup> Reno v. Koray, 515 U.S. 50, 65 (1995) (internal quotations omitted).

<sup>15</sup> 438 U.S. 422, 435 (1978).

under Section 2 (however fanciful the possibility might be) only to “wrongful” (that is, *malum in se*) conduct. Indeed, *Gypsum* read the Sherman Act to contain a *mens rea* element in its criminal applications precisely because “the behavior proscribed by the [Sherman] Act is often difficult to distinguish from the gray zone of socially acceptable and economically justified business conduct.”<sup>16</sup> To invoke lenity to narrow Section 2’s breadth when the Supreme Court imposed an intent requirement because of the statute’s “indeterminacy”<sup>17</sup> would turn *Gypsum* on its head.

Finally, a lenity-based presumption that doubts should go to the Section 2 defendants is unnecessary in light of the ability of Section 2 courts expressly to consider the risk of over- or under-deterrence in crafting appropriate Section 2 legal tests. In other words, precisely because the Sherman Act is a “charter of freedom” with the “generality and adaptability comparable to that found to be desirable in constitutional provisions,”<sup>18</sup> a lenity-based presumption against intervention is unwarranted. Substantive rules that tilt antitrust doctrine against intervention, if appropriate, ought to arise from sound antitrust decision-theoretic analysis, not from Congress’s choice to enact a statute with both criminal and civil applications.

## I. STOCK ARGUMENTS IN THE EXCLUSIONARY CONDUCT DEFINITION WAR

Section 2 of the Sherman Act remains an antitrust flashpoint. A profound difference of views persists concerning the core principles that ought to guide Section 2’s elaboration.<sup>19</sup> Moreover, although the substantive legal tests that govern certain categories of conduct are

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<sup>16</sup> *Id.* at 440-41.

<sup>17</sup> *Id.* at 439.

<sup>18</sup> *Id.* (internal quotations omitted).

<sup>19</sup> *See generally* Popofsky, *supra* note 10, at 435.

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settled, there is perhaps more about Section 2 that is undecided than decided. The legal tests that govern bundled discounts, loyalty discounts, and the proper measure of costs of predatory pricing cases are but some examples of the many questions concerning Section 2's application and operation that remain unresolved.<sup>20</sup>

The short life of the Antitrust Division's 2008 Report on Section 2<sup>21</sup> has sharpened the Section 2 debate. That Bush-administration Report suggested what many criticized as a "narrow" view of Section 2. Among other recommendations, the Report suggested applying a baseline "disproportionality" test when no specialized rule otherwise governed.<sup>22</sup> A majority of the FTC decried the Report as proposing a Section 2 defendant's paradise: "In short," three Commissioners wrote, "the Department's Report erects a multi-layered protective screen" for actual or would-be monopolists.<sup>23</sup>

The FTC majority soon found a like-minded ally in Christine Varney, President Barack Obama's Assistant Attorney General for Antitrust. In her first major post-confirmation public address, AAG Varney withdrew the Section 2 Report,<sup>24</sup> declaring that it "raises [too] many hurdles to Government antitrust enforcement."<sup>25</sup> In particular, AAG Varney disagreed with the Report's "skepticism regarding the

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<sup>20</sup> See generally ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 84-94 (Apr. 2007) ("AMC Report"), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

<sup>21</sup> U.S. DEPARTMENT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008; withdrawn May 11, 2009), available at <http://www.usdoj.gov/atr/public/reports/236681.htm>.

<sup>22</sup> *Id.* Ch. 3.

<sup>23</sup> Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice, at 10 (Sept. 8, 2008) ("FTC Statement"), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

<sup>24</sup> Christine A. Varney, *Vigorous Antitrust Enforcement in this Challenging Era* (May 11, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245711.pdf>.

<sup>25</sup> *Id.* at 6.

ability of antitrust enforcers – as well as antitrust courts – to distinguish between anticompetitive and lawful conduct” and its “related concern that failure to make proper distinctions may lead to ‘overdeterrence.’”<sup>26</sup> Resting on these flawed twin assumptions, AAG Varney continued, the Section 2 Report’s “disproportionality” baseline produced a “preference for an overly lenient approach to enforcement.”<sup>27</sup> In place of the Section 2 Report, AAG Varney promised “[r]ein vigorated Section 2 enforcement”<sup>28</sup> that will “go ‘back to the basics,’”<sup>29</sup> taking as its loadstar “leading Section 2 cases”<sup>30</sup> that include *Lorain Journal*,<sup>31</sup> *Aspen Skiing*,<sup>32</sup> and *Microsoft*.<sup>33</sup>

It is one thing for the Antitrust Division to cast aside the Section 2 Report. It is quite another to enshrine into law an approach that “look[s] closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm’s conduct, weigh[s] those factors, and determine[s] whether on balance the net effect . . . harms competition and consumers.”<sup>34</sup> “[T]he U.S. courts have the final word; the antitrust agencies can choose to bring cases and argue new positions, but the final arbiter of the meaning of the antitrust laws is

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 8.

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* at 9.

<sup>31</sup> *Lorain Journal v. United States*, 342 U.S. 143 (1951).

<sup>32</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

<sup>33</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

<sup>34</sup> Varney, *supra* note 24, at 13.

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the federal judiciary.”<sup>35</sup> And, as many observed upon the Report’s withdrawal, the federal judiciary as a whole may be more sympathetic than not with the Section 2 Report’s normative recommendations.<sup>36</sup> Section 2, moreover, is shaped largely in private litigation, where the courts’ concerns with private treble damages actions (particularly class actions) can spillover into decisions that confine the antitrust laws’ substantive reach. In particular, the Supreme Court has exhibited a reluctance to embrace an expansive role for Section 2 based in part with concerns rooted in private treble damages actions.<sup>37</sup>

In bringing Section 2 cases, federal enforcers can also expect to confront several now well-developed “stock” arguments that Section 2 defendants deploy precisely because such arguments can be (but are not always) persuasive to judges. These include:

- “*It is all about price.*” Section 2 defendants frequently (although not always successfully) seek to characterize conduct as concerning price and thus properly analyzed under *Brooke Group*’s “below-cost plus recoupment” framework.<sup>38</sup> This includes most notably bundled and loyalty discounts.<sup>39</sup> The argument is even deployed to defend

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<sup>35</sup> Joe Sims, *New Antitrust Chief Outlines Enforcement Philosophy* (May 2009), available at <http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=6257>.

<sup>36</sup> See George L. Priest, *The Justice Department’s Antitrust Bomb*, WALL ST. J., June 2, 2009, at A21.

<sup>37</sup> See, e.g., *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (refusing to recognize antitrust duty to deal in part because private challenges would be “extremely numerous”).

<sup>38</sup> See *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 22-23 (1993).

<sup>39</sup> *Compare* *LePage’s Inc. v. 3M*, 324 F.3d 141, 151-52 (3d Cir. 2003) (en banc) (rejecting contention that *Brooke Group* governed analysis of bundled discounts) *with* *Cascade Health Solutions v. Peacehealth*, 502 F.3d 895, 919-20 (9th Cir. 2007) (adapting *Brooke Group* to bundled discount context).

exclusive dealing: where competition for exclusives is possible, the argument runs, the “payment” for the exclusive obligation can be analyzed as a cost in a price/cost framework.<sup>40</sup>

- “*It is really a refusal to deal.*” Another (sometimes) successful strategy is to position conduct as unlawful only if a court invalidates a refusal to deal. For example, suppose a firm conditions future deliveries of a key product to a distributor on that distributor not dealing with the firm’s rivals. The firm surely would invoke *Colgate*<sup>41</sup> in defending its cutting off of that dealer (as to future deliveries only) as not implying an actual exclusive dealing obligation.<sup>42</sup> Another example is the price-squeeze theory recently dispatched by the Supreme Court in *linkLine*.<sup>43</sup> The Court reasoned that a price-squeeze claim, at least one that turns on the margin between wholesale and retail prices, could not get out of the

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<sup>40</sup> See, e.g., *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 451-54 (6th Cir. 2007) (en banc) (upfront payments for even multi-year exclusivity lawful when, *inter alia*, conceded not to amount to predatory pricing and when plaintiff failed to compete for the business). *But see LePages*, 324 F.3d at 157-58 (payments for sole source relationships formed part of conduct unlawful under Section 2); cf. *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 49 (1st Cir. 2001) (“Furthermore, the up-front payments were part of multi-year exclusive dealing contracts that might in principle be attacked under the rule of reason.”).

<sup>41</sup> See *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>42</sup> Cf. *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 193 (3d Cir. 2005) (“Although the parties to the sales transactions consider the exclusionary arrangements to be agreements, they are technically only a series of independent sales. Dentsply sells teeth to the dealers on an individual transaction basis and essentially the arrangement is ‘at-will.’ Nevertheless, the economic elements involved—the large share of the market held by Dentsply and its conduct excluding competing manufacturers—realistically make the arrangements here as effective as those in written contracts.” (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 n.9 (1984))). Of course, such conduct nonetheless may violate Section 2, as in *Lorain Journal*.

<sup>43</sup> *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 129 S. Ct. 1109 (2009).

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starting gates absent a duty to sell at wholesale.<sup>44</sup> At least one court has applied *linkLine*'s logic beyond price-squeezes to exonerate a bundled discount.<sup>45</sup>

- “***No causation.***” Wielding the antitrust equivalent of “if a tree falls in a forest and no one hears it, did it really fall?,” Section 2 defendants frequently argue that causation is too attenuated to support antitrust liability. For example, the defendants in *Rambus* convinced the D.C. Circuit that deceptive conduct did not implicate Section 2 absent evidence that, but for the conduct, a standard-setting organization would have selected a different standard.<sup>46</sup>
- “***Gains not worth costs.***” It is common for Section 2 litigants to frame arguments in decision-theoretic terms: given the risk of error and enforcement costs, attaching liability to particular conduct, the argument runs, likely would produce greater costs from false positives than from false negatives, and thus on balance over-deter procompetitive conduct. Although in principle a two-way ratchet, the Supreme Court recently has deployed the argument in favor of antitrust defendants.<sup>47</sup>
- “***When in doubt, courts should stay out.***” A variation of the false positive/false negatives argument is that free markets arrest

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<sup>44</sup> *Id.* at 1119-21.

<sup>45</sup> *See Doe v. Abbott Labs*, 571 F.3d 930, 934-35 (9th Cir. 2009).

<sup>46</sup> *See Rambus Inc. v. FTC*, 522 F.3d 456, 465-67 (D.C. Cir. 2008). *But cf.* *United States v. Microsoft Corp.* 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (“To require that § 2 liability turn on a plaintiff’s ability or inability to reconstruct the hypothetical marketplace absent a defendant’s anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action.”).

<sup>47</sup> *See Trinko*, 540 U.S. at 411-15; *linkLine*, 129 S. Ct. at 1121-22.

anticompetitive conduct more efficiently than antitrust courts.<sup>48</sup> Thus, the argument runs, when conduct is competitively ambiguous, courts should require particularly demanding showings to impose Section 2 liability. As reformulated by one commentator, it amounts to “an analytical starting point, a default position, that is a kind of Hippocratic oath for courts asked to intervene in private market activity: first do no harm.”<sup>49</sup> This so-called “ethical prescription,”<sup>50</sup> is the very presumption AAG Varney expressly disputed in shelving the Section 2 report.

This essay’s purpose is to address yet another “stock” argument Section 2 defendants might wield: the Rule of Lenity. The Rule of Lenity, “a basic axiom of federal criminal jurisprudence,” provides “that a court should adopt the ‘harsher’ of ‘two rational readings of a criminal statute only when Congress has spoken in clear and definite language.’”<sup>51</sup> As one commentator has noted, if this venerable canon of construction applies to “the task of construing the Sherman Act,” it “suggest[s] that doubts go against antitrust intervention in market activities.”<sup>52</sup> That is, the canon potentially would reinforce the so-called “ethical prescription” of non-intervention, but perhaps more strongly dictate pro-defendant outcomes. I demonstrate below that, although the Rule of Lenity theoretically could be relevant to construing this nation’s antitrust laws, there are sound reasons why it ought not inform the scope of Section 2.

## II. THE RULE OF LENITY: ANOTHER ARROW IN SECTION 2

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<sup>48</sup> See Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 HARV. J. L. & PUB. POLICY 5, 8 (1999).

<sup>49</sup> Taranto, *supra* note 2, at 180.

<sup>50</sup> *Id.*

<sup>51</sup> Kahan, *supra* note 4, at 345 (internal quotations omitted).

<sup>52</sup> Taranto, *supra* note 2, at 178.

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### DEFENDANTS' QUIVER?

#### *A. Civil Enforcement of Section 2 Does Not Per Force Defeat Lenity*

One rightly might ask why one dredges up the Rule of Lenity in the context of crafting Section 2 legal tests. After all, the Antitrust Division has not brought a criminal Section 2 case since the late 1970s.<sup>53</sup> The Division's guidelines for criminal prosecution suggest there may never be another.<sup>54</sup> Section 2 enforcement in the United States thus exclusively is a civil affair. And if there is a relevant world-wide trend, it is to *decriminalize* "dominance" offenses.<sup>55</sup>

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<sup>53</sup> See *United States v. Braniff Airways, Inc.*, 453 F. Supp. 724 (W.D. Tex. 1978) (conspiracy to monopolize indictment). According to one study that examined Antitrust Division enforcement from 1955 to 1997, the Division brought 6 criminal monopolization actions from 1955 to 1974; however, the same tables list 62 non-merger criminal "exclusionary" practices cases (which also include such cases brought under Section 1) during the same period, with two more from 1975-79. See Joseph C. Gallo *et al.*, *Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study*, 17 REV. OF INDUS. ORG. 75, 95 (2000).

<sup>54</sup> See Antitrust Division Manual at III-20 (Dec. 2008) ("In general, the current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations."), available at <http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf>. This may leave open potential criminal conspiracy-to-monopolize prosecutions when the conduct also amounts to *per se* Section 1 violations; but the Division Manual seems to foreclose indictments under Section 2 when the conduct also would not violate Section 1.

<sup>55</sup> Canada in 1986 replaced its long-standing but little-enforced statute that criminalized monopolization offenses with a civil statute that prohibits abuse of dominance, see A. Neil Campbell and J. William Rowley, *The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence?*, 75 ANTITRUST L.J. 267, 289 n.105 (2008), and in 2009 removed criminal sanctions from certain price-related offenses, including for predatory pricing, see Budget Implementation Act, 2009 S.C., c. 2, §§ 413 & 417

The Rule of Lenity's application to the Sherman Act warrants attention because of a relatively new line of Supreme Court cases that address how to construe a statute, such as Section 2 of the Sherman Act, where criminal and civil liability spring from the same operative text. From this line of cases two principles appear to emerge. First, such "selfsame" language must mean the same thing no matter the

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(Can.) (repealing Competition Act, R.S.C., ch. C-34), §§ 50 ("Illegal trade practices"), 51 ("Allowance"), and 61 ("Price Maintenance") (1985)). Criminal enforcement of antitrust laws at the state level appears confined to offenses that would constitute *per se* violations of Sherman Act Section 1. *See generally* ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST ENFORCEMENT HANDBOOK 110-28 (2d ed. 2008) (describing state criminal antitrust enforcement). A number of jurisdictions (notably Australia and South Africa) criminalize cartel behavior but not "abuse of dominance" offenses. *See* Trade Practices Amend. (Cartel Conduct and Other Measures) Act of 2009, No. 59, 2009, *available at* [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/BF85AF568EC41235CA2575EC0017F479/\\$file/0592009.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/BF85AF568EC41235CA2575EC0017F479/$file/0592009.pdf); Republic of South Africa Competition Act No. 89 of 30 November 1998 (last amended in Competition Second Amendment Act, No. 39 of 2000), Article 74, *available at* <http://www.compcom.co.za/assets/Files/pocket-book-2004-R.pdf>. Some newly-enacted antitrust regimes lack any criminal sanctions, *see* Egypt (Law No. 3 of 2005, the Law on the Protection of Competition and the Prohibition of Monopolistic Practices of February 15, 2005, Art. 22); Republic of Macedonia (Law on Protection of Competition (2005), Art. 47, amended by Official Gazette of Republic of Macedonia no. 22/07, Art. 8); Poland (The Act of 16 February 2007 on Competition and Consumer Protection, Art. 106); Trinidad and Tobago (Fair Trading Act of 2006, § 44(2)); and Uruguay (Ley N° 18.159 de 20 de julio de 2007, Arts. 17 & 19). *But cf.* Ugolovnyi Kodeks [UK] [Criminal Code] art.178 (Russ.), *available at* <http://www.russian-criminal-code.com/PartII/SectionVIII/Chapter22.html> (criminal penalties extend to dominance offenses); Ryan Davis, *Russia Opens Door to Criminal Antitrust Penalties*, Law360, Nov. 5, 2009, *available at* <http://www.law360.com/articles/132700>. By contrast, a few jurisdictions' criminal provisions extend to "dominance" offenses (including those of France, Ireland, Japan, and the Slovak Republic), but in practice these provisions are not enforced. *See* International Competition Network, *Report on Tying and Bundled Discounting*, June 2009, at 6, n.13, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf>.

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enforcement setting (the “textual identity” principle). Second, canons of construction applicable to determining the meaning of a statutory proscription in a criminal setting are equally applicable when construing the same text in a civil action (the “lowest common denominator” corollary). Put simply, because statutory language means what it means, the Rule of Lenity – if applicable – must be considered no matter how the statute is enforced.

The Supreme Court’s recent decision in *Clark v. Martinez*<sup>56</sup> illustrates both principles. There, the Court considered the government’s authority to detain an inadmissible alien under 8 U.S.C. § 1231(a)(6). The Court held the matter governed by its prior decision in *Zadvydas v. Davis*,<sup>57</sup> which construed the key statutory phrase “may be detained beyond the removal period” to impose certain requirements as applied to one statutorily enumerated category of aliens.<sup>58</sup> Although *Clark* itself involved another such category, the prior construction, the Court reasoned, must control “without differentiation to all three categories of aliens.”<sup>59</sup> Importantly, the Court rejected the government’s argument that *Zadvydas*’ construction of the phrase “may be detained beyond the removal period”<sup>60</sup> did not govern because, although *Zadvydas* involved a circumstance that warranted invoking “the canon that statutes should be interpreted to avoid constitutional doubts,”<sup>61</sup> the particular facts in *Clark* did not.<sup>62</sup>

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<sup>56</sup> 543 U.S. 371 (2005).

<sup>57</sup> 533 U.S. 678 (2001).

<sup>58</sup> *Clark*, 543 U.S. at 377.

<sup>59</sup> *Id.* at 378.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 379.

<sup>62</sup> *Id.* at 380 (“The Government, joined by the dissent, argues that the statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for clients, such as Martinez and Benitez, who have not been admitted into the United States.”).

The Court reasoned that, if the constitutional avoidance canon informed the meaning of statutory language in one setting, the construction compelled by that canon governed in all settings:

It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.<sup>63</sup>

*Clark's* "lowest common denominator" principle has straightforward implications for the Rule of Lenity's application when construing statutes that can be enforced both civilly and criminally: if the statute can be enforced civilly or criminally, a limiting construction in the criminal setting dictated by the Rule of Lenity would equally apply when construing the statute in a civil action.<sup>64</sup> Indeed, *Clark* cited two instances where the Supreme Court stated that "the rule of lenity" applies when construing a statute in a non-criminal setting "because we must interpret the statute consistently, whether we encounter its applications in a civil or criminal context."<sup>65</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> One commentator suggests to the contrary based on the apparent premise that, if the "least common denominator" principle applies, statutes such as the Sherman Act and other statutes might be undesirably narrowed. See Jonathan Marx, *How To Construe A Hybrid Statute*, 93 VA. L. REV. 235, 264-65 (2007). The premise is flawed. Identifying a "least common denominator" does not require the conclusion that such a denominator requires resort to lenity. On the contrary, as explained below, the Sherman Act as a formal matter is not ambiguous in a lenity-triggering sense. Marx ultimately reaches the same conclusion through a slightly different path: accepting the textual identity principle, Marx argues for lenity's applicability based on whether the statute's primary applications are civil or criminal. See *id.* at 275.

<sup>65</sup> *Clark*, 543 U.S. at 380 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004)); see also Marx, *supra* note 64, at 264-65 (invoking *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality), and *id.* at

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One, *United States v. Thompson/Center Arms Co.*,<sup>66</sup> is particularly instructive. There, as one commentator observed, “the Supreme Court endorsed for the first time the idea that the lenity canon could apply to a civil statute if that statute had criminal applications.”<sup>67</sup> The Court construed – in a civil setting – a statute in the National Firearms Act which imposed a \$200 tax on anyone “making” a “firearm.”<sup>68</sup> After concluding the statutory terms were ambiguous, a majority of the Court invoked the Rule of Lenity to “interpret a tax statute” in “a civil setting” because the statute has “criminal applications.”<sup>69</sup> In response to the dissent’s contention that lenity did not apply because the action before the Court was civil, the plurality responded that lenity “is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.”<sup>70</sup> To put the point in *Clark*’s later language, because language means what it means, the “lowest common denominator” governs. The other case *Clark* cited, *Leocal v. Ashcroft*,<sup>71</sup> is to the same effect: because the statutory term “crime of violence” had criminal applications, the Court reasoned, the

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519 (Scalia, J., concurring)). One Justice who has not endorsed the textual identity principle nonetheless has acknowledged that the principle is embraced by a majority of the Supreme Court. *See United States v. Santos*, 128 S. Ct. 2020, 2032 (2008) (Stevens, J., concurring) (recognizing that a majority of the Court required “a single definition” of the statutory term at issue).

<sup>66</sup> 504 U.S. 505 (1992).

<sup>67</sup> Marx, *supra* note 64, at 257.

<sup>68</sup> 26 U.S.C. § 5849.

<sup>69</sup> *Thompson/Center*, 504 U.S. at 517-18 n.10; *id.* at 519 (Scalia, J., concurring) (also invoking Rule of Lenity).

<sup>70</sup> *Id.* at 517-18 n.10.

<sup>71</sup> 543 U.S. 1 (2004).

Rule of Lenity applied to construing that ambiguous term in a civil setting.<sup>72</sup>

The “textual identity” principle” and its “lowest common denominator” corollary would seem to compel construing the substantive prohibitions of the Sherman Act, including Section 2, the same way in a civil or criminal setting. Section 2 of the Sherman Act, as with Section 1, proscribes a crime:

### **Section 2. Monopolizing trade a felony; penalty**

Every 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 among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.<sup>73</sup>

Today, as noted, Section 2 is enforced solely through civil actions. Civil enforcement of Section 2, however, is a consequence of *other* provisions of the Sherman Act.<sup>74</sup> Whether conduct violates Section 2 civilly or criminally requires applying a single statute’s “selfsame

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<sup>72</sup> *Id.* at 12 n.8.

<sup>73</sup> 15 U.S.C. § 2.

<sup>74</sup> *See* 15 U.S.C. § 4 (providing that “it shall be the duty of the several United States attorneys ... to institute proceedings in equity to prevent and restrain violations”); 15 U.S.C. § 15 (private right of action to recover for injury to “business or property”); 15 U.S.C. § 26 (private right of action for injunctive relief). *See generally* United States v. Cooper Corp., 312 U.S. 600, 607 (1941) (observing that “Sections 1, 2 and 3 impose criminal sanctions” while “Section 4” both grants jurisdiction and authorizes equity proceedings”).

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language.”<sup>75</sup>

Therefore, under the “textual identity” principle, Section 2’s text arguably must mean the same thing regardless of enforcement setting. As Justice Holmes famously remarked in *Northern Securities* with respect to the Sherman Act, “the words cannot be read one way in a suit which is to end in fine and imprisonment and in another way in one which seeks an injunction.”<sup>76</sup> And, as the line of cases culminating in *Clark* illustrates, under the “least common denominator” corollary, if a canon of construction – such as the Rule of Lenity – requires a limiting construction when Section 2 is enforced criminally, that limiting construction is equally applicable to Section 2’s reach in civil actions.

Two recent cases lend support to these conclusions. The first, *United States v. Nippon Paper Co.*,<sup>77</sup> concerned whether Sherman Act Section 1, when enforced criminally, reaches wholly foreign conduct. Two prior decisions, *United States v. Aluminum Co. of America*<sup>78</sup> and *Hartford Fire Ins. Co. v. California*,<sup>79</sup> stood for the proposition that the

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<sup>75</sup> 2 PHILLIP E. AREEDA AND HERBERT HOVENKAMP, ANTITRUST LAW ¶ 303, at 28 (2d ed. 2000).

<sup>76</sup> *Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting). Notably, the Areeda/Hovenkamp treatise disagrees with this conclusion, without explanation. See 2 AREEDA, *supra* note 75, ¶ 303, at 28 n.2.

<sup>77</sup> 109 F.3d 1 (1st Cir. 1997). The author argued *Nippon Paper* for the United States.

<sup>78</sup> 148 F.2d 416 (2d Cir. 1945) (“*Alcoa*”). In *Alcoa*, the Second Circuit sat as a court of last resort pursuant to 15 U.S.C. § 29. Thus, the Supreme Court has since treated *Alcoa*’s precedential value as enhanced. See *American Tobacco Co. v. United States*, 328 U.S. 781, 811-12 (1946) (“That case was decided by the Circuit Court of Appeals for the Second Circuit under unique circumstances which add to its weight as a precedent.”). *But cf. linkLine*, 129 S. Ct. at 1120 n.3 (declining to follow *Alcoa*’s price-squeeze analysis as inconsistent with modern antitrust principles).

<sup>79</sup> 509 U.S. 764 (1993).

Sherman Act had such reach in civil actions.<sup>80</sup> The First Circuit in *Nippon Paper* confronted whether the Sherman Act's territorial scope as developed in *Alcoa/Hartford* equally applied to a criminal indictment. The First Circuit answered in the affirmative largely based on the textual identity principle: "common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil."<sup>81</sup>

Having held that the Sherman Act's "trade or commerce . . . with foreign nations" language means the same thing when enforced civilly or criminally, the First Circuit confronted the argument that the Rule of Lenity nonetheless warranted reading that (assertedly ambiguous) language more narrowly in a criminal case. Implicitly endorsing the "least common denominator" principle, the court rejected the contention. "In view of the fact that the Supreme Court deems it 'well established' that Section One of the Sherman Act applies to wholly foreign conduct," the court reasoned, "we effectively are foreclosed from trying to tease an [Rule of Lenity-triggering] ambiguity out of Section One relative to its extraterritorial application."<sup>82</sup>

In concluding that "the rule of lenity plays no part in the instant case," the First Circuit did not inquire whether *Alcoa* or *Hartford* applied, or should have applied, the Rule of Lenity in construing the

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<sup>80</sup> As the First Circuit "sum[med] up, the case law now conclusively establishes that civil antitrust actions predicated on wholly foreign conduct which has an intended and substantial effect in the United States come within Section One's jurisdictional reach." *Nippon Paper*, 109 F.3d at 4. See generally Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, in 3 ISSUES IN COMPETITION LAW AND POLICY 2417 (ABA Section of Antitrust Law 2008).

<sup>81</sup> *Nippon Paper*, 109 F.3d at 4. How the additional *mens rea* requirement for criminal liability required by *Gypsum* squares with the textual identity principle is discussed below.

<sup>82</sup> *Id.* at 8.

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Sherman Act's territorial reach in a civil setting.<sup>83</sup> But that proves the point. The textual identity principle foreclosed later application of the Rule of Lenity in *Nippon Paper* when an earlier action (whether civil or criminal) established the statutory text's authoritative meaning. It follows that, if the Rule of Lenity applies, it must be considered no matter what the enforcement setting – as *Clark* put it, “[t]he lowest common denominator, as it were, must govern.”<sup>84</sup>

The Supreme Court's decision in *Illinois Tool Works*<sup>85</sup> implicitly is to the same effect. The Court in *Illinois Tool Works* revisited the presumption of market power for patented products applied by many courts in tying claims brought under Section 1 of the Sherman Act. The *Illinois Tool Works* Court found in its 1947 *International Salt*<sup>86</sup> decision a “presumption of *per se* illegality of tying arrangement[s] involving a patented product”<sup>87</sup>; for a number of reasons, the Court held the presumption unwarranted absent proof of “market power in the tying product.”<sup>88</sup>

One ground the Court gave for overturning *International Salt*'s “patent-equals-market-power presumption”<sup>89</sup> was Congress's 1988 narrowing of the patent misuse defense to require “market power in the relevant market” for patent tying to constitute misuse.<sup>90</sup> The Court reasoned:

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<sup>83</sup> *Id.* For an analysis of the First Circuit's reliance on *Alcoa/Hartford* as illustrating potentially undesirable “path dependence” in construing statutes with both civil and criminal applications, see Marx, *supra* note 64, at 254.

<sup>84</sup> *Clark v. Martinez*, 543 U.S. 371, 380 (2005).

<sup>85</sup> *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

<sup>86</sup> *International Salt Co. v. United States*, 332 U.S. 392 (1947).

<sup>87</sup> *Illinois Tool Works*, 547 U.S. at 40.

<sup>88</sup> *Id.* at 46.

<sup>89</sup> *Id.* at 41.

<sup>90</sup> 35 U.S.C. § 271(d)(5). See *Illinois Tool Works*, 547 U.S. at 42-43.

While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites a reappraisal of the *per se* rule announced in *International Salt*. A rule denying a patentee the right to enjoin an infringer is significantly less severe than a rule that makes the conduct at issue a federal crime punishable by up to 10 years in prison. It would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute “misuse.”<sup>91</sup>

In other words, and echoing *Nippon Paper*, the Court reasoned that the Sherman Act’s language means the same thing no matter the enforcement setting. After all, *Illinois Tool Works* involved a civil suit under Sherman Act Section 1; the comparison the Court drew between misuse and criminal sanctions would be inapposite if the meaning of Section 1’s language could differ depending on whether a court applied it in a civil or criminal case.<sup>92</sup>

In addition to applying the textual identity principle, the Supreme Court also implicitly endorsed the “lowest common denominator” principle. In the course of dispatching the Respondent’s arguments in support of *International Salt*, the Court noted that the U.S. antitrust enforcement agencies “in the exercise of their prosecutorial discretion” no longer endorsed the patent market power presumption.<sup>93</sup> “While that choice is not binding on the Court,” a unanimous Court continued, “it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with

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<sup>91</sup> *Illinois Tool Works*, 547 U.S. at 42 (citations omitted).

<sup>92</sup> The Supreme Court similarly invoked the possibility of criminal Sherman Act enforcement for minimum vertical resale price maintenance in overturning *Dr Miles*’ century-old *per se* rule. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2722 (2007).

<sup>93</sup> *Illinois Tool Works*, 547 U.S. at 45.

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a rule of severity for a special category of antitrust cases.”<sup>94</sup> This contrast only makes sense if the Rule of Lenity (if applicable) informs the Sherman Act’s meaning in a civil setting.

To be sure, the Court’s lenity-based comparisons do not amount to a holding that the Rule of Lenity actually *does* apply to, or compels particular constructions of, the Sherman Act.<sup>95</sup> The key point, rather, is that *Illinois Tool Works* recognizes that, because the Sherman Act defines a crime, principles of statutory interpretation that inform the construction of criminal statutes equally apply when considering the Sherman Act’s reach in a civil setting.

When *Clark’s* “lowest common denominator” principle is combined with *Nippon Paper* and *Illinois Tool Works*, the upshot is this: it is only a matter of time before defendants in civil antitrust cases invoke the Rule of Lenity in support of narrow rules of substantial antitrust liability.<sup>96</sup> The Sherman Act defines a crime; the language means the same thing whether enforced civilly or criminally; therefore, the argument runs, if the Rule of Lenity would compel particular substantive outcomes were the conduct challenged criminally, the same construction of Section 2 is required in a civil action.

### *B. How Might the Rule of Lenity Inform Section 2?*

The above establishes that the Rule of Lenity is a potential weapon in a Section 2 defendant’s arsenal. It takes little imagination to predict the lenity-based arguments that Section 2 defendants might

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<sup>94</sup> *Id.*

<sup>95</sup> On the contrary, as explained below, the Rule of Lenity plays no proper role in construing Section 2.

<sup>96</sup> *Cf. Marx, supra* note 64, at 265 (specifically noting that “[t]he effectiveness of, for example, civil antitrust statutes might be seriously impaired if courts were forced to construe them as parsimoniously as they would be compelled to do by a strong rule of lenity”).

deploy. Where, the argument might run, Section 2's proscription of particular conduct is not settled – a very broad area of gray given the Supreme Court's caution that Sherman Act “cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied”<sup>97</sup> – courts ought not declare conduct unlawful unless clearly anticompetitive. As one commentator formulated the contention, the Court's “invocation of the rule of lenity” in *Illinois Tool Works* is “of potentially quite general importance in the task of construing the Sherman Act, suggesting that doubts go against antitrust intervention in market activities.”<sup>98</sup>

A lenity-based doctrine that “doubts” are sufficient to defeat “antitrust intervention” would surely yield narrow constructions of Section 2. To take one of but many examples: the fundamental “default” or “baseline” legal test that underlies Section 2 – the doctrine to apply absent a safe harbor or other special rule – remains unsettled. Some argue for a narrow “profit sacrifice” test<sup>99</sup>; others endorse a standard that inquires whether the Section 2 defendant engaged in conduct capable of excluding an equally efficient rival<sup>100</sup>; the now-withdrawn Section 2 Report endorsed a Rule of Reason test requiring anticompetitive harm to be disproportionate to benefits<sup>101</sup>; and still others, including the current majority at the FTC, appear to endorse a more general Rule of Reason test where anticipated harms need

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<sup>97</sup> *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925); *cf.* *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C.Cir.1998) (“Anticompetitive conduct’ can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.”).

<sup>98</sup> Taranto, *supra* note 2, at 178.

<sup>99</sup> *See generally* Section 2 Report, *supra* note 21, Ch. 3, Pt. III.B.

<sup>100</sup> *See id.* Pt. III.C.

<sup>101</sup> *See id.* Pt. III.D.

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merely exceed anticipated benefits.<sup>102</sup> If leniency-based “doubts” defeat Section 2 enforcement, that would plainly favor the disproportionality test over the more general Rule of Reason as the default Section 2 legal test.

The Rule of Leniency might also influence more retail-level legal choices. For example, debate persists as to how to characterize and analyze so-called bundled and loyalty discounts. Some courts and commentators characterize the conduct as merely involving price, and therefore properly subject to a modified form of *Brooke Group*’s cost-based safe harbor.<sup>103</sup> Others, by contrast, propose analyzing certain types of bundled and loyalty discounts (*viz.*, those that pose a particular threat of impairing the scale economy of rivals or raising their costs) under a more general Rule of Reason approach.<sup>104</sup> If leniency compels that “doubts” go to the Section 2 defendant, that might impel courts to accept the price-based characterization.

Yet another example involves “screens” such as foreclosure percentages for exclusive dealing. Many courts require over 40% foreclosure from exclusive dealing to entertain challenges to such arrangements under Section 1.<sup>105</sup> By contrast, courts largely have eschewed hard foreclosure thresholds in adjudicating Section 2 challenges to exclusives; these courts have reasoned that foreclosure that might be benign when imposed by a firm lacking monopoly power might nonetheless harm competition when achieved by a monopolist.<sup>106</sup>

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<sup>102</sup> See FTC Statement, *supra* note 23, at 5.

<sup>103</sup> See AMC Report, *supra* note 20, at 99.

<sup>104</sup> See *id.* at 95-96, 99 (summarizing testimony).

<sup>105</sup> See, e.g., *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 53 (D.D.C. 2000), *aff’d in part, rev’d in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). See generally Jonathan M. Jacobson, *Exclusive Dealing, “Foreclosure,” and Consumer Harm*, 70 ANTITRUST L.J. 311, 329-34 (2002) (discussing caselaw).

<sup>106</sup> See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (en banc) (per curiam).

Consideration of the Rule of Lenity, however, might motivate courts to fashion more demanding foreclosure screens in the context of Section 2.

One can imagine many more variations on this theme: lenity-based “doubts” might inform how Section 2 courts determine legally-sufficient causation (favoring a stricter causation test than applied by many courts), calculate costs under *Brooke Group* (favoring the exclusion of costs when in doubt), delineate markets (favoring broader markets), assess entry barriers (favoring counting only so-called “Stiglerian” barriers to entry), or measure monopoly power (requiring higher share thresholds and more durable entry barriers).

Put more generally, a doctrine that lenity-based “doubts” favor non-intervention could cover judicial enshrinement of many of the normative recommendations proposed by the now-repealed DOJ Section 2 Report, resulting in the very “multi-layered protective screen for firms with monopoly or near-monopoly power”<sup>107</sup> feared by today’s FTC majority and inveighed by the current head of the Antitrust Division.

### III. WHY LENITY PROPERLY PLAYS NO ROLE IN IDENTIFYING THE CONDUCT SECTION 2 PROSCRIBES

The potential use of the Rule of Lenity to influence the application of Section 2 in a civil setting, therefore, must be met head on. But that simply raises the fundamental question: does a *proper* application of the Rule of Lenity compel a minimalist approach to Section 2? I believe the answer is no. Indeed, correctly applied, the Rule of Lenity should play no material role in the elaboration of Section 2 of the Sherman Act. The reasons, as just explained, do not lie in the civil nature of Section 2 proceedings; the textual identity principle, and its lowest common denominator corollary, appear to foreclose that argument. Rather, it can be argued that Section 2 of the Sherman Act, as a formal matter, is not ambiguous in the sense that

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<sup>107</sup> FTC Statement, *supra* note 23, at 10.

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triggers the Rule of Lenity. Moreover, the *mens rea* required for criminal conviction under Section 2 already serves the key function assertedly performed by the Rule of Lenity. Accordingly, applying that canon of construction to limit Section 2's reach would improperly narrow Section 2.

### *A. The Formal Answer: No Relevant Statutory Ambiguity*

On its face, one might think Section 2 is plainly ambiguous in the sense that triggers the Rule of Lenity. Section 2 proscribes “monopolize[ation],” as well as attempts and conspiracies to “monopolize.”<sup>108</sup> As the numerous judicial efforts over the years to give content to “monopolize” demonstrate, the term hardly is self-executing.<sup>109</sup> Similarly teeming with ambiguity is the Supreme Court's statement that the statutory term “monopolize” targets “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>110</sup>

Yet, courts have not, as a descriptive matter, tempered Section 2's application with the Rule of Lenity.<sup>111</sup> Some scholars suggest that courts thereby simply ignore lenity.<sup>112</sup> This is neither normatively satisfying nor, after *Clark, Illinois Tool Works*, and *Nippon Paper*,

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<sup>108</sup> 15 U.S.C. § 2.

<sup>109</sup> *See generally* Popofsky, *supra* note 10, at 438-44.

<sup>110</sup> *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

<sup>111</sup> *See, e.g.*, Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2201 (2002) (“Regulatory crimes like antitrust and securities violations are often defined with enormous ambiguity, yet the rule of lenity is rarely applied to them.”).

<sup>112</sup> *See generally* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420 (2006) (noting that “[m]any [observers] claim that courts have stopped applying [the Rule of Lenity] altogether”).

persuasive. Even if courts failed to consider the Rule of Lenity in the past, these decision appear to put the argument in play going forward, at least where Section 2's meaning or application remains unsettled. Formal reasons for the lenity's inapplicability to Section 2, therefore, must be found elsewhere.

At least two such arguments support refusing to apply the Rule of Lenity to Section 2. The Sherman Act often is described as a delegation by Congress to the federal courts of the power to develop competition law in a common-law fashion.<sup>113</sup> If, the argument runs, the Sherman Act effectively delegates to the courts the power to create common-law crimes, Congress has validly "opted out" of the Rule of Lenity.<sup>114</sup> Antitrust crimes in effect are defined not by the statute itself, but rather by congressionally-intended judicial elaboration.<sup>115</sup> There is no need to resort to lenity because we know what the legislature intended: "it wanted courts to exercise judgment rather than narrow the statute and return it to the legislature."<sup>116</sup> This argument, however, runs into a fundamental tenet of American constitutional law: "legislatures and not courts should define criminal activity."<sup>117</sup> Even if no "formal bar to express delegation to courts" remains as a general matter "in contemporary law,"<sup>118</sup> conceptualizing the Sherman Act to delegate powers to the federal court to develop sound competition-law principles fits uncomfortably with principles of legislative supremacy.

A second formal reason for the Rule of Lenity's inapplicability

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<sup>113</sup> See, e.g., Elhauge, *supra* note 111, at 2203.

<sup>114</sup> See *id.* at 2202-03.

<sup>115</sup> See *id.*

<sup>116</sup> *Id.* at 2203 (recognizing that the rule of lenity is "merely a default rule, and like all default rules this one should operate only if the relevant actor does not opt out of it").

<sup>117</sup> *United States v. Bass*, 404 U.S. 336, 348 (1971).

<sup>118</sup> Kahan, *supra* note 4, at 355.

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side-steps this problem by reformulating the scope of congressional delegation and invoking the Rule of Lenity's disfavored status in the hierarchy of the canons of construction. Lenity requires statutory ambiguity; but "what counts as 'ambiguity' for purposes of the rule" is a "question [that] does not answer itself."<sup>119</sup> Nonetheless, the Supreme Court has often stated that lenity "comes into operation at the end of the process of construing what Congress has expressed,"<sup>120</sup> "not at the beginning as an overriding consideration of being lenient to wrongdoers,"<sup>121</sup> and "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute."<sup>122</sup> In other words, the Rule of Lenity applies only if, after "seizing everything from which aid can be derived," a Court "can make no more than a guess as to what Congress intended."<sup>123</sup> If application of other principles of construction gives clear meaning to otherwise unclear text, lenity-triggering ambiguity will not be found "merely because it [is] possible to articulate a [narrower] construction."<sup>124</sup>

Application of these principles to the Sherman Act arguably avoids a conclusion of lenity-triggering ambiguity because the statute has judicially been construed to require application of a particular

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<sup>119</sup> *Id.* at 384.

<sup>120</sup> *Burgess v. United States*, 128 S. Ct. 1572, 1580 (2008) (quoting *Callanan v. United States*, 364 U.S. 587, 596 (1961)).

<sup>121</sup> *Callanan*, 364 U.S. at 596.

<sup>122</sup> *Burgess*, 128 S. Ct. at 1580 (quoting *United States v. Shabani*, 513 U.S. 10, 17 (1994)).

<sup>123</sup> *E.g.*, *Reno v. Koray*, 515 U.S. 50, 65 (1995) (internal quotations omitted). *See generally* Kahan, *supra* note 4, at 385-86.

<sup>124</sup> *Moskal v. United States*, 498 U.S. 103, 108 (1990). For a description of the position, acknowledged to have "scant" support "in the case law," that the Rule of Lenity is "a one-way ratchet in the defendant's favor" that "compel[s] the judge to select the narrowest [plausible] interpretation," see Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 889-94 (2004); *see also id.* at 899 (describing *Moskal's* "view of lenity" as "cramped").

substantive standard: the Rule of Reason.<sup>125</sup> As the Supreme Court explained in *Standard Oil* with respect to Section 1: “Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at common law . . . was intended to be the measure used for determining whether, in a give case, a particular act had or had not brought about the wrong against which the statute provided.”<sup>126</sup> Construing the Sherman Act to codify the common-law principle of reasonableness, the argument thus runs, means that “seizing everything from which aid can be derived,”<sup>127</sup> no ambiguity in a lenity-triggering sense remains: We know what Congress wanted, which is for courts to apply reasonableness principles in a common-law fashion.

The Sherman Act as codified common-law reasonableness avoids one defect of the delegation theory: the Rule of Reason at least specifies some standard (or, more precisely, generative principle), rather than directing courts entirely to make up what constitutes Sherman Act crimes. But the codified common-law theory of the Sherman Act raises another problem: is a statutory standard such as the Rule of Reason ambiguous in a lenity-triggering sense because (i) its content is indeterminate in its application (even if “reasonableness” is unambiguous in concept); and (ii) its content is dynamic: conduct that is unreasonable at one point may be judged reasonable in light of changed circumstances, or the other way around? After all, the Supreme Court has stressed, the Sherman Act condemns not “a particular list of agreements,” but rather “particular economic consequence[s]” that might “be produced by quite different sorts of [conduct] in varying times and circumstances.”<sup>128</sup> Put more generally, the Sherman Act “invokes the common law itself, and not merely the

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<sup>125</sup> *United States v. Standard Oil Co.*, 221 U.S. 1, 60-62 (1911).

<sup>126</sup> *Id.* at 60.

<sup>127</sup> *Reno*, 515 U.S. at 65 (1995) (internal quotations omitted).

<sup>128</sup> *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731 (1988).

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static content [as of] 1890.”<sup>129</sup>

The Supreme Court’s reasoning in *Nash v. United States*<sup>130</sup> strongly suggests that the answer is no. Speaking through Justice Holmes, the *Nash* Court rejected a void for vagueness challenge to Section 1 and to the conspiracy-to-monopolize provision of Section 2.<sup>131</sup> The Court found “no constitutional difficulty in the way of enforcing the criminal part of the act,”<sup>132</sup> construed to require applying the Rule of Reason, for two reasons – reasons that meet each of the above-described concerns. First, the Court observed, the “statute” had “taken up” the “common law as to the restraint of trade.”<sup>133</sup> That is, the Sherman Act carried forward principles and precedents developed in the common law, thereby providing notice of the conduct the law condemns. Second, and meeting the above-described “dynamic” concern, the Court noted that “the law is full of instances where a man’s fate depends on his estimating rightly,” such as the case where one might be convicted of manslaughter for driving negligently.<sup>134</sup> Thus, even if the Rule of Reason’s application cannot always be predicted accurately in advance, the principle is precise enough to avoid constitutional invalidity on vagueness grounds. The statute supplies a “generative” principle by which Congress created “scores of distinct legal obligations” that are illuminated through judicial application.<sup>135</sup>

Although unconstitutional vagueness differs from statutory

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<sup>129</sup> *Id.* at 732.

<sup>130</sup> 229 U.S. 373 (1913).

<sup>131</sup> *Id.* at 377-78.

<sup>132</sup> *Id.* at 378.

<sup>133</sup> *Id.* at 377.

<sup>134</sup> *Id.*

<sup>135</sup> Kahan, *supra* note 4, at 353.

ambiguity,<sup>136</sup> *Nash*'s reasoning strongly suggests that the Sherman Act's Rule of Reason is not ambiguous in a lenity-triggering sense; that is, the mere fact that its application cannot be precisely predicted in advance does not, as a formal matter, leave the statute's *meaning* ambiguous.<sup>137</sup> This conclusion is further supported by the Supreme Court's reasons for reading Sherman Act Section 2, like Section 1, also to require "resort[]" to "the rule of reason."<sup>138</sup> The Court conceded potential "ambiguity" in "determining what is intended by monopolize."<sup>139</sup> But the Court explained: "*this ambiguity is readily dispelled*" by "indication[s]" from the "history of the law of restraint of trade" of Congress's intent that Section 2 complement Section 1; accordingly, when the two provisions are "harmonized," it is "obvious that the criteria to be resorted to in any given [Section 2] case [is] the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve."<sup>140</sup> Even if Section 2's application is indeterminate, its ultimate substantive touchtone, the Court held, is unambiguous.<sup>141</sup>

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<sup>136</sup> See Marx, *supra* note 64, at 246 ("In short, while due process notice requires a certain degree of clarity in criminal statutes, it does not require the degree required to satisfy lenity.").

<sup>137</sup> Indeed, some cite *Nash* as illustrating the Rule of Lenity's inapplicability to the Sherman Act. See Elhauge, *supra* note 111, at 2201.

<sup>138</sup> *Standard Oil v. United States*, 221 U.S. 1, 61-62 (1911).

<sup>139</sup> *Id.* at 61.

<sup>140</sup> *Id.* at 61-62 (emphasis added).

<sup>141</sup> Notably, *Nash*, too, noted that the Rule of Reason governed Section 2 as well as Section 1, and *Nash* itself involved a conspiracy-to-monopolize claim. This is potentially significant for resolution of what some term the "exclusionary conduct definition war." Popofsky, *supra* note 10, at 435 (internal quotations omitted). If applying the Rule of Reason to Section 2 avoids a vagueness challenge, then that suggests that the *Microsoft* court rightly read Section 2 to implement the Rule of Reason. See *Microsoft*, 253 F.3d at 59. The Rule of Reason's applicability to

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Distinguishing clear statutory meaning – apparently sufficient to avoid lenity-triggering ambiguity – from indeterminate application remains a formal argument for the Rule of Lenity’s inapplicability to the Sherman Act.<sup>142</sup> The less precise the purportedly unambiguous statute (and the Rule of Reason is an imprecise standard), the wider judicial latitude to “make” law through *implicit* congressional delegation,<sup>143</sup> and the greater the degree a statute’s *practical* ambiguity. This is particularly true with respect to Section 2, where not only the statute’s application, but also the operative legal test, remain unclear for many categories of conduct. Moreover, the Supreme Court has not yet directly confronted whether the Rule of Lenity applies to the Sherman Act, and *Illinois Tool Works* could be read to imply that the Court does not view the matter as fully settled against lenity. Thus, a complete answer to why the Rule of Lenity ought to play no meaningful role in shaping Section 2 must lie elsewhere, including in an examination of whether applying the Rule of Lenity to the Sherman Act would advance the canon’s underlying purposes.

### *B. The Functional Answer: The Reasons for Resorting to Lenity are Inapplicable to Section 2*

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Section 2, however, does not preclude more particular rules that govern discrete categories of conduct. See Popofsky, *supra* note 10, at 441-56.

<sup>142</sup> It nonetheless might prove adequate. The Supreme Court has found sufficient clarity in numerous other broadly-worded statutes (such as mail fraud and RICO) to avoid a conclusion of lenity-triggering ambiguity. See generally Kahan, *supra* note 4, at 378-81.

<sup>143</sup> As Justice Stevens explained: “Statutes like the Sherman Act . . . were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified. The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.” *McNally v. United States*, 483 U.S. 350, 372-73 (1987) (Stevens, J., dissenting).

Examination of the Rule of Lenity's asserted purposes reveals a poor fit with the Sherman Act. Accordingly, a court confronted with the argument that the Rule of Lenity ought to help inform the content of Section 2's Rule of Reason should reject the contention not only because the Rule of Reason lacks ambiguity in the lenity-triggering sense, but also because embracing the argument would not legitimately advance the values that the canon assertedly protects.

### *1. The Rule of Lenity's Problematic Rationales*

Although the Rule of Lenity "is perhaps not much less old than construction itself,"<sup>144</sup> great disagreement persists as to the underlying purpose it serves.<sup>145</sup> Some contend that lenity reinforces the same "fair notice" values that underlie the void for vagueness doctrine.<sup>146</sup> This rationale, as many observe, is essentially a legal fiction and cannot withstand "critical examination."<sup>147</sup> For one thing, "criminals do not read statutes."<sup>148</sup> For another, interpretive tools that can preclude a conclusion of statutory ambiguity (judicial gloss and the policies behind the law, to name a few) "hardly provide notice 'in language that the common world will understand'"<sup>149</sup> of what the law condemns. The Rule of Lenity, in other words, "substantially underprotects the

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<sup>144</sup> Kahan, *supra* note 4, at 358 (citing *Wiltberger*).

<sup>145</sup> *See generally id.* at 389-96; Price, *supra* note 124, at 907-12.

<sup>146</sup> For an articulation of this view, see generally Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 134-41 (1998). Justice Holmes' famous opinion in *McBoyle v. United States*, 283 U.S. 25 (1931), often is cited as emblematic of the notice rationale for lenity.

<sup>147</sup> Price, *supra* note 124, at 907; Marx, *supra* note 64, at 243.

<sup>148</sup> Price, *supra* note 124, at 886.

<sup>149</sup> *United States v. Bass*, 404 U.S. 336, 348 (1976) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

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interest in fair notice.”<sup>150</sup>

Lenity, it is argued, reinforces legislative supremacy and its corollary that only the legislature, and not courts, can create crimes.<sup>151</sup> This rationale for the Rule of Lenity, however, cannot be squared with the reality of judicial elaboration of innumerable federal statutes that contain language that is not self-executing.<sup>152</sup> Moreover, as one commentator noted, “[t]here is no reason to suppose legislatures would not sometimes prefer” to “pass[] off the details of criminal lawmaking to the courts.”<sup>153</sup> Put more generally, promoting legislative supremacy cannot explain the doctrine as a descriptive matter, because the doctrine has not served to protect against the *de facto* creation of common-law crimes through judicial elaboration of statutes and because “state legislatures almost universally have attempted to abrogate lenity by statutory rules of construction.”<sup>154</sup> Nor can legislative supremacy justify the doctrine normatively in light of the practical inability of legislatures to specify every application of statutes in advance and the doctrine’s inapplicability to the construction of solely civil statutes.<sup>155</sup>

Some also suggest that the Rule of Lenity promotes the rule of law by reducing prosecutorial discretion and ensuring legislative

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<sup>150</sup> Note, *supra* note 112, at 2425.

<sup>151</sup> *See generally id.* at 2425-26 (describing the separation of powers rationale for lenity); Marx, *supra* note 64, at 244 (same). Indeed, the U.S. Supreme Court’s first employment of the Rule of Lenity rested on this rationale. “The rule that penal laws are to be construed strictly,” Chief Justice Marshall wrote, “is founded . . . on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.” *Wiltberger v. United States*, 18 U.S. (5 Wheat) 76, 95 (1820).

<sup>152</sup> *See generally* Note, *supra* note 112, at 2425-26; Price, *supra* note 124 at 909-10.

<sup>153</sup> Price, *supra* note 124, at 909-10; Marx, *supra* note 64, at 244.

<sup>154</sup> Marx, *supra* note 64, at 244.

<sup>155</sup> *See* Price, *supra* note 124, at 909-10.

accountability.<sup>156</sup> Strict construction of criminal statutes, it is argued, ensures that legislatures do not criminalize conduct without the voters knowing it.<sup>157</sup> A strong application of the Rule of Lenity, the argument further runs, ensures that prosecutors do not abuse their discretion in charging decisions.<sup>158</sup> But as one commentator has observed, “[t]he rule of law justification for lenity fails because it confuses ambiguity with [over]breadth.”<sup>159</sup> Congress can pass “broad yet clear” statutes, the breadth of which may escape notice of the voters yet create opportunities for selective prosecution.<sup>160</sup> Moreover, “a strong rule of lenity could even ‘cause more overcriminalization than it prevents’ by giving legislators incentives to pass even broader statutes.”<sup>161</sup>

To the above three traditional justifications for the Rule of Lenity – none of which strongly support the canon – can be added another, which is actually a variation on the fair notice theme: lenity avoids criminalizing conduct that is not plainly wrongful absent a clear statement from Congress. Criminal statutes often are characterized either as *malum in se*, which condemn conduct that is facially wrongful, or *malum prohibita*, which condemn conduct that is not. *Malum in se* conduct, the argument runs, “provide[s] notice of

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<sup>156</sup> See *id.* at 911-12. Professor Elhaug has explained the Rule of Lenity in similar, “preference-eliciting” terms: “By providing the most lenient reading in unclear cases, the rule of lenity forces legislatures to define just how anti-criminal they wish to be, and how far to go with the interest in punishing crime when it runs up against other societal interests.” EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 169 (2008).

<sup>157</sup> See Price, *supra* note 124, at 911, 916 (explaining that lenity “compels [legislatures] to own up” to the precise conduct criminalized).

<sup>158</sup> See *id.* at 918-21.

<sup>159</sup> Note, *supra* note 112, at 2427.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (quoting William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 561 (2001)).

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wrongfulness by [its] very nature.”<sup>162</sup> By contrast, “[w]hen the conduct at issue is only *malum prohibitum*, however, this notice can only be guaranteed if the statute incorporates knowledge of illegality” or of “wrongfulness.”<sup>163</sup> Viewed in this light, the Rule of Lenity ensures that Congress clearly specifies when it intends to condemn *malum in prohibita* conduct by resolving ambiguities in the defendant’s favor.<sup>164</sup>

This rationale, too, only imperfectly fits with the Rule of Lenity. As one scholar observes, “the rule of lenity[’s rationale] is strongest in *mala prohibita* cases and weakest in *malum in se* cases” but “the actual doctrine does not draw this distinction” and the pattern of application is precisely the reverse. The rule of lenity is applied more consistently in *malum in se* offense than *mala prohibita* ones.”<sup>165</sup> Nevertheless, deployment of the canon to ensure that the legislature in fact criminalized wrongful conduct explains a number of recent cases,<sup>166</sup> including the generative *Thompson/Center Arms* decision.<sup>167</sup> Moreover, the rationale supplies a more satisfying reason for invoking the canon than the more general fair notice argument, which is recognized to rest on a legal fiction.

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<sup>162</sup> *Id.* at 2435.

<sup>163</sup> *Id.*

<sup>164</sup> A closely-related rationale for lenity is that the doctrine reduces the costs of interpretive errors by “[s]kewing statutory construction toward under- rather than over-criminalization.” Marx, *supra* note 64, at 245.

<sup>165</sup> Elhauge, *supra* note 111, at 2201; *see also* Price, *supra* note 124, at 909 (“If the notice theory is insufficient to justify the application of lenity across the gamut of crimes, there appears to be little authority to support selective application of the rule to some crimes but not others.”).

<sup>166</sup> *See Note, supra* note 112, at 2434-36.

<sup>167</sup> *See Marx, supra* note 64, at 258-60 (observing that *Thompson/Center Arms* invoke lenity in part because the statute lacked a *mens rea* requirement and suggesting that a “narrow” reading of that decision “suggests that lenity applies to hybrid statutes in civil cases only when the criminal prohibition contains no additional *mens rea* requirement”).

2. *The Even More Problematic Fit Between Lenity's Rationales and Section 2*

None of these relatively weak rationales for the Rule of Lenity strongly support, let alone compel, a doctrine that “doubts” go to a Section 2 defendant. Section 2’s incorporation of the Rule of Reason defeats notice, separation of powers, and legislative accountability justifications for the canon’s application. The Rule of Reason does not leave Section 2 so bereft of meaning that one can “make no more than a guess as to what Congress intended.”<sup>168</sup> Congress intended the federal courts to make case-specific judgments concerning the reasonableness of conduct, and to develop that doctrine in a common-law fashion.<sup>169</sup> To be sure, that Section 2 invokes the dynamic content of reasonableness means that Section 2’s reach is not static and its application to particular conduct is sometimes uncertain. But that would be true even if courts applied the Rule of Lenity to Section 2; uncertainty would simply exist over a potentially narrower subset of fact patterns. Moreover, *Nash* teaches that some level of uncertainty as to conduct’s reasonableness is not at war with fair notice.<sup>170</sup>

<sup>168</sup> *United States v. Wells*, 519 U.S. 482, 499 (1997) (internal quotations omitted); *see also Burgess v. United States*, 128 S. Ct. 1572, 1580 (2008) (observing that the Rule of Lenity “applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute” (internal quotations omitted)).

<sup>169</sup> *See, e.g., Leegin*, 127 S. Ct. at 2724 (“Congress intended § 1 to give courts the ability to develop governing principles of law in the common-law tradition.” (internal quotations omitted)). For the same reason, applying the Rule of Lenity to the Sherman Act would not advance “democratic accountability”; that is, “compel[ling] lawmakers” to “indicate explicitly what they are doing.” Price, *supra* note 124, at 887-88. Although the Rule of Reason’s application cannot be completely specified in advance, the public understands that Congress charged the federal courts to elaborate the rules of the competitive road in the common-law tradition.

<sup>170</sup> *Nash v. United States*, 299 U.S. 373, 376-77 (1913).

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Nor would applying the Rule of Lenity to narrow Section 2 legitimately further legislative supremacy. If, as *Nash* held, the Sherman Act's enshrinement of the reasonableness principle does not itself amount to an unconstitutional delegation of the power to create common-law crimes, the Rule of Lenity ought not protect that unviolated constitutional value by requiring narrowing constructions. Some might argue that judicial elaboration of reasonableness effectively *is* an impermissible delegation of legislative power. But if such judicial elaboration is not constitutionally impermissible – and no such argument has successfully been advanced in the case of the Sherman Act – the Rule of Lenity is not properly deployed in service of an inapplicable non-delegation principle.<sup>171</sup> Nor would a lenity-based Rule that Section 2 doubts go to the defendant advance such a principle. Whether Section 2's Rule of Reason is read “broadly” or “narrowly” would not affect the legitimacy of Congress's “delegation” of criminal law-making authority.

As for lenity's role in upholding the rule of law by constraining prosecutorial discretion: the reality is that for at least thirty years Section 2 has not been enforced criminally; the only realistic threat of Section 2 criminal enforcement today involves circumstances that also would comprise *per se* violations of Section 1. Over-criminalization of conduct subject to Section 2 is not a realistic concern. Accordingly, that rationale for lenity provides no warrant for narrowing a statute that is exclusively enforced, and almost surely will be exclusively forced, through actions for injunctive relief and civil damages.

On the contrary, a lenity-based narrowing of Section 2 merely would undesirably exacerbate American civil antitrust schizophrenia.

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<sup>171</sup> See ELHAUGE, *supra* note 156, at 178 (arguing that “congress has every right” to “delegat[e] to the federal courts the power to devise and revise [antitrust] rules of conduct in common law fashion”); cf. Marx, *supra* note 64, at 245-46 (“It should be emphasized that lenity is a rule of statutory construction, not a means of smuggling constitutional law in through the back door to save an otherwise unambiguously constitutional statute or to avoid a difficult constitutional question.”).

Certain antitrust statutes – Section 5 of the FTC Act<sup>172</sup> and Sections 3<sup>173</sup> and 7<sup>174</sup> of the Clayton Act – proscribe conduct that also can be reached by Sherman Act Section 2<sup>175</sup>; yet those provisions do not define crimes.<sup>176</sup> Whatever the argument for invoking lenity in construing Section 2, the case is much weaker, if it can be made at all, for employing lenity to narrow these provisions.<sup>177</sup> Employing lenity to limit Section 2 also would shine an even more intense spotlight on whether, and to what extent, the FTC Act can reach conduct beyond that condemned by the Sherman Act,<sup>178</sup> and potentially aggravate the perceived unfairness of the substantive antitrust standard turning on the happenstance of the FTC taking up a matter. Antitrust plaintiffs, moreover, can be expected to seek to shoe-horn what really are square peg Section 2 cases into the round holes of the Clayton Act.<sup>179</sup> None of this advances the sound development of antitrust law.

That leaves the argument that resolving Section 2 doubts in the

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<sup>172</sup> 15 U.S.C. § 45.

<sup>173</sup> 15 U.S.C. § 14.

<sup>174</sup> 15 U.S.C. § 18.

<sup>175</sup> These statutes, however, also reach other conduct. For example, Section 7 of the Clayton Act can condemn mergers that do not threaten to create monopoly power.

<sup>176</sup> Notably, certain provisions of other “antitrust” statutes, including the Robinson-Patman and Wilson Tariff Acts, do carry criminal penalties. See 15 U.S.C. §§ 8, 13a.

<sup>177</sup> The argument would be that construction of these provisions must be consistent with the antitrust laws as a whole.

<sup>178</sup> The FTC has recently sought to enforce Section 5 even when the conduct would not amount to a Sherman Act violation. See *In re Negotiated Data Solutions, LLC*, No. 051-0094 (2007), available at [www.ftc.gov/os/caselist/0510094/index.shtm](http://www.ftc.gov/os/caselist/0510094/index.shtm).

<sup>179</sup> For example, litigants might seek to link “monopolizing” conduct to prior acquisitions challenged under Clayton Act Section 7, see *Reading Int’l Inc. v. Oaktree Cap. Mgmt. LLC*, 317 F. Supp. 2d 301, 311-17 (S.D.N.Y. 2003), or stress conditions on dealings reached by Clayton Act Section 3.

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defendant's favor provides assurances that defendants know they have committed wrongful conduct. Beyond the point that actual criminal enforcement of Section 2 is merely notional, the *mens rea* requirement for Section 2 convictions required by the Supreme Court in *United States v. United States Gypsum Co.*<sup>180</sup> sufficiently fulfills that role. There is no need to confine Section 2's substantive reach to avoid criminalizing a mere error in judgment.

Both the Supreme Court's rationale for reading the Sherman Act to impose a *mens rea* requirement for a criminal offense beyond that required for a civil violation, and the content of the Sherman Act's criminal intent element, reinforce this conclusion. *Gypsum* read the Sherman Act to require a certain level of intent – and although the case concerned Section 1, *Gypsum*'s *mens rea* requirement plainly is applicable also to Section 2<sup>181</sup> – for a number of reasons. First, “with regard to crimes having their origin in the common law,” the Court's cases established “an interpretative presumption” that “*mens rea* is required.”<sup>182</sup> This presumption rests, the Court observed, on the assumption that “Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor.”<sup>183</sup> Importantly, the Court reasoned that those “traditional legal concepts” themselves derive from the same source as

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<sup>180</sup> 438 U.S. 422 (1978).

<sup>181</sup> *Gypsum* did not distinguish between Section 1 and Section 2; on the contrary, the Court noted that both Section 1 and Section 2 are criminal statutes and cited *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), which recognized that both Sections 1 and 2 invoke the rule of reason. See *Gypsum*, 438 U.S. at 438. Antitrust Division guidelines cited by the Court, moreover, expressly contemplated criminal Section 2 offenses and listed “other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize” as among the “type” of “offenses” that “are prosecuted criminally.” *Id.* at 440.

<sup>182</sup> *Gypsum*, 438 U.S. at 437.

<sup>183</sup> *Id.*

the Rule of Lenity: to “read a state-of-mind component into an offense even when the statutory definition did not in terms so provide,” according to the Court, was “*in keeping* with the common-law tradition and with the general injunction that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor on lenity.’”<sup>184</sup>

The Court’s second reason for reading the criminal Sherman Act offense to require *mens rea* – the Act’s potential substantive breadth and common-law elaboration – even more directly answers lenity-based concern with condemning a mere error in judgment. “The Sherman Act,” the Court observed, “unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes.”<sup>185</sup> “Nor has judicial elaboration of the Act always yielded 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.”<sup>186</sup> The Sherman Act, in other words, exhibits “indeterminacy.”<sup>187</sup> The inability precisely to predict criminal liability supported requiring some level of intent beyond intent to engage in the conduct. As the Court put it, the “same basic concerns which are manifested in our general requirement of *mens rea* in criminal statutes” are “at least equally salient in the antitrust context.”<sup>188</sup>

Importantly, the Court found this concern “buttressed” by

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<sup>184</sup> *Id.* (emphasis added) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). As some scholars have observed, the common-law Rule of Lenity differed significantly from that first invoked by the Supreme Court in *Wiltberger*. See generally Kahan, *supra* note 4, at 357-61. Nonetheless, the important point for present purposes is that *Gypsum* associated the underlying concerns that animate the *mens rea* presumption with lenity.

<sup>185</sup> *Gypsum*, 438 U.S. at 438.

<sup>186</sup> *Id.* at 438 (citations omitted).

<sup>187</sup> *Id.* at 439.

<sup>188</sup> *Id.* at 440.

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“[c]lose attention to the type of conduct regulated by the Sherman Act.”<sup>189</sup> Outside of conduct condemned as *per se* unlawful, “the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.”<sup>190</sup> “The imposition of criminal liability . . . for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken,” the Court reasoned, “holds out the distinct possibility of overdeterrence.”<sup>191</sup>

*Gypsum’s* invocation of the Sherman Act’s indeterminacy, the Court’s recognition of the Act’s potential otherwise to condemn conduct which “is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct,” and the Court’s conclusion that a *mens rea* requirement diminishes the prospect that “salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error in judgment,”<sup>192</sup> all reinforce the absence of any justification for invoking lenity to confine Section 2’s substantive scope. For one thing, if the very substantive breadth of the Sherman Act is a reason to require a *mens rea* requirement that is “in keeping” with the Rule of Lenity, lenity can hardly be invoked to reduce the statute’s substantive scope. Put differently, *Gypsum’s mens rea* requirement presupposes

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 440-41. Other reasons the Court cited for imposing a *mens rea* requirement included the severity of criminal sanctions, *see id.* at 442 n.18, recognition in the Sherman Act’s legislative history of the traditional distinctions between civil and criminal offenses, *id.* at 443 n.19, and reluctance to impute to Congress an intent to wield criminal sanctions to regulate rather than “punish conscious and calculated wrongdoing,” *id.* at 442.

<sup>191</sup> *Id.* at 441.

<sup>192</sup> *Id.*

that the Sherman Act exhibits a “generality and adaptability comparable to that found to be desirable in constitutional provisions.”<sup>193</sup> Invoking lenity to narrow the Sherman Act is thus inconsistent with the scope of the Sherman Act *Gypsum* assumed, a scope which reinforced the Court’s conclusion that a criminal Sherman Act offense requires some level of intent.

For another, if, as the Court reasoned, a *mens rea* requirement diminishes overdeterrence by precluding criminalization of unintended anticompetitive conduct, that undermines the need to invoke lenity to ensure that a defendant has knowledge of wrongdoing for *malum in prohibita* criminal offenses. The *mens rea* requirement ensures notice of wrongfulness. *Gypsum*’s description of the *mens rea* required for a criminal Rule of Reason conviction illustrates the point. Although *Gypsum* did not require proof of the antitrust defendant’s “conscious object” to cause anticompetitive effects,<sup>194</sup> the Court did require proof of “action undertaken with knowledge of its probable [anticompetitive] consequences.”<sup>195</sup> Requiring knowledge that “proscribed effects would most likely follow” is the antitrust equivalent of requiring awareness of conduct’s wrongfulness.<sup>196</sup>

Although lower courts have read *Gypsum* to permit less demanding proof of intent to demonstrate a *per se* criminal violation of the Sherman Act,<sup>197</sup> *Gypsum*’s requirement that the government prove

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<sup>193</sup> *Id.* at 439 (internal quotation omitted).

<sup>194</sup> *Id.* at 444.

<sup>195</sup> *Id.* The Court further explained that evidence of “conscious object” intent could support criminal liability if anticompetitive effects otherwise also required for liability “did not come to pass.” *Id.* n.21.

<sup>196</sup> *Id.*

<sup>197</sup> Courts reason that “[w]here *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid.” *United States v. Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir. 1981). *See also, e.g.*, *United States v.*

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knowledge of probable anticompetitive effects in a criminal Rule of Reason prosecution cuts decisively against invoking lenity to confine Section 2. *Gypsum's* knowledge requirement is plainly more demanding than the intent required for a civil violation of Section 2's monopolization proscription, which is merely that the antitrust defendant knowingly engaged in the conduct that gives rise to the violation.<sup>198</sup> And *Gypsum's* knowledge requirement arguably provides the very notice of wrongdoing that some commentators contend is a central reason for invoking lenity.

*Gypsum* leaves one apparent puzzle. In requiring knowledge of probable anticompetitive effects for a Sherman Act criminal violation, *Gypsum* created a distinction in the elements required for a civil and criminal Sherman Act violation for the very same conduct under the very same statutory provision (whether Section 1 or Section 2). It might be argued, therefore, that *Gypsum* renders the “textual identity” and “least common denominator” principles inapplicable to the Sherman Act. As the Supreme Court's invocation of lenity in the civil *Illinois Tool Works* case suggests, such a conclusion is likely incorrect.

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Brown, 936 F.2d 1042, 1046 (9th Cir. 1991) (following *Koppers* and explaining that its rule “accords with the express holdings of six other circuits, and the intimations of another”); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 682-84 (5th Cir. 1981); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979); *United States v. Cont'l Group, Inc.*, 603 F.2d 444, 461-62 (3d Cir. 1979).

<sup>198</sup> See *United States v. Griffith*, 334 U.S. 100, 107 (1948); see also *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 602 & n.28 (1985) (explaining that “no monopolist monopolizes unconscious of what he is doing” (quoting *Alcoa*, 148 F.2d 416, 432 (2d Cir. 1945))). The conspiracy to monopolize and attempt to monopolize offenses are judicially construed to require specific intent to monopolize, even in a civil setting. See, e.g., *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). However, “specific intent to monopolize” can be inferred from engaging in conduct that causes anticompetitive effects, *id.* at 459; thus, as a practical matter, specific intent to monopolize appears to be less demanding than *Gypsum's* *mens rea* requirement for a criminal Rule of Reason violation.

Instead, as the United States has argued, the *mens rea* presumption *Gypsum* invoked can be reconciled with the textual identity principle by conceptualizing the Sherman Act to have “an implied clause stating that, in its criminal applications, *mens rea* must be shown” that does not affect the construction of the statute’s express provisions.<sup>199</sup>

The *mens rea* requirement for the Sherman Act’s criminal applications, in other words, arises from a special background presumption against which Congress is assumed to legislate that is inapplicable to construing the express statutory language.<sup>200</sup> This method of easing the tension between the criminal *mens rea* requirement and the textual identity principle is suggested by *Gypsum* itself, which noted that “[b]oth civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of the conduct proscribed – restraints of trade or commerce and illegal monopolization – without reference to or mention of intent or state of mind.”<sup>201</sup>

### 3. *Lenity is Unnecessary to Calibrate Section 2 Legal Tests*

Finally, against the extremely poor fit between the rationales for employing lenity to inform the elaboration of Section 2 stands perhaps a stronger counter-force: The Sherman Act, including Section 2, forms

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<sup>199</sup> See, e.g., Brief for the United States at 11, *United States v. Nippon Paper Indus. Co.*, No. 96-2001 (1st Cir. filed Nov. 25, 1996), available at <http://www.justice.gov/atr/cases/f1000/1002.htm>.

<sup>200</sup> Cf. Marx, *supra* note 64, at 276-77 (“Under a presumption of consistent usage, terms of art common to civil and criminal portions of hybrid statutes should be interpreted as having the same meaning. The presence of mens rea terms in the criminal portion of the statute does not affect the probative value of the legislative decision to use the term of art in both contexts. . . . The common term should have the same application in both civil and criminal cases, even though the civil and criminal portions of the statute are different in an important respect: the presence of mens rea.”).

<sup>201</sup> *Gypsum*, 438 U.S. at 438.

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part of a “charter of freedom.”<sup>202</sup> It is part of “the Magna Carta of free enterprise,” as “important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>203</sup> Particularly in light of the merely theoretical possibility of criminal enforcement, there is no place in a statute recognized to have the “generality and adaptability comparable to that found to be desirable in constitutional provisions”<sup>204</sup> for a background assumption in favor of narrow constructions.<sup>205</sup>

To be sure, the Sherman Act’s “charter of freedom” does not proscribe all private restraints; nor does the Act create a guarantee of the right to compete on particular terms with dominant firms. The Sherman Act’s Rule of Reason (used here in the sense of a principle by which courts construe the Sherman Act<sup>206</sup>) contemplates judicial elaboration of administrable rules of the competitive road that are calculated to make consumers in the long run better off relative to the application of other rules. Concerns with over-deterrence, the relative balance of false-positives and false-negatives, and the costs and benefits of more general standards as compared to more precise rules properly inform Section 2’s elaboration. As the Court in *Gypsum* recognized, antitrust differs from other areas of the law, because

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<sup>202</sup> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933).

<sup>203</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

<sup>204</sup> *Gypsum*, 438 U.S. at 439 (internal quotations omitted).

<sup>205</sup> *Cf. Marx*, *supra* note 64, at 275 (“Presumptions of lenity or broad construction should not be decisive of ambiguities in hybrid statutes, *unless* the court makes a determination that the statute is hybrid in name only - that is, its enforcement and application are so overwhelmingly civil or criminal that permitting purely civil or purely criminal rules of construction to govern will be appropriate.” (emphasis added)). The tension with other provisions of the antitrust laws that applying lenity to Section 2 would exacerbate, discussed above, reinforces this point.

<sup>206</sup> *See Popofsky*, *supra* note 10, at 453-56.

“excessive caution” generated by inappropriate legal tests “will not necessarily redound to the public’s benefit.”<sup>207</sup>

It is precisely the ability of Section 2 courts applying antitrust principles in a common-law fashion *directly* to take into account over-deterrence concerns liability tests create that leaves no proper role for lenity. A lenity-based view of Section 2, as explained, suggests a strong *presumption* that benefits from judicial intervention are not worth the costs.<sup>208</sup> But the common-law process by which Section 2 doctrines are generated, as *Trinko*<sup>209</sup> illustrates, allows courts to perform that cost/benefit analysis for particular conduct. There is, accordingly, no reason for a special lenity-based “ethical prescription”<sup>210</sup> that confines Section 2’s scope. Put differently, the debate over Section 2’s meaning should be informed by predictive judgments concerning the relative costs and benefits to competition and consumers of applying a given test to assess the legality of particular conduct as opposed to some other legal test. Lenity does not provide a valid basis for putting a thumb on the scale in that judicial weighing.

*Illinois Tool Works* is not to the contrary. The Court first invoked the criminal nature of the Sherman Act in contrasting *International Salt’s* special *per se* rule for patent tying (presuming market power) to Congress’s 1988 amendment to the Patent Act respecting the showing required for tying to amount to misuse (requiring a demonstration of market power). The Court reasoned: “It would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute misuse.”<sup>211</sup> This statement does not compel a lenity-based

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<sup>207</sup> *Gypsum*, 438 U.S. at 441 n.17.

<sup>208</sup> *See supra* notes 99-107.

<sup>209</sup> *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

<sup>210</sup> *Taranto*, *supra* note 2, at 180.

<sup>211</sup> *Illinois Tool Works*, 547 U.S. at 42.

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rule of strict construction. Instead, it recognizes the textual identity principle (how the Sherman Act is construed civilly equally applies when enforced criminally) and acknowledges that the elaboration of the common law (and therefore of the Sherman Act) properly takes into account “statutory policy laid down by the legislature in closely related areas.”<sup>212</sup>

Nor is the Court’s direct reference to lenity a command to apply it. The Court noted that the U.S. antitrust enforcers in “their prosecutorial discretion” refused to presume market power from patents.<sup>213</sup> “While that choice is not binding on the Court,” Justice Stevens continued, “it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with a rule of severity for a special category of antitrust cases.”<sup>214</sup> The Court, here, simply made the observation that *International Salt’s per se* rule runs far outside the currents of modern antitrust. In particular, the Court cited the “normal rule of lenity applied in criminal cases” to illustrate the *effect* of maintaining *International Salt’s* market power presumption: such a ruling would perpetuate an unsound special “rule of severity” – the opposite, the Court implied, of the “normal” Rule of Lenity. It is one thing to contrast a special “rule of severity” with the Rule of Lenity, a contrast that reaffirms the application of textual identity principle to the Sherman Act. It is quite another, and inappropriate, to read that invocation as a holding that the Rule of Lenity requires strict constructions of the Sherman Act, an argument no brief submitted in *Illinois Tool Works* made.<sup>215</sup>

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<sup>212</sup> Taranto, *supra* note 2, at 177 (citing *Moragne v. State Marine Lines*, 398 U.S. 375, 390-91 (1970)).

<sup>213</sup> *Illinois Tool Works*, 547 U.S. at 45.

<sup>214</sup> *Id.*

<sup>215</sup> None of the merits briefs filed in *Illinois Tools Works* so much as mentioned the Rule of Lenity.

## CONCLUSION

The Supreme Court's invocation of the criminal nature of the Sherman Act in *Illinois Tool Works* is indeed "striking."<sup>216</sup> But as with many Supreme Court *dicta*, it intrigues more than it illuminates.<sup>217</sup> Examination of the Rule of Lenity's operation and its underlying rationale demonstrate that the canon fits poorly with, and accordingly ought not to inform, Section 2 of the Sherman Act. Courts confronted with the argument that Section 2 liability is improper because strict construction is required by the criminal nature of the statute should reject the contention. The mysteries of Section 2 of Sherman Act may not present easy answers. That the Sherman Act defines a crime, however, does not provide an easy out.

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<sup>216</sup> Taranto, *supra* note 2, at 178.

<sup>217</sup> As Guildenstern quipped: "What a fine persecution – to be kept intrigued without ever quite being enlightened." THOMAS STOPPARD, *ROSENCRANTZ AND GUILDENSTERN ARE DEAD* 41 (Grove Press 1967).

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