Article

Rules Versus Standards in Antitrust Adjudication

Daniel A. Crane*

Abstract

Antitrust law is moving away from rules (ex ante, limited factor liability determinants) and toward standards (ex post, multi-factor liability determinants). This movement has important consequences for the structure of antitrust adjudication, including shifting ultimate decision-making down the legal hierarchy (in the direction of juries, trial courts sitting as fact-finders, and administrative agencies) and increasing the importance of economic experts. The efficiency consequences of this trend are often negative. Specifying liability determinants as open-ended, unpredictable standards increases litigation costs, chills socially beneficial industrial practices, allocates decision-making on microeconomic policy to unqualified juries, and facilitates strategic misuse of antitrust litigation by rent-seeking competitors. Instead of following a generalized preference for standards, courts should consider five factors in choosing the ex ante precision of liability determinants: (1) whether the lawsuit was brought by the government or a private party; (2) whether the legal determinant would create liability or immunize against it; (3) whether the remedy sought is prospective (*i.e.*, injunctive) or retrospective (*i.e.*, damages); (4) whether the conduct is idiosyncratic or paradigmatic; and (5) whether the misconduct alleged is collusion or exclusion. A standard-based approach is most appropriate to create liability in public litigation seeking injunctive relief against idiosyncratic practices. A rule-based approach is most

appropriate when used to immunize archetypal forms of industrial behavior from private actions for damages.

INTRODUCTION

Antitrust law finds itself in the midst of a creeping transition from rules to standards. Adjudicatory categories that have long held sway—such as the dichotomy between the per se rule and the rule of reason for collaborative conduct or categorical rules of liability and immunity in monopolization law—are progressively being replaced by open-ended balancing of market values. As antitrust has become de-politicized and de-ideologized, flexible technocratic expertise has replaced legalist conceptualism. Once the stars of the antitrust courtroom, lawyers now play the supporting cast to economists. Economic theory and post-hoc, contextual examination of facts rather than *a priori* legal categories take center stage in antitrust proceedings. Gone are the days when the Supreme Court advocated stark antitrust rules and condemned "rambl[ing] through the wilds of economic theory in order to maintain a flexible approach."[1] The wilds are being tamed, and adjudicatory flexibility favored.

Why this transition? The Chicago School's dramatic influence on antitrust law since the mid-1970s accounts for a significant part of the story. Economic theory has rehabilitated practices once condemned as per se illegal because courts thought it a waste of time to see whether that conduct might be justified by efficiency considerations.[2] Full-blown review of the context and motivation of practices once viewed as necessarily anticompetitive often reveals that they are competitively benign.[3] Yet the

* Assistant Professor, Benjamin N. Cardozo School of Law, Yeshiva University. B.A. Wheaton College; J.D. University of Chicago.

[1] U.S. v. Topco Assoc., Inc., 405 U.S. 569, 609 n.10 (1972).

[2] *See* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213 (1985). The Supreme Court has described its per se approach in antitrust as "reflect[ing] broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful." Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 92-93 (2002).

[3] For example, vertical maximum resale price setting by upstream firms was once condemned as *per se* unlawful. Albrecht v. Herald Co., 390 U.S. 145 (1968). In 1997, the Supreme Court held that *Albrecht* had been mistaken and that the flexible rule of reason should apply instead. State Oil v. Khan, 522 U.S. 3, 16 (1997). Since *State Oil*, plaintiffs appear to have had a hard time establishing that maximum retail price setting has anticompetitive effects. *See*, *e.g.*, Mathias v.

move toward greater adjudicatory flexibility—the move from rules to standards—cannot be attributed solely to a less interventionist preference. In recent years, the growing inclination toward fulsome review of the facts has led a number of courts to reject bright-line rules that would have immunized defendants from liability. In monopolization cases, in particular, prominent decisions have emphasized the need to consider the fullness of the defendant's conduct on a case-by-case basis, thus denying defendants the sort of categorical legal rules most helpful for averting jury trials.[4] The move toward standards, it appears, has been motivated in part by a sense that antitrust cases are too complex and socially important to turn on simplistic legalist commands.

If history is a reliable teacher, the pendulum will eventually swing back toward rules. Morris Cohen once noted that "periodic waves of reform during which the sense of justice, natural law, or equity introduces life and flexibility into the law and makes it adjustable to its work" are often followed by periods where "under the social demand for certainty, equity gets hardened and reduced to rigid rules."[5] Similarly, Carol Rose has documented a tendency in property law to "shift back and forth between hard-edged, yes-or-no crystalline rules and discretion-laden, post hoc muddy rules."[6] Whatever the perceived advantages of standards over rules in antitrust, the disadvantages of standards will probably induce a counter-movement back toward rules once the current movement has run its course.

This is not to say that a rules-standards-rules-standards cycle is inevitable. Certain fields lend themselves primarily to rules (tax comes to mind)[7] and others lend themselves more to standards (constitutional law

Daily News, L.P., 152 F.Supp.2d 465 (S.D.N.Y. 2001). Similarly, the Supreme Court once believed that tying could "serve hardly any purpose beyond the suppression of competition," Standard Oil Co. of California v. United States, 337 U.S. 293, 306 (1949), but subsequent learning has shown that tying has many procompetitive purposes. David S. Evans and Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 Yale J. Reg. 37 (2005); Benjamin Klein, *Tying*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, vol. 3, p. 630 (Peter Newman ed., 1998).

[4] *See infra* text accompanying notes xxx-xxx.

[5] MORRIS R. COHEN, LAW AND THE SOCIAL ORDER 261 (1933).

[6] Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 590 (1988).

[7] *See* Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. Chi. L. Rev. 859 (1982).

comes to mind, although less obviously).[8] Other fields settle on a mixture between rules and standards, thus preventing "crystals and mud" cycles.[9] There is wisdom in seeking such balance. As Richard Posner has aptly observed, "no sensible person supposes that rules are always superior to standards, or vice versa."[10] Antitrust law is a good case in point. Neither a completely rule-based nor standard-based juridical structure would adequately promote competitive and efficient economic markets.

In this article, I argue against wholesale abandonment of rules in antitrust, which appears to be where prevailing currents are taking us. Part of my argument follows familiar lines from the "rules versus standards" literature,[11] such as the trade-offs between precision and predictability and

[8] *But see* Antonin Scalia, *The Rule of Laws as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

[9] *See* Rose, *supra* n. xxx.

[10] MindGames, Inc. v. Western Pub. Co., Inc., 218 F.3d 652, 657 (7th Cir. 2000).

[11] A litany of the leading generalist literature on the "rules versus standards" question includes P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLE-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY AND LEGAL INSTITUTIONS (1987); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) (primarily chapters one and two); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS 155-58 (tent. ed. 1958); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987); Anthony I. Ogus, *Quantitative Rules and Judicial Decision Making*, in THE ECONOMIC APPROACH TO LAW 210 (Paul Burrows & Cento G. Veljanovski eds., 1981); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42-53 (1990); ROSCO POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 48-71 (1922); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND LIFE (1991); ROBERTO UNGER, KNOWLEDGE AND POLITICS 88-100 (1975);); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65 (1983); Ronald M. Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14, 22-29 (1967); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257 (1974); Jason S. Johnston, *Bargaining Under Rules Versus Standards*, 11 J. L. Econ. & Org. 256 (1995); Louis Kaplow, *A Model of Optimal Complexity of Legal Rules*, 11 J. L. & Econ. Org. 150 (1995); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L. J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 Or. L. Rev. 23 (2000); Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 482-87 (1933); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 Harv. J.L. & Pub. Pol'y 101 (1997); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. Rev. 379 (1985); Kathleen M. Sullivan, *The*

the costs of promulgating legal commands based on the frequency of the regulated conduct. But antitrust has unique features—such as the treble damages remedy, the close proximity of socially beneficial and harmful behavior, and the propensity of competitors to misuse antitrust lawsuits for strategic advantage—that require an expanded set of considerations when it comes to the precision of liability determinants. Given the peculiarities of antitrust, the optimal choice between rules and standards depends on a variety of factors. I identify five such factors that should influence the choice between rules and standards as to different types of industrial behavior and different types of proceedings and parties. In rough order of importance, they are: (1) whether the lawsuit was brought by the government or a private party; (2) whether the legal determinant would create liability or immunize against it; (3) whether the remedy sought is prospective (*i.e.*, injunctive) or retrospective (*i.e.*, damages); (4) whether the conduct is idiosyncratic or paradigmatic; and (5) whether the misconduct alleged is collusion or exclusion. A standard-based approach is most appropriate to create liability in public litigation seeking injunctive relief against an idiosyncratic practice. A rule-based approach is most appropriate when used to immunize archetypal forms of industrial behavior from private actions for damages.

Part I of this article summarizes the progression that antitrust law has made and is making from a system mixing rules and standards to one in which rules are increasing disfavored and standards favored. Part II asks whether rules are really possible or whether even those legal commands framed as rules inevitably dissolve into standards. It concludes that, in antitrust at least, important consequences follow from the designation of liability and adjudicative criteria as either rules or standards. Part III considers the efficiency implications of antitrust rules and standards. It argues for an approach sensitive to the nature of the plaintiff (*i.e.*, public or private) and the nature of the remedy sought (*i.e*., injunction or damages) and to whether the legal expression would create or prevent liability. Finally, Part IV considers some non-efficiency based criteria for choosing between rules and standards, such ideologically oriented objections to either rules or standards and the value of maintaining a short set of foundational antitrust rules in order to maintain the expressive core of antitrust law and orient the public toward the meaning of this often ill-understood enterprise.

Justices of Rules and Standards, 106 Harv. L. Rev. 22 (1992); Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 956-57 (1995).

I. THE PROGRESSION FROM RULES TO STANDARDS

Antitrust law has never been, and could not be, an exclusively rule-based system.[12] It governs too vast and complex an array of business practices to be reduced to a handful of categorical rules. Yet rules—specifications of liability criteria in formal, seemingly precise, and usually short directives[13]—have made up a significant part of antitrust law for a good bit of the Sherman Act's interpretive history. In the not too distant past, it was possible to describe much of antitrust law in categorical terms, both in terms of what was categorically prohibited and what was categorically allowed.

This is changing, although not primarily through Supreme Court leadership. The Rehnquist court was largely uninterested in antitrust, granting certiorari in few antitrust cases that raised issues of substance.[14] In

[12] Richard Epstein imagines the possibility of antitrust fitting within his preferred paradigm of a few simple rules for a complex world. Epstein, *supra* note xxxx at 123-27. As discussed below in Section IV(A), however, what Epstein imagines is not so much rule-based antitrust as much less antitrust.

[13] I do not mean to try and add to the jurisprudential debate over what is a rule and what is a standard. The general properties of liability criteria that are more rule-like (*i.e.*, do not drive over 55 miles an hour; pay at a marginal rate of 33%; a Senator must be 35 years old) and standards (*i.e.*, good faith; negligence; unconscionably; undue burden; proportionality) are fairly apparent, although as with virtually any category, they tend to fray at the margins. *See* Duncan, *supra* n. xxx at 1688.

[14] During its 19 year, the Rehnquist Court decided only 11 cases involving issues of substantive antitrust law. *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); California Dental Association v. FTC, 526 U.S. 756 (1999); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998); State Oil v. Khan, 522 U.S. 3, 16 (1997; Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993); Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992); Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990); Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988). *See generally* Eleanor M. Fox, *Antitrust and Business Power* in THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT (Herman Schwartz, ed. 2002) (providing a critical analysis of the Rehnquist Court's antitrust jurisprudence and expressing relief that the Court did not take more antitrust cases). It remains to be seen whether the Roberts court—led by a Chief Justice whose spent a good bit of time in private practice on antitrust matters—will take a greater interest. For his part, Justice Alito has signaled a low degree of interest in antitrust. *See Hearing on the Nomination of Judge Samuel Alito to the U.S. Supreme Court*, 109th Cong.

the few substantive antitrust cases it decided, the Rehnquist court sometimes followed a rule-based approach, particularly with respect to exclusionary practices where it seemed concerned about the deleterious effects on incentives to compete of open-ended, unpredictable standards.[15] But the Supreme Court simply has not decided enough antitrust cases in recent years to permit a broad generalization about its direction. With the Supreme Court rarely intervening, a movement away from rules and toward standards has been carried out by the lower courts and antitrust enforcement agencies, which have followed an impulse to manage antitrust adjudication in a more multi-factor, fact-dependent, and ex post way than under the older rule-based model.

A. Collusion

Any student of U.S. antitrust doctrine in the past half-century quickly learned that restraints of trade fall into two categories—(1) those that are per se illegal; and (2) those that require examination under the rule of reason.[16] The rule of reason is, for present purposes, a misnomer, since it is theoretically at least more standard-like than rule-like.[17] Under the classic *Chicago Board of Trade* formulation,[18] conduct falling within the rule of reason must be examined under a wide range of criteria, including the structure of the relevant industry, the justifications for the restraint, and its effects on prices and output levels. On the other hand, conduct falling within the per se rule is absolutely prohibited. Antitrust doctrine curtails inquiry into the reasons for the conduct, the market power of the firm engaging in the conduct, and the desirability of the conduct from a consumer welfare perspective.[19]

The Supreme Court's 1972 decision in *Topco*[20] represents the high water mark of the absolutist nature of the per se rule. The defendants were

(2006) (Statement of Sen. Mike Dewine on Antitrust Issues), *available at* 2006 WL 53273.

[15] *See infra* text accompanying notes xxx-xxx.

[16] *See*, *e.g.*, LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK §§ 5.3c-5.3f at 192-217 (2000).

[17] I say "theoretically at least" because, as discussed below, the rule of reason often resulted in fairly summary adjudication for the defendant. In Section I(A) below, I consider the possibility that the rule of reason was once fairly rule-like in application.

[18] Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

[19] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[20] U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972).

small regional grocers that formed a buying cooperative to create a private label brand—Topco—in order to compete more effectively with large national grocery chains. In order to prevent free-riding on local-market promotion of the Topco brand, the participating grocers agreed to a system of exclusive territories.[21] When the federal government challenged the Topco exclusivity system as a per se illegal market division agreement, the district court made a series of "dream" findings for an antitrust defendant: Topco's members had no market power; the exclusivity system was supported by legitimate free-riding concerns; the exclusivity system would strengthen the Topco grocers and make them more efficient competitors with the large national grocery chains; and enjoining operation of the Topco exclusivity system would actually diminish competition in the grocery business because it would make the dominant national chains even more dominant.[22] As Justice Blackmun lamented in dissent, the effect of enjoining the exclusivity system would be that "the bigs . . . should find it easier to get bigger."[23]

Without denying the validity of any of the district court's findings, Justice Marshall's opinion for the Supreme Court nonetheless reversed the district court's opinion approving the Topco exclusivity system. His opinion dismisses the possibility of a balancing, post-hoc approach to antitrust adjudication. The problems with such an approach include institutional incompetence to engage in meaningful fact-specific balancing ("The fact is that courts are of limited utility in examining difficult economic problems"),[24] loss of ex ante predictability for the subjects of the legal regime ("Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act"),[25] and general distrust of economic theory ("Should Congress ultimately determine that predictability

[21] On the free-riding concerns that motivated the exclusivity system in *Topco*, *see* Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. Rev. 5, 70-71 (2004). *But see* Robert Pitofsky, *Joint Venture Guidelines: Views from One of the Drafters*, Speech before ABA Antitrust Section Workshop: Joint Ventures and Strategic Alliances: The New Federal Antitrust Competitor Collaboration Guidelines 5 (Nov. 11, 1999) <http://www.ftc.gov/speeches/pitofsky/jvg991111.htm> (questioning whether *Topco* exclusivity system was necessary to prevent free-riding).

[22] United States v. Topco Assocs., 319 F. Supp. 1031, 1033, 1040, 1042 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).

[23] *Topco*, 405 U.S. at 612

[24] 405 U.S. at 609.

[25] *Id*. at 609 n.10.

is unimportant in this area of the law, it can, of course, make per se rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach").[26]

Although the law of collaborative conduct was often presented as a dualism between the rule of reason and the per se rule,[27] there was actually a third category that also appeared in rule-like form: per se legality. For example, under the venerable *Colgate* doctrine,[28] a manufacturer was free to announce a suggested retail price ("MSRP") and then refuse prospectively to do business with any retailer that deviated from the MSRP. Although it would not take any great stretch of legal reasoning or the English language to imagine such conduct as an agreed-upon restraint of trade,[29] the Supreme Court (influenced by the property rights and freedom of contract formalist ideology of the *Lochner* era)[30] permitted such use of MSRPs as an absolute right. But because setting of retail prices by agreement was (and still is to some extent) per se illegal,[31] a manufacturer who deviated ever so slightly from the simple model of announcing an MSRP and cutting off any cheating retailer would lose the *Colgate* privilege and find itself within the per se rule.[32] This doctrinal dualism caused radical swings between the poles of per se legality and illegality based on slight differences in the challenged conduct.[33]

[26] *Id.*
[27] *See* Polygram Holdings, Inc. v. FTC, 416 F.3d 29, 33-34 (D.C. Cir. 2005) (describing traditional "dichotomous categorical approach" in Section 1 cases).
[28] U.S. v. Colgate & Co., & Co., 250 U.S. 300 (1919).
[29] Under traditional contract law doctrine, a unilateral contract is formed by a promisee's performance of a requested act. Restatement (Second) of Contracts § 45 (1982). If a manufacturer announces an MSRP and a retailer acquiesces by selling the product at that price, a unilateral contract has been formed in conventional terms. In other contexts, the Supreme Court has recognized that an invitation to collude followed by unspoken acquiescence meets the threshold requirement of a "contract, combination, or conspiracy." Interstate Circuit.
[30] Edward P. Krugman, *Soap, Cream of Wheat and Bakeries: The Intellectual Origins of the Colgate Doctrine*, 65 St. John's L. Rev. 827 (1991).
[31] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911); *c.f.* State Oil v. Khan, 522 U.S. 3, 16 (1997).
[32] United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Albrecht v. Herald & Co., 390 U.S. 145 (1968).
[33] In *Albrecht*, for instance, the defendant's only deviation from privileged exercise of its *Colgate* rights was that it integrated forward into distribution and hired another person to deliver newspapers on the terminated distributor's old routes. 390 U.S. at 147-48.

In recent years, there has been a marked transition away from rules and toward standards in collaborative conduct cases. This occurred in an obvious way beginning in the 1970s as the Burger and then Rehnquist courts overruled Warren court precedents that had condemned a variety of business agreements as per se illegal. As common business practices such as vertical territorial allocations,[34] maximum resale price setting,[35] expulsions of members from industry associations,[36] and a manufacturer's acquiescence in a retailer's demand to terminate a competing retailer that was deviating from the manufacturer's MSRP[37] went from the per se rule to the rule of reason, the domain of rules shrunk and the domain of standards grew. Significantly, the Court declined the Chicago School's call to move vertical restraints from per se illegality to per se legality. In *State Oil*, Justice O'Connor—who is also fond of balancing tests in constitutional law[38]—went out of her way to make clear that the Court was not holding "that all vertical maximum price fixing is *per se* lawful."[39] Vertical restraints would still require scrutiny, but under the multi-factored rule of reason.

The transition from rules to standards did not take place solely due to a juridical shift of particular business practices from one category to another. Instead, the entire judicial rhetoric of antitrust has moved in a more nuanced, standard-based direction over the past few decades. With few exceptions,[40] the courts have stopped creating new categories of per se

[34] *Compare* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) and Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).
[35] *See supra* n. xxx.
[36] *Compare* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) and Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).
[37] *Compare* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) and Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988). In *Sharp*, the Court denied that it was overruling Klors, which it characterized as a horizontal case because Broadway Hale had gotten its suppliers to agree among themselves not to supply Klors. However, the horizontal aspects of the case were certainly not stressed in *Klors* and the *Sharp* distinction has the effect of essentially limiting Klors to its facts.
[38] *See* Suzanna Sherry, *The Unmaking of a Precedent*, 55 S. Ct. Rev. 231 (2003).
[39] *State Oil*, 522 U.S. at 22; *c.f.* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981) (arguing for per se legality for most vertical restraints).
[40] Although the Supreme Court has not created a new per se illegal category in a very long time, a lower court will occasionally stretch the bounds of the per se rule to encompass a new practice. *See* In re Cardizem CD Antitrust Litig., 332 F.3d 896

illegal conduct, even though commercial circumstances and practices evolve over time and litigation frequently explores new areas of commercial behavior. Since the mid-1970s, the Supreme Court seems to have frozen the canon of per se illegal practices, without necessarily pushing all other behavior into rule of reason. Instead, arguably beginning with *National Society of Professional Engineer v. FTC*[41] in 1978, the Court adopted what came later to be known as the "Quick Look" approach. In subsequent cases like *NCAA v. Board of Regents*[42] and *California Dental v. FTC*,[43] the Court described the Quick Look approach as involving an initial determination by the court, based on a "rudimentary understanding of economics," that the practice at issue has obvious anticompetitive effects, which puts the defendant to the burden of immediately putting forth a procompetitive justification for the practice.[44]

The quick look approach could be nothing more than an initial triaging tool to decide whether the particular practice falls into the per se rule or the rule of reason, but its effects on antitrust doctrine have been more transformative. Although the Supreme Court has only hinted in this

(6th Cir. 2003) (holding per se illegal an agreement between a branded pharmaceutical firm and a generic pharmaceutical firm that the generic firm would not produce a drug allegedly infringing the branded firm's patent during the pendency of the infringement litigation); but see In re Tamoxifen Citrate Antitrust Litigation, 429 F.3d 370 (2005); Schering-Plough Corp. v. FTC, 402 F.3d 1056 (2005); Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294 (11th Cir. 2003); In re Ciprofloxacin Hydrochloride Antitrust Litigation, 261 F. Supp. 2d 188 (E.D.N.Y. 2003) (all evaluating such settlements under the rule of reason); *see generally* Daniel A. Crane, *Antitrust Implications of Patent Settlements*, in ISSUES IN COMPETITION POLICY (Dale Collins, ed., forthcoming 2006).

[41] National Society of Professional Engineers v. FTC, 435 U.S.679 (1978). In *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005), the D.C. Circuit described *Professional Engineers* as the last of the dualist cases. But see text accompanying notes xxx – xxx, describing later cases in which the Supreme Court mechanically applied the per se rule.

[42] NCAA v. Board of Regents, 468 U.S. 85 (1984).

[43] California Dental Association v. FTC, 526 U.S. 756 (1999).

[44] On the quick look, *see* Max R. Shulman, *The Quick Look Rule of Reason: Retreat from Binary Antitrust Analysis*, 2 Sedona Conf. J. 89 (2001); Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 Antitrust L. J. 461 (2000); Stephen Calkins, *California Dental Association: Not a Quick Look but not the Full Monty*, 67 Antitrust L. J. 495 (2000); James A. Keyte, *What Is It and How Is It Being Applied: The Quick Look Rule of Reason*, 11-SUM Antitrust 21 (1997); Kathleen E. McDermott, *A Quick Look at the "Quick Look,"* 5-SPG Antitrust 32 (1991).

direction,[45] the Federal Trade Commission and some federal appellate courts have explicitly read the quick look cases, in combination with the "characterization" cases discussed in the next section, to have broken down the entire dualistic structure of Section 1 of the Sherman Act. In its recent *Polygram* decision, the D.C. Circuit reported: "The Supreme Court's approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case-specific inquiry."[46]

Polygram was an appeal of a decision by the Federal Trade Commission finding illegal an agreement between Polygram Records and Warner Music with respect to the marketing of recordings of live concerns by the famed "Three Tenors" (José Carreras, Placido Domingo, and Luciano Pavarotti). Polygram had distribution rights to the original 1990 Three Tenors recording and Warner had rights to the second (1994) Three Tenors recording.[47] In 1998, the Three Tenors made a third recording and Warner and Polygram agreed to distribute it jointly. Ostensibly so as to avoid free-riding on their joint promotional activities, the distributors agreed that they would each forgo promoting the earlier two albums for a six-week period during which the 1998 album was going to be heavily promoted.[48]

The Federal Trade Commission's staff challenged the "moratorium" agreement as anticompetitive,[49] and the administrative law judge, the

[45] *See* California Dental Association v. FTC, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear.").
[46] Polygram Holdings, Inc. v. FTC, 416 F.3d 29 (2005).
[47] *Id.* at 31.
[48] *Id.* at 32.
[49] Although the FTC challenged the practice under Section 5 of the FTC Act and not Section 1 of the Sherman Act, the agency and the courts treated the analysis under both statutes as identical. *See* 416 F.3d at 32 (observing that that the FTC was correct in observing "that the analysis under § 5 of the FTC Act is the same in this case as it would be under § 1 of the Sherman Act). This point is significant for present purposes because the Supreme Court has ruled that the FTC may have more prophylactic flexibility under the FTC Act than either the Department of Justice or a private litigant would have under the Sherman Act. *See* FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966); F.T.C. v. Motion Picture Adv. Co., 344 U.S. 392, 394-395 (1953). However, the fact that both the FTC and the D.C. Circuit equated the analysis under the two statutes and relied interchangeably on Supreme Court cases involving the FTC and private litigants indicates that the approach to collaborative conduct outlined in *Polygram* and similar FTC decisions is not limited to public enforcement.

Commission itself, and the D.C. Circuit all agreed that it was. Following the rule-based system, the analysis could have been quite short. As the ALJ found (and the Commission, at least, agreed), the agreement not to discount the separate products marketed by the joint venturers outside the joint venture was "simply a form of price fixing."[50] In conventional terms, that would have meant per se condemnation, without considering the reasons for the agreement, whether defendants had market power, whether there were anticompetitive effects, and other rule of reason factors. Yet both the Commission and the D.C. Circuit went out of their way to stress that they were not evaluating the restraint in any fixed category, because fixed categories are no longer in vogue. As the D.C. Circuit explained, it would be mistaken to think of the quick look approach as merely a new antitrust category—as though "the Court has moved from a dichotomy to a trichotomy"[51]—when in fact the question is always "whether . . . the challenged restraint enhances competition."[52]

To put it that way is to take the law of collaborative restraints out of rules and place it squarely into a flexible, post-hoc framework. Although a reticulated burden-shifting framework remains in place,[53] it is procedural and flexible rather than substantive and rigid. Rather than specifying ex ante rules of conduct, it allocates burdens of proof and persuasion within the litigation: Step One: The judge or agency considers whether the restraint obviously harms consumers; Step Two: If so, the judge or agency concludes that the practice does presumptively harm consumers, the defendant must come forward with a plausible and legally cognizable efficiency justification; Step Three: If the defendant does, the burden shifts back to the agency to address the justification, in one of two ways; and so forth.[54] This approach captures the values of a standard (flexibility, ex post policy-making, fact-specificity, object-dependence) and eschews the values of a rule (predictability, ex ante policy-making, category generality, subject-dependence).

It remains to be seen whether the Supreme Court will ultimately accept that its precedents signaled an end to doctrinal dichotomy, trichotomy, or any other discrete categorization and an opening to the incremental

[50] In re Polygram Holdings, Inc., Docket No. 9298, 2003 WL 21770765, at * xxx (FTC July 24, 2003).
[51] 416 F.3d at 35.
[52] *Id.* (*citing California Dental*, 536 U.S. at 779-80).
[53] The FTC traces this approach back to its decision in *In re Massachusetts Bd. of Optometry*, 110 F.T.C. 549 (1988).
[54] 416 F.3d at 35-36.

continualism adopted by the *Polygram* court.[55] However, signs abound that the law of collaborative restraints of trade is collapsing from both of its rule-bound poles—per se legality and per se illegality—toward a flexible center. Not only are practices like the no-discounting agreement in *Polygram* that once would have been condemned as per se illegal now adjudged under a more nuanced standard, but practices that might have been rubber-stamped as acceptable under older rule of reason jurisprudence are receiving a more thorough investigation under a reinvigorated rule of reason.

At the outset of this section, I said that the rule of reason was "theoretically at least" a more fact-intensive, multi-factor approach than the per se rule. The caveat was necessary because many scholars believe that categorization of a practice into the rule of reason once meant virtual per se legality. During the earlier years of the Chicago revolution, Richard Posner offered that "the content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability,"[56] and during its

[55] The Court will have a further opportunity to reveal its direction when it rules in *Texaco Inc. v. Dagher*, U.S. N. 04-814, which concerns the question of whether a joint venture that unifies its marketing and production functions but continues to sell separately through its joint venturers and sets a uniform price for the individual joint venturer's sales has committed a *per se* illegal price-fix.

[56] Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 14 (1977). More recent assessments along the same lines include Mark E. Roszkowski, *State Oil Company v. Khan and the Rule of Reason: The End of Intrabrand Competition*? 66 Antitrust L.J. 613, 638 (1998) ("There is no justifiable reason for the rule of reason to be the 'defendant always wins' non-standard sanctioned by the Chicago School."); Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 685 (1991) ("The rule of reason and per se approaches have been so divergent that a court's choice of one analysis over the other will usually determine the outcome of an antitrust case. Traditionally, the rule of reason has meant a decision for the defendant and the per se rule a victory for the plaintiff."); Deborah A. Widiss, *Uneasy Labeling*, 107 Yale L.J. 1529, 1529 (1998) ("In theory, rule-of-reason analysis requires a careful examination of the competitive impact of a specific agreement; in practice, however, the challenged agreement is rarely struck down."); Joe Sims, *Developments in Agreements Among Competitors*, 58 Antitrust L.J. 433, 435 (1989) ("If it was per se illegal the plaintiffs won; if it was rule of reason the defendants won; and all you had to do was put it in the right box. For those who like bright-line rules, this was perfect."); Albert A. Foer, *The Political-Economic Nature of Antitrust*, 27 St. Louis U. L.J. 331, 337-38 (1983) ("With only slight exaggeration, there is really only one thing one needs to know about the rule of reason: when the rule is applied, the defendant virtually always wins."); see also, Discon, Inc. v. Nynex Corp., 93 F.3d 1055, 1059

later years Frank Easterbrook offered that adjudication under the rule of reason meant "as a practical matter meant that [the challenged practices] were declared lawful per se."[57] This may have been a bit of an overstatement, since, focusing even on just the Supreme Court precedents, defendants have lost some significant rule of reason cases.[58] Still, the assessment that rule of reason often came close to a rule of per se legality was not far off the mark, especially in cases involving vertical restraints.[59]

In recent years, even as the per se rule has moved toward a more flexible balancing approach, the rule of reason seems to have become reinvigorated. Important cases like *Visa*[60] have found business practices to be in violation of the rule of reason, resulting in billions of dollars of payments to consumers and sometimes radical restructuring of industry practices. Some lesser known decisions have also held that particular business practices failed the rule of reason.[61] At the same time, the venerable *Colgate* rule categorically privileging firms to announce in advance the criteria they will use to choose upstream or downstream business partners appears to be gradually dissolving into a more flexible middle ground between per se legality and per se illegality. Judicial decisions have found ways to narrow the *Colgate* "right" without casting the conduct into the opposite pole of per se illegality.[62]

(2d. Cir. 1996), *decision vacated* Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998 ("[T]he initial categorization is often outcome determinative.").

[57] Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 Geo. L.J. 305, 305 (1987).

[58] United States v. Terminal Railroad Assn. of St. Louis, 224 U.S. 383 (1912); Associated Press v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992).

[59] *See* Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L. J. 67, 71 (1992) (reporting that defendants have won over 90% of rule of reason decisions in vertical nonprice cases since *Sylvania*)

[60] U.S. v. Visa U.S.A., Inc., 344 F.3d 229 (2d Cir. 2003). In the settlement to the private lawsuits following the Justice Department action, Visa settled for $2 billion and Mastercard for $1 billion. *See Lawyers Seek $609 Million Fee for Negotiating Deal for Retailers with Visa and Mastercard,* N.Y. Times, Aug. 19, 2003, at C4.

[61] *See* Telecor Com'n, Inc. v. Southwestern Bell Tel. Co.,305 F.3d 1124 (10th Cir. 2002); Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000); Law v. Nat. Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998); Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533 (10th Cir. 1996).

[62] *See*, *e.g.*, Care Heating & Cooling, Inc. v. American Standard, Inc., 427 F.3d 1008, 1013 (6th Cir. 2005) (holding that manufacturer's refusal to do business with service provider was "*per se* legal, because a 'manufacturer has a right to select its customers and refuse to sell its goods to anyone, for reasons sufficient to itself,' " but then holding that the service provider "is required to establish the

In sum, the law of collaborative restraints of trade is collapsing from both of its poles—per se legality and per se illegality—into a broad middle ground where nothing is prejudged and everything is negotiable in litigation.

B. Exclusion

It is more difficult to tell a strong "before and after" rules versus standards story with respect to exclusionary practices than it is with respect to the law of voluntary restraints. Monopolization law has always been more flexible and fact-sensitive. This is partly because Section 1 of the Sherman Act gives a clear target for adjudication—a "contract, combination, or conspiracy" that, juridically, must be the subject of the court's inquiry. Section 2, by contrast, contains no clear target since all of a firm's amorphous conduct may be relevant to answering the question whether it unlawfully monopolized. A strenuous debate is presently stirring in antitrust circles about how to conceptualize the monopolization offense.[63] After over a century of Sherman Act development, we still are not clear on the organizing principles of exclusionary practices law.

Yet it is not difficult to locate a variety of actual or potential rules, both imposing liability and immunizing against it, in the arena of exclusionary practices. Examples include: (1) no above-cost price can be called predatory;[64] (2) pricing below cost is conclusively presumed predatory;[65] (3) patents are presumed to confer market power and requiring customers to purchase a separate item if they want to purchase the patented item amounts to per se illegal tying;[66] (4) no firm with a market share of less than 50%

unreasonableness of the alleged trade restraint"); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 939-40 (7th Cir. 2000) (holding that Toys "R" Us did not have a *Colgate* right to encourage its suppliers not to sell certain toys to "club" retailers and affirming the evaluation of such restraints under the Rule of Reason).

[63] *See* Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 56 Emory L. J. xxx (2006); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 Geo. L.J. 1623 (2005); Herbert Hovenkamp, *Exclusion and the Sherman Act,* 72 U. Chi. L. Rev. 147 (2005); Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 272 (2003).

[64] Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[65] Northeastern Telephone Co. v. AT&T, 651 F.2d 76 (2d Cir. 1981); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 716-18 (1975).

[66] Independent Ink, Inc. v. Illinois Tool Works, Inc., 396 F.3d 1342 (2005).

can be said to be a monopolist;[67] (5) even a dominant firm has no obligation to cooperate with its competitor;[68] (6) exclusive dealing is per se legal if more than 80% of the market remains open to competitors;[69] (7) exclusive dealing cannot be illegal if the non-dominant party is free to terminate the contract on short notice;[70] (8) a firm does not have market power in an after market if it lacks market power in the primary market;[71] (9) bundled discounts are not unlawful unless an equally efficient competitor making only one product covered by the discount would have to price below its cost in order to compete;[72] and (10) a firm can never be liable for monopolization based on the mere fact that it has designed its products in a way that harms competitors.[73]

For its part, the Supreme Court has not yet given a strong indication of any general predilection for rules or standards with respect to exclusionary practices. In *Kodak*, Justice Blackmun's majority opinion made a nod toward standards: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record.'"[74] As discussed below, a number of lower court judges have taken this admonition as a general preference for post-hoc determinations in exclusionary conduct cases.[75] But it is not clear that a consistent majority of the Supreme Court's

[67] *Compare United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (opining that "it is doubtful whether sixty or sixty-four percent [market share] would be enough" to constitute a monopoly); *and Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) (observing that a 50% market share is a "prerequisite for a finding of monopoly"); *with Broadway Delivery Corp. v. United Parcel Service*, 651 F.2d 122, 127-29 (2d Cir. 1981) (holding that a 50% market share is not a prerequisite for being a monopolist).

[68] *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985).

[69] ANTITRUST LAW, 1 ANTITRUST LAW DEVELOPMENTS 222 (5th ed. 2002) (surveying cases and reporting that there thus exists a "virtual safe harbor . . . for market foreclosure of 20 percent or less").

[70] United States v. Dentsply Intern., Inc., 399 F.3d 181, 186 (3d Cir. 2005).

[71] Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992).

[72] Ortho Diagnostic Sys. Inc. v. Abbott Labs., Inc., 920 F. Supp. 455 (S.D.N.Y. 1996).

[73] C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1369-72 (Fed. Cir. 1998) (Newman, J., concurring in part and dissenting in part) (arguing for per se immunity from antitrust liability for product design of patented goods).

[74] Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 466-67 (1992).

[75] *See* infra text accompanying notes xxx-xxx.

justices in the past two decades would prefer to shun rules in exclusionary conduct cases. In two of its most recent decisions, the Court has seemingly applied rules corresponding to examples (1) and (5) above.[76] On the other hand, it rejected rule (8) in favor of a more fact-specific approach.[77] Example (3) was once the rule but the Court recently heard argument on the issue and appears open to reconsidering it.[78] The Court's most recent exclusionary practices decision, involving discriminatory manufacturer rebates to dealers selling to different customers, formulated its holding in a fairly rule-like way, although it left open the possibility that the rule might not apply in extraordinary cases.[79] But the Court has heard so few exclusionary conduct cases in the last few years that it is difficult to extrapolate a general direction.

On the other hand, there is a definite trend in the lower courts in favor of standards over rules. In many of the recent significant exclusionary practices cases, the lower courts have rejected categorical rules that would either have created or immunized against liability for exclusionary practices, even though there was often support for such rules in case law precedent or in the academic literature. In *Microsoft*,[80] the D.C. Circuit rejected the district court's per se approach to the tying of Windows and Internet Explorer and remanded for consideration under a full rule of reason approach, but also rejected Microsoft's argument that its product design decisions were "per se lawful." In *Dentsply*,[81] the Third Circuit rejected

[76] *See* Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985).

[77] Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992).

[78] *See* Transcript of Oral Argument in Illinois Tool Works Inc. v. Independent Ink, Inc., No. No. 04-1329 2005 WL 3370426, 74 USLW 3350 (Nov. 29, 2005).

[79] Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., ___ U.S. ___, 2006 WL 43971 (Jan. 10, 2006) (holding that manufacturer ordinarily may not be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer).

[80] U.S. v. Microsoft Corp., 253 F.3d 34, 89-95 (2001). *Microsoft* deviates from earlier Supreme Court decisions that had seemed to impose a rule of per se illegality where the defendant has market power in the tying market. *E.g*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969).

[81] U.S. v. Dentsply Intern., Inc., 399 F.3d 181, 193 (3d Cir. 2005). The possibility of a "rule" in this area is shown by cases like *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 395 (7th Cir. 1984), where the Seventh Circuit held

defendant's argument that an exclusive dealing arrangement could not be exclusionary if the customer could terminate it at will. In *Ticketmaster*,[82] the Ninth Circuit rejected plaintiff's argument that an exclusive dealing contract of six years of duration was "inherently unreasonable." In *LePage's*,[83] the Third Circuit held that bundled discounts are not subject to bright-line cost/revenue comparison tests applicable in predatory pricing cases, but must be evaluated based on whether they have exclusionary effects. In *Spirit*,[84] the Sixth Circuit held that even in single product predation cases a dominant firm does not have an absolute defense if it priced above its cost. In *Conwood*,[85] the Sixth Circuit held that the facts that output was expanding, new products were being introduced, and the plaintiff's market share increased during the period of the alleged monopolization did not categorically negate the possibility that the defendant was monopolizing. Framing the governing law as a rule would have been possible in all of these cases, but the courts declined in preference for a standard-based approach.

In these and a number of other recent exclusionary practices decisions, federal appellate courts have signaled that simple rules are insufficient to address the diverse and complex business practices governed by the antitrust laws addressed to exclusionary practices. Rhetorical slogans expressing the impossibility of rule-based monopolization law are being repeated in the leading cases, linking together disparate exclusionary practices cases to form a common standard-oriented jurisprudence. Courts have taken *Kodak* admonition against "legal presumptions based on formalistic distinctions"[86] as a mandate for adjudicatory flexibility and post hoc decision making.[87] The D.C. Circuit's proclamation that "[a]nticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have

that exclusive dealing contracts "terminable in less than a year are presumptively lawful."

[82] Ticketmaster Corp. v. Tickets.com Inc., 127 Fed.Appx. 346 (9th Cir. 2005).

[83] LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2002) (en banc).

[84] Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917, 951-52 (6th Cir. 2005).

[85] Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 788-91 (6th Cir. 2002).

[86] *See* supra at xxx.

[87] United States v. Dentsply Intern., Inc., 399 F.3d 181, 189 (3d Cir. 2005); Z-Tel Communications, Inc. v. SBC Communications, Inc., 331 F. Supp. 2d 513, 522 (E.D. Tex. 2004); Minnesota Mining and Mfg. Co. v. Appleton Papers, Inc., 35 F.Supp.2d 1138 (D. Minn. 1999); USAirways Group, Inc. v. British Airways PLC, 989 F.Supp. 482 (S.D.N.Y. 1997).

enumerated all the varieties"[88] is gaining popularity—and an aura of inevitability—through repetition.[89] The implication is that since it is impossible to catalogue anticompetitive practices ex ante, the liability determinants governing exclusionary practices can never be decided until a particular practice is examined in context in litigation. Another popular maxim, derived from the Supreme Court's *Continental Ore* decision, cautions courts to give plaintiffs "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[90] Courts sometimes employ the *Continental Ore* maxim to justify rejecting rule-based holdings in exclusionary practices cases, reasoning that no single rule can exonerate the defendant since the legality of each practice depends upon its interaction with other practices.[91] This approach lessens the possibility of a rule-bound approach to exclusionary practices cases by increasing the number of variables necessary to determine liability.

To be sure, courts still adjudicate some exclusionary practices cases based on rules. A prominent recent example includes the Department of Justice's losing predatory pricing lawsuit against American Airlines that was dismissed on summary judgment because the government could not demonstrate that American priced below its cost.[92] But the trend is clearly in the opposite direction. As with collaborative practices, the lower courts, largely unchecked by the Supreme Court, have been moving exclusionary practices cases into open-ended, fact-specific adjudication.

[88] Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C.Cir.1998).

[89] *See* Spirit, 431 F.3d at 951; LePage's, 324 F.3d at 152; Conwood, 290 F.3d at 784; Z-Tel Communications, Inc. v. SBC Communications, Inc., 331 F. Supp. 2d 513, 522 (E.D. Tex. 2004).

[90] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

[91] *See*, *e.g.*, Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1364 (3d Cir. 1992); SmithKline Beecham Corp. v. Apotex Corp., 383 F.Supp.2d 686, 699 (E.D. Pa. 2004); Z-Tel Communications, Inc. v. SBC Communications, Inc., 331 F.Supp.2d 513, 534 (E.D. Tex. 2004); *see also* HERBERT HOVENKAMP, II ANTITRUST LAW, § 310c, 147 (1996) ("In a monopolization case conduct must always be analyzed 'as a whole.' A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices. Each one viewed in isolation might be viewed as *de minimis* or an error in judgment, but the pattern gives increased plausibility to the claim.").

[92] U.S. v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).

II. THE POSSIBILITY OF (REAL) RULES

Before proceeding much further, it is worth pausing to consider the possibility that a world of antitrust rules would be illusory because, in practice, rules always fade into standards. Take H.L.A. Hart's observation that "[n]atural languages like English are . . . irreducibly open-textured" when specifying "general classifying terms,"[93] or Wittgenstein's point that the problem with rules is that they do not tell you when they should be applied.[94] Because language is irreducibly open-textured and indeterminate and because rules lack internal mechanisms to specify when they should be applied, even when the law is formally framed as a rule, it requires penumbral rules, canons of interpretation, and other secondary decisional criteria which end up swallowing the apparent simplicity of the rule.[95] Specifying the governing law as a simple, bright-line rule may merely conceal the fact that important balancing of social interests, weighing of probabilities, and choosing between competing ends and means lurk in the shadow of the rule. Declaring a legal rule thus appears misleading or even dishonest because it hides the social preferences that animate the decision-maker's conclusion.

Under one interpretation, antitrust law provides the perfect illustration for Hart and Wittgenstein's point. In this view, there never have been such things as case-determinative antitrust rules—only standards clad in rule-bound rhetoric. The current march toward standards, then, is not so much a change in liability determinants as a dissipation of the mystery surrounding antitrust's concealed methodology. In a moment, I will dispute this possibility and argue that the specification of antitrust law as rule or standard has very important practical consequences. But first, it is worth acknowledging the extent to which Hart and Wittgenstein's observation rings true in antitrust.

A case in point is antitrust law's long-standing per se prohibition against "price fixing." As any antitrust practitioner will recognize, price fixing appears in quotation marks because application of the per se rule depends not on the fact that competitors have literally fixed prices but that the challenged conduct falls within the antitrust category known as "price

[93] H.L. A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994)

[94] Ludwig Wittengenstein, PHILOSOPHICAL INVESTIGATIONS §§143-252 (G.E.M. Anscombe trans., 1953); *see* Scott Hershovitz, *Wittgenstein on Rules: The Phantom Menace*, 22 Oxford. J. Legal Stud. 619 (2002).

[95] Hart, *supra* n. xxx at 128; *see also* Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. Cal. L. Rev. 585, 599 (1994) (arguing that rules almost always become "impossibly cumbersome and complex").

fixing." The judicial decision often thought to have established the per se rule against price-fixing did not involve price fixing either literally or figuratively but rather a gentleman's agreement by dominant oil producers to buy up distressed oil from small refineries and thereby stabilize the wholesale market.[96] The defendants never came close to agreeing on price. Nonetheless, the Supreme Court held that any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" amounts to "price fixing" in the relevant legal sense, whether or not the defendants have actually done the act that a lay person might suppose "price fixing" to be—fixing a price.[97]

On the other hand, the Supreme Court has described an act of literal price fixing by horizontal competitors—an agreement on prices for blanket licensing of musical repertoires—as something other than "price fixing" and hence subject to the rule of reason.[98] In *BMI v. CBS*, the Supreme Court rejected textual "literalism" and held that application of the per se rule against price fixing is not as "simplistic" as "determining whether two or more potential competitors have literally 'fixed' a 'price.'" Rather, "[a]s generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable."[99] Application of the per se rule turns not on whether the conduct amounts literally to price fixing but on whether the "particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue.'"[100] This flex in the per se rule invites endless pages of briefing on whether the conduct at issue should be properly characterized as "price fixing" because it unjustifiably tampers with the market mechanism for determining prices or as something else because its can be justified by efficiencies, a very standardish way of doing law.[101] Hence, Hart's point that rules inevitably dissolve into standards and Wittgentsein's point that rules do not tell us when to apply them.

[96] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
[97] *Id.* at 223.
[98] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).
[99] *Id.* at 9.
[100] *Id.*
[101] *See* Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685 (1991); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization Antitrust Injury, and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221, 1257-62 (1989).

But although rules may not be as neatly confined as they sometimes give the appearance of being, it would be wrong to suppose that the specification of antitrust law as either rule or standard has no practical consequences. Indeed, it has many. First, when judicial decisions about certain forms of conduct takes on a rule-bound rhetorical form, it is not always possible to recharacterize the conduct to avoid application of the rule. For example, given the strong efficiencies of the challenged conduct, one might have recharacterized *Topco* as involving a vertical rather horizontal restraint and thereby avoided application of the per se rule.[102] However, it was sufficiently obvious that the exclusivity system was a horizontal territorial allocation agreement that even its uncontested efficiencies were insufficient to save the arrangement. Even in decisions since the Supreme Court's "recharacterization" cases such as *BMI* and *NCAA*,[103] conduct that paradigmatically fit the per se archetypes has not escaped per se condemnation. In *Superior Court Trial Lawyers*, the Court condemned as per se unlawful what amounted to a strike by criminal defense lawyers.[104] In *Palmer*, the court summarily reversed a court of appeals decision that a market division agreement between competing bar review courses should be analyzed under the rule of reason. So while the indeterminacy of language may render a rule-based approach porous in borderline cases, it does not preclude fairly mechanical application of rules in paradigmatic cases.

The specification of a liability determinant as either a rule or a standard may also critically affect the choice of who the ultimate legal decision-maker will be: jury, trial judge, or appellate court. In U.S. legal culture, deference by players higher in the judicial hierarchy to players lower in the hierarchy depends in part on how the governing liability norm is framed. Trial judges are more likely to enter case-dispositive rulings on motions to

[102] Defendants unsuccessfully attempted this in *U.S. v. Sealy, Inc.,* 388 U.S. 350, 87 S.Ct. 1847, 1850, 18 L.Ed.2d 1238 (1967), but the Court characterized the licensor-licensee relationship as horizontal because the licensees owned substantially all of the licensor's stock. *See also Abadir & Co. v. First Mississippi Corp.,* 651 F.2d 422, 426-27 (5th Cir. 1981) (holding that competitors are not allowed to turn an otherwise horizontal agreement into a vertical one by setting up a licensing corporation to impose market allocation agreements).

[103] NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

[104] Confusingly, the Court primarily analyzed the lawyers' strike as a horizontal boycott, even though the case did not fit the per se boycott category articulated in recent cases. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co. 472 U.S. 28 (1985) and FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

dismiss or for summary judgment, a directed verdict, or judgment notwithstanding the verdict if the governing law is framed as a rule than if it is a standard. Rule-oriented liability determinants allow the court to isolate a small number of dispositive facts in the record and hinge a dispositive order on the incontestability of those facts (or the absence of a proof on a critical fact): *i.e.*, the defendant did not price below average variable cost; the contract was terminable at will with ten days' notice; the defendant's market share was 30% indicating a lack of market power; the manufacturer and wholesaler agreed on a minimum resale price.

Trial judges may be more reluctant to enter case-dispositive rulings where the governing law is framed as a standard. Since liability or exculpation turns on multiple facts, which often must be weighed and balanced against one another, standard-based liability criteria are often said to create "issues of fact" that cannot be summarily decided on the sufficiency of the complaint or the undisputed facts in the record.[105] If the trial judge does enter a dispositive order (usually, an order granting summary judgment for the defendant) after applying a liability standard, the appellate court should in principle review the matter *de novo*. In practice, however, appellate judges often quietly defer to trial court judgments based on multiple criteria rather than reinvestigate a complex and burdensome record.[106] When liability determinants are framed as standards, trial judges

[105] For instance, the reasonableness or unreasonableness of a restraint of trade is said to be a question of fact. *See* California Dental Ass'n v. F.T.C., 224 F.3d 942, 958-59 (9th Cir. 2000); Winn Ave. Warehouse, Inc. v. Winchester Tobacco Warehouse Co., 341 F.2d 287 (6th Cir. 1965).

[106] In factually dense rule of reason cases, it is not unusual for the Circuit Court of Appeals to say something along the following lines, often in an unpublished opinion: "After carefully considering each of these issues in light of the voluminous summary judgment record before the district court, we affirm for the reasons stated in the district court's thorough Memorandum Opinion." Schueller v. Norman, 46 F.3d 1136 (8th Cir. 1995) (unpublished disposition). Of course, sometimes cases involving conduct subject to the per se rule also present factually dense summary judgment records and also invite appellate deference to the district court's summary judgment ruling. E.g., Hall v. American Airlines, Inc., 118 Fed.Appx. 680 (4th Cir. 2004). However, questions of antitrust policy in per se cases (as supposed to questions of commission—did or did not the defendants agree?, for example) are usually treated as crystallized question of law inviting truly de novo appellate review. *See* Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761 (8th Cir. 2004) (holding that district court's determination that agreement was per se illegal would be reviewed de novo and citing Areeda-Hovenkamp treatise for the proposition that although a court's determination that the *per se* rule applies "might involve many fact questions, the selection of a mode

often will take this as a signal that they should be sparing in entering dispositive orders, but when they do enter dispositive orders after canvassing a complex record, they will often receive deference in the court of appeals. If the appellate court does reverse, this usually means that ultimate decision-making is allocated to the jury. Rarely will the court of appeals reinvestigate the entire record under a standard-based decisional criterion and reverse the decision of the jury.[107]

So the specification of antitrust law as a rule or a standard does have practical importance in allocating decision-making. In general, the more that a body of law expresses itself in rules as opposed to standards, the more frequently that appellate courts will be the ultimate decision-makers. The more that a body of law expresses itself in standards as opposed to rules, the more frequently both trial judges and reviewing courts will insist that the matter must be committed to the discretion of the jury in a jury trial, the district court in a bench trial, or the agency or administrative law judge in an administrative proceeding.[108] Or, if the trial court does enter a dispositive ruling under a multi-factored decisional criterion, the appellate court will often defer to the dispositive rulings of the district court rather than reinvestigate the record. Hence, the practical effect of rules is to push ultimate decision-making up the legal hierarchy and the effect of standards is to push ultimate decision-making down the legal hierarchy.

A related point is that framing the governing liability determinant as a rule encourages trial courts to play a gate-keeping role to prevent weaker

[of analysis] is entirely a question of law.") (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1909b (1998)).

[107] One the rare cases where this occurred was *Brooke Group*, where the Supreme Court undertook sufficiency of the evidence review and reversed the jury's primary line price discrimination liability verdict. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). Although primary line price discrimination is subject to a below-cost rule, the Supreme Court did not decide the case based on that rule but on the implausibility of the claim that Brown & Williamson could have recouped its costs of predation, a decidedly more standard-like question.

[108] Technically, factual findings are never committed to the discretion of administrative law judges. The FTC may review factual findings of its ALJs *de novo* and courts of appeal review factual findings of the FTC under the usually deferential substantial evidence standard. Schering Plough Corp., Docket No. 9297, slip op. at 8 (F.T.C. Dec. 18, 2003);16 C.F.R. § 3.54(a); 15 U.S.C. § 45(c). However, where the FTC's factual findings differ from those of the ALJ, the court of appeals gives less deference to the agency's factual findings**,** *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062-63 (2005), which gives the Commission some incentive to avoid overruling its ALJs on questions of fact.

cases from reaching a jury. The Supreme Court's *Matsushita*[109] decision encourages such gate-keeping by trial courts in complex antitrust cases. In theory, *Matsushita* should create a gate-keeping culture in both antitrust cases governed by rules and those governed by standards, since trial courts are directed to inquire into the economic plausibility of the plaintiff's claims before allowing them to go to a jury.[110] In practice, however, courts have resisted using *Matsushita* to justify the grant of summary judgment or directed verdict in cases involving practices governed by the rule of reason or generalized monopolization standards.[111] They have been more apt to invoke their gate-keeping function in cases involving rules, whether prohibitory or exculpatory, such as the per se prohibition on price fixing[112] and the below-cost pricing rule for predatory pricing.[113] Some courts have explicitly distinguished between the use of the *Matsushita* "plausibility" screen in alleged conspiracy cases (bound by a per se rule) and tying cases like *Kodak*[114] where, although a per se rule nominally applies, economic analysis rather than a priori legal categories is generally dispositive.[115] Courts are more comfortable playing gatekeeper to the jury when a

[109] Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).
[110] *Id.* at xxx.
[111] *See*, e.g., Continental Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499 (4th Cir. 2002); Key Enterprises of Delaware, Inc. v. Venice Hosp., 979 F.2d 806 (11th Cir. 1992); Instructional Systems Development Corp. v. Aetna Cas. and Sur. Co., 817 F.2d 639 (10th Cir. 1987); *but see* Dreiling v. Peugeot Motors of America, Inc., 850 F.2d 1373 (10th Cir. 1988).
[112] *See*, *e.g.*, In re Flat Glass Antitrust Litigation, 385 F.3d 350 (3d Cir. 2004); InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144 (3d Cir. 2003); Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000); Merck-Medco Managed Care, LLC v. Rite Aid Corp., 201 F.3d 436 (4th Cir. 1999); *but see* Rossi v. Standard Roofing, Inc., 156 F.3d 452, 472-74 (3d Cir. 1998) (concluding that defendants' alleged behavior would be per se illegal as group boycott if proven and denying summary judgment after conducting "*Matsushita* implausibility" analysis).
[113] *See,* e.g.*,* Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191 (3d Cir. 1995); Stearns Airport Equipment Co., Inc. v. FMC Corp., 170 F.3d 518 (5th Cir. 1999); Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253 (5th Cir. 1988); U.S. v. AMR Corp., 140 F.Supp.2d 1141 (D. Kan. 2001), *aff'd*, 335 F.3d 1109 (10th Cir. 2003); C.B. Trucking, Inc. v. Waste Management, Inc., 944 F.Supp. 66 (D. Mass 1996); *but see* Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich, 63 F.3d 1540 (10th Cir. 1995).
[114] Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992).
[115] Merck-Medco Managed Care, LLC v. Rite Aid Corp., 201 F.3d 436 (4th Cir. 1999).

formalized rule rather than an amorphous standard supplies the liability determinant.

Finally, rules signal a greater importance for lawyers and standards signal a greater role for economists in antitrust adjudication. The rising influence of economists in the antitrust agencies coincided with, and probably influenced, the shift from rules to standards.[116] While economists have some importance in cases governed by rules (for example, to explain whether a price was below cost or a pattern of parallel prices supports an inference of collusion), their testimony is more likely to be curtailed or excluded when the governing liability criteria are articulated as rules than as standards. Rules are imperative—they can be "violated," "broken," "ignored," and "disregarded." Standards are subjunctive—they ask a question that can be answered in any number of ways. In a case governed by a rule, an economist who disagrees with some premise in the rule is liable to find his testimony rejected by the court.[117] In a case governed by a standard, the gate keeping function of the court will generally be limited to ensuring the scientific reliability of the economist's presentation.[118] It is hard to reject an economist's testimony for being contrary to a standard when the standard is framed in terms like "reasonableness" and "exclusionary."

The choice between rules and standards matters in antitrust. As an expression of legal culture, articulation of antitrust law as rule prejudges many outcomes, pushes ultimate decision-making up the legal hierarchy, encourages judges to play a stronger gate-keeping role, and widens the scope of allowable economic testimony and other evidence. Even if it turns out that the "rules" governing these practices are as indeterminate and malleable as Hart and Wittgenstein's comments on language would suggest, antitrust judges perform their legal-cultural roles differently when the

[116] *See* Marc Allen Eisner & Kenneth J. Meier, *Presidential Control Versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 Am. J. Pol. Sci. 269, 282-84 (1990) (arguing that the changing antitrust policy of the Department of Justice in the 1980s was caused by the hiring of more economists in the Antitrust Division).

[117] Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1322 (11th Cir. 2003) (affirming exclusion of testimony of economist who failed to "differentiate between lawful, conscious parallelism and collusive price fixing"); Information Resources, Inc. v. The Dun & Bradstreet Corp., 359 F.Supp.2d 307 (S.D.N.Y. 2004) (excluding economist's testimony to the extent he could not show that defendant's prices were below variable cost).

[118] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

liability determinant is framed as a rule than when it is framed as a standard.

III. EFFICIENCY REASONS FOR CHOOSING RULES OR STANDARDS

So far we have seen that antitrust is moving in the direction of flexible, post hoc standards and that this has significant consequences for antitrust adjudication. Is this movement desirable? The answer depends in part on what normative goals one uses to measure the success of competition policy. If efficiency is the goal, as generally assumed today,[119] the movement toward standards is not unambiguously positive. The effects of such a transition are felt both within litigation in terms of the costs and accuracy of adjudication and within the realm of market behavior because of the varying incentive effects of rules and standards. This section considers the different ways in which the choice between antitrust rules and standards affects the efficiency outcomes of the antitrust enterprise and concludes with some decisional principles to guide the choice.[120]

A. Costs of Promulgating and Administering the Legal Command

Louis Kaplow has formulated an economic model in which the choice between rules and standards turns on the costs of promulgating and administering the law and the incentive effects caused by the choice between the two.[121] Kaplow observes that when a legal command will be applied frequently, costs are minimized by framing the command as a rule since there are economies of scale to figuring out the optimal content of law ex ante.[122] Conversely, when the legal command will be applied infrequently, it may be less costly to wait and see whether a particular circumstance actually arises before deciding on the content of the legal command.[123] The costs of the rules versus standards choice is also affected by the degree to which individuals subject to the command acquire legal advice ex ante. In general, it is less costly for individuals to acquire knowledge about rules and therefore more likely that they will and the

[119] *See infra* text accompanying notes xxx-xxx.
[120] *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984) (distinguishing between "decision rules" that govern governmental decision-making and "conduct rules" that govern the conduct of regulated actors).
[121] Kaplow, *supra* n. xxx.
[122] *Id.* at 577.
[123] *Id.*

acquisition of the knowledge about rules makes it more likely that individuals will conform their behavior to the law.[124]

Antitrust law applies to a finite number of archetypes of industrial behavior: vertical resale price maintenance; tying; merger; refusal to deal; below-cost pricing; exclusive dealing; joint venture; territorial allocation; patent pooling; and perhaps twenty or thirty more. Business transactions occur within each of these categories with high frequency. The financial stakes from running afoul of the law—felony convictions, treble damages, attorneys fees, stock price declines—are high compared to the (also not inexpensive) cost of legal advice. Following Kaplow's model, there are economies of scale to be achieved by ex ante promulgation of the relevant legal command as to these behavioral archetypes and a high likelihood that the subjects of the legal command will acquire knowledge about the legal command.

One objection to antitrust rules governing industrial archetypes is that they could not possibly cover every category of potentially anticompetitive conduct. Hence, the D.C. Circuit's previously mentioned admonition that "[a]nticompetitive 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"[125] This maxim makes sense when understood as an admonition against attempting to catalogue in advance every possible permutation of antitrust conduct and specifying its liability determinants—that would be excessively costly as to infrequently practiced forms of anticompetitive behavior. But the maxim does not make sense as applied to archetypal industrial behavior that is frequently the subject of antitrust litigation. In its recent *Spirit* decision, the Sixth Circuit invoked the *Caribbean Broadcasting* maxim to explain why Northwest Airlines could be liable for lowering its price on its Detroit-Philadelphia and Detroit-Boston flights.[126] According to the court, even if the lowering of the prices did not amount to predatory pricing, that fact should not be dispositive on liability since anticompetitive conduct can take forms other than predatory pricing. But the alleged conduct at issue was archetypal predation—lowering price to drive out a rival—which has been the subject of hundreds of predation cases which have yielded well-known predatory pricing liability rules. It is no reason to avoid framing or applying liability rules as

[124] *Id.* at 577.
[125] Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C.Cir.1998).
[126] *See* Spirit, 431 F.3d at 951.

to paradigmatic and frequent occurrences that it would be too costly to frame rules for non-paradigmatic and infrequent occurrences.[127]

There are difficulties in applying this cost-based preference for rules in paradigmatic cases. Easterbrook rightly complains that the standard-based approach to antitrust creates high litigation costs,[128] but also does not want to return to the per se rule, which he finds excessively interventionist.[129] Rather, Easterbrook proposes a series of strong, but not quite rule-like, presumptions, such as the use of a market-power screen and a requirement that plaintiff "demonstrate that the defendant's practices are capable of enriching the defendant by harming consumers."[130] These presumptions, however, can be every bit as vague as the rule of reason. How does one know whether a firm has market power without defining a relevant market?[131] How does one know whether the defendant's practices are capable of enriching defendant by harming consumers without analyzing the actual effects of the conduct on prices and output levels?

So here lies a dilemma. Per se rules of illegality are often vastly overbroad but an open-ended rule of reason approach would create excessive litigation costs and uncertainty. Clear rules are necessary to provide optimal incentives to engage in beneficial competitive behavior and

[127] The Sixth Circuit seemed to believe that Northwest's conduct was distinguishable from ordinary predation because Northwest had not only lowered its price but added capacity to absorb demand diverted from Spirit. 431 F.3d at 951. That distinction makes no sense. Every predator will have to expand its capacity to absorb the business diverted from the prey and every predator facing a downward sloping demand curve will have to further expand its output to absorb new demand occasioned by the lower price. Lowering price and adding capacity go hand in hand in virtually every predation case.

[128] Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12-13 (1984) "When everything is relevant, nothing is dispositive . . . . Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the rule of reason.").

[129] *Id.* at 10.

[130] *Id.* at 17-18.

[131] Easterbrook is confident that the market definition question can often be answered without resort to a full market definition inquiry, which he rightly identifies as a "fool's errand." *Id.* at 22. He believes that it is possible to "ascertain power directly" by using "either evidence of inability to raise price or evidence of price covariance between the defendant's goods and the products of rivals." *Id.* Easterbrook is right a court may be able to rule out the possibility that the defendant has market power without reaching a definitive conclusion as to what is the relevant market in some platonic sense, but the tools he describes to conduct the inquiry are the same sorts of fact-intensive, economically complex tools ordinarily used in market definition inquiries.

reduce litigation costs but relatively few forms of industrial behavior should be negatively sanctioned without a careful inquiry into their motivation and market effects. As in most "rules versus standards" discussions, the debate quickly reaches a stalemate.

The solution, though imperfect, is to use bright-line rules as immunizing devices for broad swaths of industrial behavior while preserving a role for standards in determining liability for conduct falling outside of the safe harbors created by the rules. For many categories of conduct, such an approach minimizes the cost of configuring the law because the rule itself supplies a conclusive answer of no liability or presents a safe harbor that defendants can elect in order to minimize the likelihood of litigation. For example, specifying that a firm cannot be held liable for tying unless it has at least a 50% market share in the tying market would provide a case-dispositive safe harbor that could reduce litigation costs substantially in a large number of tying cases, even though such costs would remain in cases where the defendant's market share exceeded 50%. While it would also save costs to specify prohibitory rules for cases falling outside the safe harbor (such as making tying per se unlawful if the defendant's tying product market share exceeds 50%), the generalization of such a rule would be vastly overbroad. Bright-line rules are most appropriate in antitrust when used as immunizing devices. Relatively few categories of conduct are unambiguously harmful and can be prohibited in equally categorical terms.

Even as to the 50% market share immunizing rule, there remains the question whether such a rule would be penny wise but pound foolish by saving litigation costs while licensing firms to engage in socially costly tying behavior. I consider that overinclusion question next.

B. Underinclusion, Overinclusion, Adjudicative Error, and Incentive Effects

There is an oddity in the timing of antitrust law's progression from rules to standards. This transition has taken place during the same time frame as antitrust law has settled on allocative efficiency as its primary, if not sole, objective. In the currently dominant paradigm, antitrust law is supposed to deter firms from engaging in collusive or exclusionary conduct resulting in deadweight losses attendant to the output reductions that result from price increases.[132] Antitrust today is primarily concerned with

[132] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ¶ 1.3b at 19-20 (2d ed. 1999).

incentive effects and not with compensation or distributive justice.[133] But, if that is true, the case for open-ended standards and post hoc adjudication seems prima facie weak. One strong advantage of rules over standards is predictability, which matters most when one is trying to incentivize appropriate behavior.

This last statement is subject to a caveat. Predictability may be disadvantageous if the lawmaker is trying to limit behavior of dubious, but uncertain, social value. Take sexual harassment. A legal rule specifying every form of prohibited behavior would have the disadvantage of providing a roadmap for boors to avoid liability while continuing to be boors. One could respond by adding further boorish behavior to the list of prohibitions, but sooner or later the rule-makers would begin to sense that adding further categories to the list would be overly cumbersome and dilute the seriousness of more offensive categories of behavior already on the list. By instead framing the liability determinant vaguely,[134] the EEOC has discouraged a wide range of behavior that has low social value but might not be prohibited if all forms of misbehavior were catalogued in advance. So uncertainty about the legal determinant can have healthy deterrent effects.

Antitrust is not that way. It regulates business behavior that generally has high social value but is somewhat "tipsy"—at a certain point, the conduct tips suddenly from beneficial to harmful. For example: lowering prices is highly socially valuable until suddenly they are so low that competitors are driven out of the market leading to long-term price increases;[135] product innovation is highly socially valuable until the new design abruptly shuts out competitors from an after-market;[136] cross-

[133] On the trade-offs between total social welfare (i.e., efficiency) and consumer welfare, *see* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 Geo. Wash. L. Rev. 1, 1, 4-5 (1982); Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. Rev. 1020, 1032-33 (1987). On the predominance of total welfare concerns in antitrust today, *see* RICHARD A. POSNER, ANTITRUST LAW 9-32 (2d ed. 2001). For a contrary view, *see* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hastings L.J. 65, 68-69 (1982).

[134] "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that create "an intimidating, hostile, or offensive working environment." 29 CFR § 1604.11(a).

[135] *See* Crane, *The Paradox of Predatory Pricing*, *supra* n. xxx.

[136] *See* Joseph Gregory Sidak, *Debunking Predatory Innovation*, 83 Colum. L. Rev. 1121, 1142 (1983); Kara E. Harchuck, *Microsoft IV: The Dangers to Innovation*

licensing patented technology lowers production costs and improves quality until it becomes a mechanism for price-fixing;[137] and information exchange between competitors lowers search costs and helps firms rationalize production decisions until it tips over and facilitates cartelization.[138] Antitrust is not a field in which unpredictability of litigation outcomes is beneficial because chilling broad categories of low-value behavior is desirable. Most of the conduct adjacent to the harmful conduct is valuable.

Predictability in antitrust is thus important, but it is not a sufficient reason to justify rules even for a system concerned primarily with incentive effects. If the rules cannot be framed to correspond closely to socially optimal behavioral criteria, then the rules will provide predictability but not the right incentives. Broad rules often fail to capture socially optimal outcomes. The 55 mile-per-hour speed limit slows down some drivers who would be perfectly safe at 70 and speeds up some drivers who are dangerous at any speed over 40. Rules tend toward over-and under-inclusion, which dulls the advantage of their predictability. The "rules versus standards" debate thus descends into the following kind of stalemate: Rules, more than standards, provide ex ante notice of the law's command and therefore enable the law's subjects to conform their behavior to its dictates.[139] This is widely thought to be a virtue of rules, particularly if one is concerned about due process values or deterring undesirable behavior.[140]

Posed by the Irresponsible Application of a Rule of Reason Analysis to Product Design Claims, 97 Nw. U. L. Rev. 395 (2002).

[137] *See* Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, in 1 Innovation Policy and the Economy 119 (Adam B. Jaffe et al. eds., 2001).

[138] *See* United States v. Container Corp. of Am., 393 U.S. 333 (1969) (holding that an informal arrangement among corrugated container manufacturers to share bid information on specific customer contracts was sufficient to find an unlawful restraint of trade); Am. Column & Lumber Co. v. United States, 257 U.S. 377, 411-12 (1921) (affirming the district court's finding that a manufacturers' association information-sharing plan was an unlawful restraint of trade that contributed to a significant decrease in production and increase in prices).

[139] *See* Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of §2-207*, 68 Va. L. Rev. 1217 (1982).

[140] Due process is particularly important when the sanction for violation is criminal punishment including lengthy incarceration. It is thus not surprising that the current enforcement practice of the federal government is not to criminally prosecute any behavior other than hard-core cartels, which are subject to a sharply delineated per se rule. *See* Department of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, available at http://www.usdoj.gov/atr/public/guidelines/211578.htm (visited 1/21/06).

But standards are more likely than rules to locate the precise dividing line between desirable and undesirable behavior. Rules are more likely than standards to be overinclusive or underinclusive. Finally, promulgation of law as a standard is more likely than promulgation of law as a rule to result in adjudicatory error, since there are more variables to consider and the relationship between the variables is exponentially more complex.

Let us examine these proposition more closely with a careful eye on the peculiarities of antitrust law. If antitrust law is framed in a rule-like way, it is more likely that firms will be able to avoid some of the inefficient and consumer-harming behavior with which antitrust law is concerned because they will have clearer advance guidance. But because the rules will necessarily be over- and under-inclusive,[141] rent-seeking firms will find the loopholes and zones of underinclusion and exploit them to cause inefficiencies and harm to consumers. At the same time, some "innocent" firms will either be penalized for engaging in conduct that is efficient and does not harm consumers or will simply forgo that conduct, finding less efficient and consumer-friendly ways of doing business. At this level of generality, the argument between rules and standards still reaches a draw.

The impasse can be broken by considering the remedial features of antitrust law. In a civil case, a prevailing plaintiff is entitled to recover automatically trebled damages.[142] To the extent that the antitrust violation was difficult to detect, this multiplier may simply ensure that antitrust violations do not have a positive expected value.[143] But apart from hard-core price fixing or bid rigging cartels and similar conspiracies, the conduct giving rise to many antitrust violations is not difficult to detect since many violations arise from publicly perspicuous business practices.[144] While it

[141] *See*, *e.g.*, Jules Coleman, *Rules and Social Facts*, 14 Harv. J. L. & Pub. Pol'y 703, 710 (1991) (arguing that "rules are necessarily under- and over-inclusive with respect to the sets of reasons that support or ground them"); Schauer, *supra* n. xxx at 31-34 (describing rules as "entrenched generalizations likely to be under- and over-inclusive in particular cases).

[142] 15 U.S.C. § 15.

[143] *See generally* Gary Becker*, Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

[144] For example, the Visa and Mastercard bylaw requiring issuer banks not to issue other credit cards had been in place for years, and approved by an earlier court of appeals decision, before the Second Circuit disapproved it under the rule of reason in the Department of Justice action. SCFC ILC, Inc. v. VISA U.S.A., Inc. (Mountainwest), 36 F.3d 958 (10th Cir. 1994). With thousands of participating banks, it is inconceivable that the bylaw could have remained a secret. *See also* Crane, *The Paradox of Predatory Pricing*, *supra* n. xxx at xxx (discussing how

may be difficult for the court to determine whether to find the conduct a violation, such adjudicatory uncertainty is just as likely to result in a false positive as a false negative, so the ex ante incentive effects are a wash.[145]

Even where there is only a one in three chance that the conduct will be detected, other costs of an adverse judgment deter the antitrust violation. Prevailing plaintiffs are entitled to recover their attorneys fees from the defendant, but the defendant does not have a reciprocal right.[146] This unilateral fee shifting comes on top of the costs that the defendant incurs to defend the suit, including not only hiring attorneys and economists but the time and effort of its executives called upon to aid in the defense of the case, produce documents, and testify in deposition or at trial. And then there are reputational effects from an adverse judgment. The filing of an antitrust lawsuit may cause a decline in the defendant's stock price exceeding the net present value of the expected damages judgment and costs of defense (since shareholders may take the lawsuit as a signal of careless or incompetent managers).[147] The intra-firm reputations, status, and compensation of individual managers may be at risk, causing them to be particularly careful to avoid actions that would bring about an adverse judgment to the firm.[148]

Antitrust law is thus powerfully structured to deter violations. Now consider the implications for underinclusion and overinclusion. Say that there is a dividing line *x* that represents the exact point of demarcation between conduct that is socially desirable and undesirable. The function of a standard is to locate *x* as closely as possible. Ex ante, the subject of the standard—let us call her *A*—does not know exactly where *x* will fall, but makes her own estimate. Having located her own estimate at *y*, she will only approach *y* to the point that the gains from her approach exceed the probability that she will unknowingly have crossed *x*, multiplied by the costs of having crossed *x*. Since the costs of crossing *x* are large, *A* will

predatory pricing relies on reputation effects to be successful, and therefore is unlikely to be undetected).

[145] Except to the extent that the relevant subjects of the law are risk averse, in which case the difficulty in predicting how a court will decide will prevent some firms from engaging in the conduct.

[146] 15 U.S.C. § 15.

[147] Werner F.M. De Bondt & Richard H. Thaler, *Further Evidence on Investor Overreaction and Stock Market Seasonality*, 42 J. Fin. 557, 557-58, 577-79 (1987); Werner F.M. De Bondt & Richard H. Thaler, *Does the Stock Market Overreact?*, 40 J. Fin. 793, 799 (1985).

[148] *See* MICHAEL C. JENSEN, A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS, AND ORGANIZATIONAL FORMS 144-45 (2000).

keep a safe distance from *y*. If *A's* information about the location of *x* was relatively accurate, *A* will have forgone some socially desirable behavior to avoid coming close to *x*.

Framing the law as a rule gives *A* a better indication of how she is entitled to behave. It does not completely solve the problem, because there is some residual uncertainty about how the rule will be enforced and some risk of adjudicatory error. Let us assume that adjudicatory error is equally likely to be type one (false negative) as type two (false positive). The cost of a type two error (treble damages, attorneys fees, reputation effects) are usually going to be greater to *A* than the benefits of a type one error (monopoly profits).[149] So *A* will still back away somewhat from the dividing line specified by the rule.

Because it must be formulated *ex ante*, without knowledge of all of the facts, and for a class of conduct rather than a particular case, the rule will tend to be overinclusive, underinclusive, or both. But, because of the remedial structure of antitrust law, underinclusion may cost less than underinclusion would in other circumstances. The uncertainty about application and the risk of adjudicatory error, multiplied by the heavy cost of an adverse judgment, will cause *A* to keep away from the line established by an underinclusive rule. Suppose again that *x* marks the exact dividing line between socially desirable and undesirable behavior. If the rule is framed to create liability at $x + 1$, subjects of the rule, deterred by expected costs that exceed expected gains from approaching the line and risk aversion, may come no closer than *x*. Hence, the judge or legislator framing antitrust as a rule can afford to be deliberately underinclusive without creating suboptimal deterrence.

One could argue that it is also possible to be underinclusive when framing standards. In order to create optimal incentives given the remedial structure of antitrust law, the courts could signal loudly that they will be underinclusive when applying standards after the fact.[150] But that is still a much less certain way to affect incentives than announcing an underinclusive rule. Another solution is to raise the quantum of evidence necessary to find a violation (such as requiring clear and convincing

[149] *See* Crane, *The Paradox of Predatory Pricing*, *supra* n. xxx at xxx.

[150] The Supreme Court has done this with predatory pricing law, announcing that it views predation claims with suspicion and that they are presumptively unlikely to succeed. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

evidence),[151] but this will usually be a less successful strategy than announcing underinclusive rules since the margin of error in predicting outcomes will be larger. The ex post nature of the liability determination that comes with standards weakens the ex ante incentive effects of trying to announce the standards in an underinclusive way.

Things are somewhat different when it comes to public enforcement. Criminal enforcement of the Sherman Act must occur in the realm of rules, as it in fact does.[152] The threat of criminal penalties coupled with unpredictable standards and risk aversion would create excessive deterrence and due process values would be violated by announcing criminal punishment for crimes that were determined after the fact based on complex economic analysis. On the other hand, standards look more attractive than rules when the government is suing for injunctive relief directed at future conduct.[153] The risk of overdeterring socially beneficial conduct becomes much smaller and value of avoiding over- or under-inclusion increases since the legal command will be applied to the future behavior of a specific person whose unique circumstances are known.[154] The purpose of antitrust law is no longer to create optimal incentives but rather to engage in command-and-control directives with respect to future behavior. Further, in injunctive actions by the government the party ultimately deciding the facts is likely to be either an administrative law judge or a federal district judge, which reduces the probability of adjudicatory error endemic when juries apply complex balancing tests. Thus, given the remedial structure of U.S. antitrust laws, there is a strong case to be made for liability rules for private adjudication and liability standards for public adjudication where prospective relief is sought.[155]

[151] *See* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 Geo. L.J. xxx (2006).

[152] *See supra* n. xxx.

[153] In principle, the same is true when a private plaintiff sues only for injunctive relief, although (with the occasional ex ante private challenge to a merger) that is a very rare occurrence in antitrust.

[154] *See* Kaplow, *supra* n. xxx at 606 (noting that "if extremely harmful activities are to be permanently enjoined . . . it is valuable to invest resources to make accurate determinations in adjudication even if the enhanced accuracy toes not affect ex ante behavior").

[155] Private plaintiffs might try to take advantage of collateral estoppel principles to claim that a judgment in favor of the government conclusively determines the defendant's liability in a subsequent private action for treble damages, thus reviving the overdeterrence concerns. *See*, *e.g.*, In re Microsoft Antitrust Litigation, 355 F.3d 322 (4th Cir. 2004) (holding that certain factual findings made by the district court in Department of Justice Microsoft litigation were binding on

C. Choice of Ultimate Decision-Maker

In Kaplow's model, the content of law is generally assumed to be the same whether the decision is made ex post (as a rule) or ex ante (as a standard).[156] In antitrust, however, the denomination of law as rule or standard may affect the allocation of ultimate decision-making authority and, hence, the content of the law. As discussed in Section II, the effect of announcing the law as a standard is generally to push ultimate decision-making in individual cases down the legal hierarchy—in the direction of the trial court, administrative law judge, or the jury—and the effect of announcing the law as a standard is generally to push ultimate decision-making up the legal hierarchy—in the direction of the court of appeals.[157] If the institutional actors lower in the legal hierarchy tend to have different levels of competence or systemic biases than those in the upper levels, the choice of legal form may affect the formulation and application of law.

There is no reason to believe that court of appeals and district courts generally have different systemic biases, except in the limited sense that court of appeals judges may be screened more rigorously during their Senate confirmations and therefore tend slightly more toward the political

Microsoft in subsequent private actions for damages). However, this can be addressed doctrinally by providing that only findings of fact made in the governmental litigation would be binding on the defendant in the subsequent private case, since the law applied in the two cases would be different.

[156] Kaplow, *supra* n. xxx at 570. Kaplow recognizes that this assumption is not always realistic. *Id.*

[157] Congress may also specify the content of antirust law through legislation. Putting aside the treble damages remedy, which is decisively rule-like (as compared to open-ended punitive damages standards), most of the important concepts in the federal antitrust concepts are articulated as open-ended standards. The choice between adjudicatory standards is thus delegated to the courts through the medium of common law development. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 36- 46 (1985) (describing antitrust statutes as delegating to courts power to develop common law of antitrust); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1705 (1986) (same) Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983) (same). This is not inevitable. The Antitrust Modernization Commission is presently studying a vast array of substantive and procedural antitrust questions and could recommend to Congress the adoption of legislation creating legislative rules or various matters. *See* Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856. The Commission's website is http://www.amc.gov.

center than district court judges.[158] There may be a wider competence gap, however, particularly on complex questions of industrial policy. Court of appeals judges are somewhat more likely than district judges to be drawn from academia or policy-oriented political posts, whereas district judges are more likely to have gained their seat through service as a prosecutor, public defender, or litigator in a law firm.[159] To the extent that formulation of law as rule tends to push ultimate decision-making up the legal hierarchy toward appellate judges, the formulation of complex industrial policy as rule may be desirable, although the effect may be small.

The effect is considerably larger when it comes to the allocation of responsibilities to jurors. First, there is some evidence that juries tend to be predisposed against dominant firms, particularly when the dominant firm has taken harsh (although not necessarily anticompetitive) action against a smaller rival.[160] Judicial opinions often warn against the dangers of relying on "bad intent" evidence consisting of violent metaphors culled from internal business memoranda precisely because this is the sort of evidence that jurors tend to focus on in otherwise dull antitrust cases that they don't understand.[161]

Further, even if jurors have no systemic biases, they are less competent on average than judges to decide complex matters of microeconomics,

[158] Appellate court nominations are more likely than district court nominations to be politically contentious. Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 Judicature 282, 302 (2003). One result of the increasing politicization of the judicial nomination process has been to produce a politically centrist circuit court judges. Richard A. Posner, *The Supreme Court 2004 Forward: A Political Court*, 119 Harv. L. Rev. 31, 71 (2004).

[159] *See generally* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997). Of course, both trial judges and court of appeals judges tend often acquire their posts through political patronage, but patronage is often dispensed along the lines discussed.

[160] *See* Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. xxx, xxx (2005); Arthur Austin, *The Jury System at Risk from Complexity, the New Media and Deviancy*, 73 Denv. U. L. Rev. 51, 52-59 (1995); *but see* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000) (questioning claim that juries tend to be biased against big businesses).

[161] Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1199 (3d Cir. 1995); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1990); Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101, 1113 (1st Cir. 1989); Olympia Equip. Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986); *see also* Posner, *supra* n. xxx at 215 ("Especially misleading is the inveterate tendency of sales executives to brag to their superiors about their competitive prowess, often using metaphors of coercion that are compelling evidence of predatory intent to the naïve").

regulatory policy, and industrial organization. This is not to say that jurors are never competent in antitrust cases. In this regard, it may be useful to distinguish between two kinds of factual determinations that juries are called upon to make: *personal facts* and *economic facts*. Personal facts concern the motivations and conduct of the people who made the relevant business decisions, for example the truthfulness of witnesses, whether the relevant people took certain actions such as attending meetings, discussing certain topics, or placing telephone calls, whether they had knowledge of specified information as of a certain date, and whether they intended to bring about certain effects. Economic facts concern the efficiency and economic effects of conduct, for example whether a particular free-riding concern is justified, whether a particular practice could exclude an equally efficient competitor, whether the defendant has market power, and whether specified conduct was more likely to contract or expand output. Personal facts require no great business sophistication and are likely to be within the ken of an ordinary juror. Economic facts often involve contested economic theories and are far outside the educational, experiential, and intellectual range of the ordinary juror.

Cases governed by rules are more likely than those governed by standards to be resolved by reference to personal facts. For example, price fixing cases—bound by a per se rule—turn on whether the defendants agreed on price, a matter that does not necessarily involve complex economic theory. Although the jurors may still be exposed to conflicting economic testimony propounded to explain how parallel prices could (or could not have) emerged absent (or with) an agreement, the economic testimony will usually be merely corroborative of more direct evidence, such as fact witness testimony, diaries, phone logs, itineraries, and correspondence.[162] Such cases raise fairly ordinary questions about human nature and conduct not unlike other kinds of criminal conspiracy cases. On the other hand, an open-ended monopolization jury instruction like that given in *LePage's*—did the defendant exclude the plaintiff on some basis other than efficiency?[163]—makes liability turn on economic facts which the average juror is ill-equipped to address. Suppose that the defendant has used a particular practice as a means of price discrimination. Asking the

[162] Where direct evidence of a conspiracy is lacking, circumstantial evidence tending to exclude the possibility of independent action may be sufficient to establish the existence of a conspiracy. Interstate Circuit v. United States, 306 U.S. 208 (1939); Theater Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537 (1954).

[163] *LePage's*, 324 F.3d at 167.

jury to decide whether this particular form of price discrimination is likely to increase or decrease output—whether it is efficient or inefficient—is unlikely to yield a very reliable answer when this very matter is highly contested among antitrust experts.[164]

Antitrust rules sometimes turn on economic facts also,[165] but standards almost inevitably do so. This suggests that framing antitrust law as a standard for cases in which each party has the right to demand a jury trial is problematic. Not only will the jury be called upon to decide economic facts outside its competence, but the designation of the law as a standard may influence the trial judge and court of appeals to afford a greater degree of deference to the jury's (often confused) determination. Rules have the virtue of presenting decisions to jurors in a way that tends to involve personal facts. Rules also suggest a stronger gate-keeping and sufficiency of the evidence reviewing role for judges, which minimizes the costs of adjudicative errors by jurors.

When it comes to public civil enforcement, framing the law as a standard is more desirable because it signals that greater deference will be given to the judgments of experts within the antitrust enforcement agencies, such as administrative law judges and the Commissioners of the Federal Trade Commission, and to the testimony of economists.[166] Privileging the testimony of economists is problematic in cases likely to be decided by a jury, since it means deferring to the jury's uninformed choice between competing experts. Unfettering economic testimony from strict liability rules is more desirable in cases decided by antitrust specialists as fact-finders or even in bench trials before federal district judges. The risk of adjudicatory error diminishes, and the advantage of seeking the exact dividing line between socially beneficial and harmful behavior increases.

[164] To get a flavor of the debate, see Illinois Tool Works Inc. v. Independent Ink, Inc., No. 04-1329 (S. Ct.), 2005 WL 2427646 Brief of Professors Barry Nalebuff, Ian Ayres, and Lawrence Sullivan as Amici Curiae in Support of Respondent (Sep. 28, 2005); 2005 WL 2427642 Brief of Professor F.M. Scherer as Amicus Curiae in Support of Respondent (Sep. 28, 2005).

[165] In *Brooke Group*, for example, the jury was called upon to apply the average variable cost test—a rule. Post-verdict interviews revealed that the jurors found Brown & Williamson liable for predatory pricing even though the jurors did not understand the relevant rule. Austin, *supra* n. xxx at 53-60.

[166] In his classic work on administrative discretion, Kenneth Culp Davis argues that a major function of the FTC should be to frame rules. *See* Davis, *supra* n. xxx at 70-74. But there is only a limited advantage to the FTC framing antitrust that will only apply to FTC actions, since there is no private right of action under the FTC Act. Rules are most needed to govern private damages actions, not injunctive actions by the FTC.

D. Strategic Manipulation and Public Choice Considerations

Antitrust law is susceptible to strategic misuse in two ways. First, antitrust decision-makers may be subject to capture by regulated constituencies or others interested in influencing the content of antitrust law for personal advantage.[167] Second, even if the content of antitrust law is correctly specified from a social welfare perspective, there is a danger that regulated parties will use antitrust litigation (or the threat of it) to achieve anticompetitive goals.[168] The choice to promulgate law as either rule or standard can sometimes affect the likelihood that antitrust law will be strategically misused in either of these ways.

First, consider the likelihood that the creation of antitrust norms will be unduly influenced—or "captured"—by special interests.[169] Most antitrust law is created by the courts through a common law approach,[170] not by Congress through statutes or the antitrust agencies through promulgation of administrative regulations.[171] The constitutional structure of the federal judiciary—life tenure, irreduceable salary—is designed to create independence and objectivity, but there are still opportunities for judicial capture.[172] Amicus curiae briefs by special interests can exert considerable

[167] *See* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shughart II eds., 1995); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition* , 28 J. L. & Econ. 247 (1985).

[168] *See* Edward A. Synder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991); Crane, *The Paradox of Predatory Pricing*, *supra* n. xxx; R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, Working Paper, on file with author (2004).

[169] Antitrust law creation could also by the subject of another kind of public choice distortion—cycling or randomness—which may occur when numerous legislators consider multiple options. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951). My focus here is on the specification of antitrust law by the courts, which entails a much smaller number of decision-makers and smaller range of decisional options.

[170] *See supra* n. xxx.

[171] The agencies do promulgate guidelines concerning their enforcement intentions which can strongly influence business behavior. This is particularly true in merger cases where, due to the importance of closing a deal quickly, opposition from the Federal Trade Commission or Department of Justice can mean the death of a deal whether or not a court would ultimately agree with the agencies' position.

[172] *See generally*, Frank B. Cross, *The Judiciary and Public Choice*, 50 Hastings L.J. 355 (1999); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31, 66-87 (1991); Lee Epstein, *Courts*

influence on a court's decision.[173] Affected constituencies frequently attempt to shape antitrust decisions through a barrage of amicus curiae briefs joined by leading corporate sectors (*i.e.*, pharmaceutical companies, manufacturers, retailers, franchisees), business associations, consumer groups, or the States. Intellectual or attitudinal capture can also occur. The Chicago School's models hypothesizing the efficiency of previously suspect business practices (such as vertical restraints, tying, price discrimination, and predatory pricing) may have "captured" the Supreme Court during the 1970s and 80s, largely because the Chicago School faced weak intellectual competition.[174] This is not "capture" in the usual sense—Chicago School scholars were not trying to influence the Court's direction for personal advantage—but judicial outcomes can become distorted if judges begin to rely too heavily on any single intellectual current just because it consistently "wins" the argument against weaker theoretic rivals.

Rules, more than standards, invite collaborative efforts by special interests to influence the outcome of judicial decisions. When the Supreme Court or Court of Appeals frames antitrust law as a standard, it leaves most decisions about that particular business practice to case-by-case, post hoc determination. Industry sectors, labor groups, consumer advocates, or other special interests have less to gain from seeking to influence any single litigated case involving a standard, since the next case involving the same constituencies may be decided differently when all of the relevant factors are weighed.[175] Framing the law as a standard also lessens the chance for "capture" by any single intellectual school of thought, since the law will be made in the interstices of litigated cases rather than as a broad conceptual construct. By contrast, special interests have more to gain from

and Interest Groups, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 335, 349 (John B. Gates & Charles A. Johnson eds., 1991).

[173] Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 Law & Soc'y Rev. 807 (2004); Joseph D. Kearny & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) (reporting that amicus curiae briefs have an impact on Supreme Court decisions).

[174] Michael A. Carrier, *Antitrust After the Interception: Of a Heroic Returner and Myriad Paths*, 55 Stan. L. Rev. 287, 291 (2002) (book review). The "Post-Chicago" school has not exerted as strong an influence on the courts, in part because it continues to face strong intellectual resistance from the Chicago School. Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision-Theoretic Approach*, 69 Antitrust L.J. 469, 470 (2001).

[175] Framing the law as a standard also minimizes the number of cases on which the Supreme Court grants certiorari, since it is harder to create circuit splits out of adjudications under open-ended standards.

participating when the courts' resolution will involve framing a rule, since that rule may predetermine many more future outcomes for those constituencies. Framing antitrust law as a rule concentrates the stakes for larger swaths of interests and therefore invites special interests to undertake concentrated efforts to shape the rule.

These considerations militate in favor of antitrust standards rather than rules, but the case is different when one considers the strategic manipulations that can occur in litigation itself. Antitrust law is most subject to strategic misuse by rent-seeking competitors when it is framed as an amorphous standard. A growing literature shows that firms can strategically misuse antitrust to coerce or induce their competitors to forgo engaging in practice that are efficient but disadvantage the plaintiff.[176] For example, a less efficient firm might threaten a predatory pricing lawsuit against a more efficient firm to discourage price-cutting, a single-product firm might threaten a tying lawsuit against a diversified firm to discourage bundling, a technologically outdated firm might threaten a monopolization lawsuit against an innovative rival to discourage design innovation, or a firm making an inferior product might threaten a monopolization lawsuit to prevent its rival from making disparaging remarks. Such rent-seeking behavior is more likely to be successful when the governing law is presented as a standard than as a rule because a standard creates more adjudicatory uncertainty and risk-averse defendants may desist from an efficient practice even if it is likely to be vindicated through litigation. Further, adjudication under a standard tends to prolong litigation and increase its costs, which increases the chances that the litigation can be used as a cover to organize tacit collusion between the parties.[177]

So, again, rules and standards reach a conceptual impasse. Standards are preferable because they are less likely to cause judicial capture at a macro level but rules are preferable because they are less likely to encourage rent-seeking litigation or litigation threats at a micro level. Neither one of these tendencies is probably strong enough to warrant a general preference for rules or standards, but some guiding principles can be drawn. The strategic misuse of antitrust law by competitor plaintiffs is most likely to be a concern in exclusionary practices cases. Competitors typically do not have standing to assert antitrust claims in cases involving collusive but non-exclusionary conduct since the plaintiff usually benefits

[176] *See supra* n. xxx.
[177] *See* Crane, *The Paradox of Predatory Pricing*, *supra* n. xxx at xxx.

from such conduct.[178] In exclusionary conduct cases, rules are particularly desirable because they provide rent-seeking competitors with less opportunity to manipulate the remedial structure of U.S. antitrust law to achieve anticompetitive gains. Where strategic manipulation is less a concern, framing antitrust law a standard may lessen the likelihood that the content of the law will be distorted through interest group pressures.

E. Synthesis of Efficiency Considerations and Decisional Principles

The rules versus standards debate often ends in a stalemate because there are so many potential variables and it is difficult to know how to weight them.[179] When a court breaks the impasse and chooses a rule or a standard (or a legal norm that is more rule-like or standard-like), it usually must do so based on an informed, but imprecise, judgment—what an earlier generation would have called "wisdom"—about which approach is the lesser of two evils.[180] Both rules and standards have costs. Weighting the various costs of rules and standards in antitrust is difficult. Perhaps the most prudent course is to articulate the paradigmatic instances where rules or standards are preferable and leave the middle grounds ungeneralized.

Rules have the greatest advantage when governing classes of lawsuits likely to be decided by juries and to result in overdeterrence due to the uncertainty of standards or strategic abuse in litigation. Especially troubling is the trend in the lower courts to leave private exclusionary conduct cases to post hoc, fact-specific determination.[181] This commits ultimate decision-making about economic facts to ill-equipped juries, threatens to chill vigorous competitive behavior, invites strategic manipulation by rent-seeking competitors, and increases the costs of antitrust litigation. Antitrust law can afford to frame underinclusive rules governing exclusionary behavior in private cases because the high

[178] *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 337 (1990) (holding that competitor lacked antitrust injury and therefore could not challenge vertical minimum price-fixing scheme since such a scheme would have worked to the competitor's advantage)

[179] *See* Diver, *supra n.* xxx at 70-71, 107 (discussing the difficulties of aggregating tradeoffs between rules and standards into "an overall evaluation" and noting that "[c]ourts, as much as politicians, must throw competing values on the scales and somehow total the score").

[180] Colin Diver refers to this as "an irreducible core of legal controversy about rule precision that yields only to an indwelling jurisprudential principle of fairness and propriety." Diver, *supra* n. xxx at 107.

[181] *See supra* text accompanying notes xxx-xxx.

likelihood of detection of such behavior combined with the substantial costs of an adverse judgment will deter most dominant firms from straying too close to the line drawn by the rule. The same concerns hold, although to a lesser degree, in private collaborative conduct cases where only consumers are likely to have standing. The risk of chilling efficient conduct remains, although the risk of strategic misuse diminishes.

Rules are especially appropriate when used as immunizing devices for commercial behavior with ambiguous but usually positive social welfare consequences that could otherwise be challenged under the rule of reason. The antitrust agencies have encouraged the use of such safe-harbors for public litigation, for example in announcing that they usually will not challenge intellectual property licensing agreements where the licensor and licensee account for less than twenty percent of the relevant market.[182] Other potential safe-harbors include market share thresholds for tying, exclusive dealing, monopolization, and vertical restraints claims, an absolute "above cost" defense for predatory pricing, primary line price discrimination, and bundled discounting claims, and per se legality for new product design. Conduct falling outside these or other safe-harbors would then be subject to rule of reason treatment.

Few categories of business behavior warrant per se prohibition in rule-like form—perhaps price fixing, bid rigging, patent fraud, and a few others. But rules can also be used to predetermine individual issues in litigation. For example, a conclusive presumption that a patent about which a patentee has brought an infringement lawsuit confers market power may be useful in simplifying tying litigation,[183] even though it does not by itself resolve whether liability should be imposed. Even where courts believe that ultimate liability issues should be left to rule of reason balancing, crafting rules to govern individual issues may reduce the costs of litigation, increase predictability, and minimize the risk of adjudicatory error and arbitrariness.

Standards are paradigmatically most appropriate to govern public enforcement seeking prospective relief.[184] Such cases pose the least risk of

[182] U.S. Dep't of Justice, Antitrust Guidelines for the Licensing of Intellectual Property § 4.3 (1995), http:// www.usdoj.gov/atr/public/guidelines/0558.pdf.

[183] *See* Illinois Tool Works Inc. v. Independent Ink, Inc., No. 04-1329 (S. Ct.), 2005 WL 2427642 Brief of Professor F.M. Scherer as Amicus Curiae in Support of Respondent (Sep. 28, 2005).

[184] The distinction I make between public and private enforcement is consistent with the Supreme Court's view that the Federal Trade Commission has prophylactic authority to create antitrust norms beyond those that would obtain under the Sherman Act. *See* FTC v. Brown Shoe Co., 384 U.S. 316, 322 (1966); F.T.C. v. Motion Picture Adv. Co., 344 U.S. 392, 394-395 (1953).

overdeterrence and strategic misuse of antitrust and maximize the benefit of detailed, case-specific review. To the extent that such cases are heard by specialized administrative law judges in the Federal Trade Commission, they also lower the cost of promulgating the applicable legal command, since the judges can apply at low cost experience from prior cases. Standards minimize the likelihood of special interest capture of the enforcement agencies by pushing decision-making down the legal and administrative hierarchy.

To capture these considerations in a more concrete way, it may be useful to imagine a set of binary conceptual pairings where one value in each paring correlates more positively with rules and the other with standards, as shown in Table A.

Table A

Standard	***Rule***
Public litigation	Private litigation
Prohibitory determinant	Immunizing determinant
Injunction	Damages
Idiosyncratic conduct	Archetypal conduct
Collusive conduct	Exclusionary conduct

In choosing between rules and standards in antitrust, a court should be guided by the extent to which these various factors line up or juxtapose in that particular case. Not all of the factors are of equal weight,[185] but at a minimum they are useful in identifying the paradigmatic cases for applying rules or standards. Thus, for example, a competitor action seeking damages for predatory pricing, which is a frequently litigated practice, should be subjected to immunizing determinants in the form of a rule since this case lines up all five rule factors (private, immunizing, damages, exclusionary, archetypal).[186] Conversely, in a government action seeking an injunction against future participation in a potentially collusive agreement of a kind

[185] For example, the distinction between collusive and exclusionary conduct is predicated on the concern that competitors will exploit the indeterminacy of standards for anticompetitive advantage. In a case brought by the government, this is unlikely to be a concern. Thus, this conceptual pairing is only relevant in private actions.

[186] This roughly corresponds with the justification for the rule of per se legality for prices above marginal cost. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 709-10 (1975).

not often observed, it would be appropriate to create liability under a standard-based approach since that case would line up all five standard factors (public, prohibitory, injunctive, collusive, idiosyncratic).[187] In cases where some factors point to standards and others to rules, the court would need to identify which of the factors was most relevant to its particular case and assign weight to the different factors based on the circumstances.

IV. NON-EFFICIENCY CONSIDERATIONS

Antitrust may be primarily concerned with economic efficiency, but the rules versus standards debate comprehends other values and concerns as well. This final section considers the extent to which reasons other than efficiency might affect the choice between rules and standards in the antitrust domain. In particular, it considers the role of both moral and expressive concerns and concludes that both have some limited importance to antitrust jurisprudence.

A. Distributive Justice, Personal Autonomy, and Equal Treatment

A significant part the rules versus standards debate has an ideologically charged flavor. Libertarians like Friedrich Hayek and Richard Epstein have advocated a rule-based approach to law, believing that ex ante specification of bright-line liability criteria will minimize the aggrandizement of governmental authority.[188] Conversely, critical legal studies adherents like Duncan Kennedy and Morton Horwitz have attacked the structure of rules as entrenching the inequitable status quo and allowing manipulation by the wealthy and privileged.[189]

These arguments seem largely off the mark when it comes to antitrust. While the choice of *particular* antitrust rules or standards, or the mixture of the two, may have important implications for the distribution of wealth or

[187] This may describe the *Polygram* case. *See supra* text accompanying notes xxx-xxx.

[188] *See* Epstein, *supra* n. xxx; FRIEDRICH HAYEK, THE ROAD TO SERFDOM 72 (1944) (advocating approach whereby "government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge"); *see also* FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY, 205-14 (1960).

[189] *See* Kennedy, *supra* n. xxx at 1737-51, 1753-56; Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

the degree of governmental interference with consensual market transactions, it seems difficult to predict *ex ante* whether a generally rule-based or standard-based approach will be more interventionist when it comes to competition policy. The earliest antitrust decisions pitted interventionist rules against permissive standards.[190] When conservative federal judges used the antitrust laws to suppress the labor movement, Congress responded with legislative rules categorically immunizing strikes from the Sherman Act.[191] Antitrust opposition to mergers,[192] collaborative restraints of trade, and exclusionary practices reached its zenith under the Warren Court's rule-based approach which restricted concentrations of industrial power and favored non-economic values and small business interests.[193] The movement toward standards was at least in part the work

[190] Compare Chicago Board of Trade v. United States, 246 U.S., at 231 (1918) (per se rule of illegality and United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897) (rule of reason applied in favor of defendants). In fairness, *Chicago Board of Trade* could be considered "progressive" insofar as it permitted a practice that allowed smaller, probably less efficient, rural dealers to participate in the market. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 44-45 (1978).

[191] Congress initially responded to use of antitrust law to enjoin strikes by providing in the Clayton Act that "[t]he labor of a human being is not a commodity or article of commerce" and that labor organizations are not to be "construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws" and by prohibiting federal courts to enjoin strikes. 15 U.S.C. § 17; 29 U.S.C. § 52. After the Supreme Court continued to sanction injunctions against labor picketing, *see* Truax v. Corrigan, 257 U.S. 312, 330 (1921); Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 202-03 (1921); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 464 (1921), Congress responded with the Norris LaGuardia Act, 29 U.S.C. §§ 104, 105, categorically prohibiting federal injunctions against peaceful labor activities.

[192] In a succession of opinions, the Warren Court rejected merger after merger, creating the impression that it was following a rule of per se illegality for mergers causing an increase in market concentration. *See* Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. the Counterrevolution*, 66 N.C. L. Rev. 931, 948 (1988) (describing ("Warren Court merger decisions [as] virtual per se holdings.").

[193] A classic statement of the Warren Court's small-business preference appears in Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."). For a generally positive account of the Warren Court's approach to antitrust, *see* Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 Cal. L. Rev. 917, 919, 922-23 (1987).

of the Chicago School's laissez-faire project in the 1970s and 1980s. While some of the recent exclusionary practices cases have rejected rules that would have immunized defendants in favor of open-ended standards more likely to result in a plaintiff's verdict, the history of antitrust jurisprudence generally suggests the opposite tendency than that suggested by Duncan and Horwitz: rules have often been more favorable to antitrust interventions in market conduct and standards more favorable to business interests.[194]

It is also hard to make the case that rules systematically favor powerful industrial interests that understand the rules and their loopholes and best know how to, and can afford to, manipulate the system. Antitrust law is often enforced publicly by expert, motivated, and relatively well-financed staff at the Department of Justice or Federal Trade Commission. Even on the private side, the treble damages remedy,[195] unilateral fee-shifting in favor of plaintiffs,[196] and the magnitude of recoverable damages (often in the hundreds of millions or even billions of dollars) has created a competent, motivated, and well-financed plaintiffs' bar. In cases of exclusionary conduct, the injured party is liable to be a corporation and not a poorly educated individual. Even where the harm is distributed across a wide number of consumers, the class action mechanism—which is often favored in antitrust cases involving uniform conduct by the defendants affecting prices to a large number of consumers[197]—allows aggregation of claims in a way that levels the playing field.

Of course, it is possible to view the entire antitrust project as a farce designed to conceal the deep inequities of capitalism.[198] But if that is the

[194] This is not to say that, going forward, there is any particular reason to believe that rules will be applied in a more interventionist way than standards.
[195] 15 U.S.C. § 15.
[196] *Id*.
[197] Federal judges are fond of reporting that class certification is favored in antitrust cases. *See*, *e.g.*, In re Rubber Chemicals Antitrust Litigation, 232 F.R.D. 346, 350 (N.D. Cal. 2005); Daniel v. American Bd. of Emergency Medicine**,** 269 F.Supp.2d 159, 188 (W.D.N.Y. 2003); In re Industrial Diamonds Antitrust Litigation, 167 F.R.D. 374, 378 (S.D.N.Y. 1996).
[198] *See, e.g.,* William L. Letwin, *Congress and the Sherman Antitrust Law* 1887-1890, 23 U. CHI. L. REV. 221, 221 (1955) (reporting that some observers maintained that Sherman Act was a fraud because Congress was dominated by "many of the . . . industrial magnates most vulnerable to real antitrust legislation") (*quoting* M. FAINSOD & L. GORDON, GOVERNMENT AND THE AMERICAN ECONOMY 450 (1941)). Senator Sherman, the Act's sponsor, admonished that Congress "must heed [the public's] appeal or be ready for the socialist, the communist, and the nihilist," 21 Cong. Rec. 2460 (1890), suggesting that the goal of the Sherman

case, the choice between rules and standards does not matter much and the conversation needs to be about deeper questions of resource allocation, property ownership, labor rights, industrial policy, and law as a means of social control. Antitrust—whether based on rules or standards—assumes the normativity of free enterprise, industrial competition, and demand-based allocation of social resources. Within those parameters, rules are not generally more oppressive to the disadvantaged than standards.

On the other side of the aisle, libertarian Richard Epstein advocates "simple rules for a complex world" in order to curb the power of the state.[199] When it comes to antitrust, Epstein envisions a set of narrow rules—perhaps a common-law refusal to enforce price-fixing agreements and little more.[200] Epstein envisions not simpler antitrust but virtually no antitrust. The argument for minimalist antitrust policy does not have that much to do with whether antitrust policy should be formulated as rules or standards if it is broadly formulated. As we have seen, in the antitrust realm it is possible for rules to be either interventionist or laissez-faire (compare the *Colgate* and *Dr. Miles* rules).[201] If antitrust law is going to address business practices like vertical restraints of trade, predatory pricing, or horizontal collusion, it is not clear *ex ante* that rules will be less interventionist than standards.

Eric Posner argues that rules are to be favored "if we care about autonomy, because standards, more than rules, encourage self-reinforced conformity to the imagined goals of the state rather than actions that reflect one's authentic values and interests."[202] It is not clear to what extent this argument has force as applied to antitrust law, which generally applies to large corporate actors rather than individuals. The "authentic values and interests" of corporations are generally profit maximization for the benefit of shareholders,[203] and it is hard to state categorically *ex ante* whether rules or standards are more likely to maximize shareholder profits.

Act was to appease the public rather than to achieve significant wealth redistribution.

[199] Epstein, *supra* n. xxx.

[200] *Id.* at 123-27; *see also* Richard A. Epstein, *Monopoly Dominance or Level Playing Field: The New Antitrust Paradox*, 72 U. Chi. L. Rev. 49 (2005).

[201] *See supra* text accompanying notes xxx-xxx.

[202] Eric Posner, *supra* n. xxx at 117.

[203] Indeed, managers and boards of directors are ordinarily assumed to have a fiduciary obligation to pursue these goals single-mindedly. *But see* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733 (2005) (arguing that corporate law gives managers the discretion to sacrifice shareholder profits in favor of the public interest).

Another political-moral concern that often arises in the rules versus standards debate concerns equality. Rules tend to create formal equality by eliminating arbitrariness and inconsistency in adjudication, but the bright lines drawn by rules sometimes create substantive inequality by lumping together people who are not similarly situated.[204] On the other hand, standards can conceal arbitrariness in decision-making because it is always possible to point to some ostensibly relevant factor differentiating two otherwise similar cases.[205] It has been a long time since anyone has thought about antitrust in explicitly moral terms,[206] but whatever the content of antitrust, courts must make some effort to apply it evenly. The risk of arbitrary and inconsistent results in a standard-based system increases with the complexity of the law administered and the unsophistication of the ultimate decision-maker. Much of antitrust law is highly complex, and juries—which are more likely to be entrusted with decisions under standards than under rules[207]—are often in over their heads in economically complicated antitrust cases. These factors create the conditions for adjudicatory arbitrariness. In Section III(C), I discussed the allocation of decision-making responsibilities that comes with the choice of rules or standards further, suggesting that standards tend to push more ultimate decision-making onto jurors. If we are concerned about disparate treatment of similarly situated parties, there is something to be said for maintaining antitrust rules.

B. Maintaining the Expressive Core

In thinking about the optimal specification of legal commands, it is important to keep in mind how the legal commands will communicate the

[204] *See* Sullivan, *supra* n. xxx at 62; Davis, *supra* n. xxx at v (arguing that "the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide no or little guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often rejected in the choices made).

[205] Posner, PROBLEMS OF JURISPRUDENCE, *supra* n. xxx at 44.

[206] No less an authority than Herbert Hovenkamp informs us that "antitrust has no moral content." Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. Corp. L. 607, 609 (2003); *but see* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. Rev. 1, 86-87 (1999) (describing turn-of-the-century view that prices at a competitive level were part of a "natural" order and that deviations from that price through monopolistic or collusive conduct were a moral wrong).

[207] *See supra* text accompanying notes xxx-xxx.

core values of the relevant legal enterprise both to regulated entities and the general public. As Thurman Arnold wrote a few years before transforming the Antitrust Division into a modern, aggressive agency, law plays an important role in expressing contradictory social values.[208] Nowhere is this more evident than in a case like *Socony*, which Arnold pressed on behalf of the United States. The "dancing partner" arrangement among the Midwestern oil refiners challenged by the Government had been instigated by the Administrator of the Petroleum Administration Board that was created by the Secretary of the Interior pursuant to a federal statute and an executive order of President Roosevelt.[209] After the Supreme Court invalidated key portions of the National Industrial Recovery Act,[210] the Department of Justice turned on the dancing partner program as a price fix. The shift from federal instigation to federal condemnation happened in heartbeat and it was left to the federal courts to work out the contradiction. Justice Douglas found that solution in the enunciation of a sweeping per se prohibition on price fixing, a decree so strong that the reasonableness of the defendants' conduct in light of the regulatory apparatus of a few weeks earlier was utterly irrelevant.[211]

Although antitrust practioners have come to think of antitrust as a generally bureaucratic discipline at the public enforcement level and a complex field for expert lawyers and economists at the private enforcement level, antitrust will always symbolize to the public at large certain values of capitalism and its restraints.[212] Even if most lawyers, judges, or business people do not think of antitrust in moral terms,[213] the enforcement agencies go out of their way to depict core antitrust violations as *malum in se*. In press releases, the Attorney General solemnly informs the public that price fixing "robs American consumers of the benefit of competitive prices,"[214]

[208] THURMAN ARNOLD, THE SYMBOLS OF GOVERNMENT (1935).
[209] 310 U.S. at 171-74.
[210] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corporation v. U.S., 295 U.S. 495 (1935).
[211] 310 U.S. at 221-222. Justice Douglas dismissed the governmentally mandated origins of the distress gasoline program, saying: "Though employees of the government may have known of those programs and winked at them or tacitly approved them, no immunity would have thereby been obtained." *Id.* at 226.
[212] As Bob Pitofsky reminds us, antitrust has always had, and will always have, a political content. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979).
[213] *See supra* n. xxx.
[214] Press Release, U.S. Dept. of Justice, *Samsung Agrees to Plead Guilty and to Pay $300 Million Criminal Fine for Role in Price Fixing Conspiracy* (Oct. 13. 2005), http://www.usdoj.gov/atr/public/press_releases/2005/212002.htm.

just as surely as if the price-fixers had walked into a bank with a drawn gun. If price fixing is to be analogized (when convenient) to robbery, it will do no good to explain that this is only true at the end of the collaborative restraints of trade continuum where the defendant has failed to rebut a prima facie assumption that the conduct in question causes social welfare losses. Price fixing is only "robbery" if price fixing is prohibited—period.

Simply articulated rules about what is categorically permitted are also necessary to express the competition preference of capitalism. Rules are needed as bookends to the range of possible legal outcomes. If price fixing is categorically prohibited, then perhaps refusing to collaborate with competitors should be categorically allowed.[215] This allows antitrust to be reduced to a maxim like "competition, not collusion" which expresses the heart of the enterprise to the laity even if antitrust insiders experience the rules as somewhat fuzzier.

Antitrust law needs to maintain a rule-expressed core not only for the general public but also for the constituencies whose behavior it regulates. Business schools seem to teach very little about antitrust.[216] Larry White reports that nine leading business school microeconomics textbooks devoted a total of 64 pages out of 6,421 to antitrust principles.[217] Business people frequently profess surprise—real or feigned—when told that their conduct violated the antitrust laws.[218] If all of antitrust breaks down into amorphous standards, it will be even easier for business schools to shunt all of antitrust off to the lawyers.

In order to maintain the expressive core of antitrust law, the Supreme Court should take care to ensure that, even in a generally standard-based system, at least a few principles of antitrust law remain enunciated as black-letter rules. One could imagine a canon of antitrust rules along the following lines: (1) If you fix prices with your competitor, you will go to

[215] In *Trinko*, the Supreme Court came close to ruling that firms never have an obligation to cooperate with their competitors, although it avoided overruling *Aspen Skiing* which did recognize such an obligation in the facts of that case. *See* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408-10 (2004).

[216] *See* Norman W. Hawker, *Antitrust Insights from Strategic Management*, 47 N.Y.L.S. L. Rev. 67, 73 (2003); Lawrence J. White, *Microeconomics in MBA Programs: What's Thought, What's Taught*, 47 N.Y.L.S. L. Rev. 87, 91-95 (2003).

[217] White, *supra* n. xxx at 94-95.

[218] Even in a hard-core price-fixing case like the Christie's/Sotheby's agreements on seller's commissions, some of the high-ranking executives involved expressed surprise that their conduct was illegal. *See* CHRISTOPHER MASON, ART OF THE STEAL (2004). One does not have to believe their protestations to appreciate the value of clearly delineated rules in removing the excuse.

jail; (2) Do not divide markets with your competitors—you must compete!; (3) You have no obligation to cooperate with your competitors; (4) You may set your price as high or as low as you please, but not below your cost; (5) If your market share exceeds 70%, you are a monopolist—watch yourself! These or other similar principles could be enunciated as simple rules, thus maintaining the expressive core of antitrust, even if practitioners realize that the rules are not as determinate as they appear on paper.

CONCLUSION

In many ways, antitrust's transition from a categorical ex ante approach to a more open-ended, multi-factor, and post-hoc approach resembles the development of Anglo-American common law. The system started with a number of relatively narrow and formalistic rules (compare the per se rules to the common law writs); eventually the needs of the relevant constituency outgrew the boundaries of the rules; the courts essentially froze the rules and refused to create new categories; new modes of adjudication were required and found their place in a flexible system of "equity;" equity and law competed for some time until the flexibility of equity overcame the rigidity of law; eventually law and equity collapsed into a single system, with the spirit of equity predominating.[219] To a large extent, this narrative describes where we have been, and where we appear to be headed, in antitrust adjudication.

It is easy to recount a rules-to-standards story as a saga of progress, and there is much to be said in favor of antitrust law's transition toward standards, particularly because there was much to be said against many of the old rules. But the deficiencies of the old rules should not mislead us to believe that antitrust standards are always superior to antitrust rules or that a system of flexible standards can be maintained without a core of bright-line rules. As noted at the outset, the legal pendulum usually swings back and forth between rules and standards as the disadvantages of the prevailing regime lead to calls for reform. The best way to prevent such cycles and maintain long-term flexibility where it most matters is to preserve a rule-based structure for significant portions of the antitrust endeavor.

In deciding between rules and standards, it is critical to keep in mind the remedial and legal-cultural settings in which antitrust law intersects with litigants and prospective litigants. The trend toward open-ended rule of reason analysis makes good sense when applied to the Federal Trade

[219] *See generally* Davis, *supra* n. xxx at 19; FREDERICK WILLIAM MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW (1910).

Commission or Department of Justice when they seek to alter future behavior. It makes less sense when applied to treble damages actions by rent-seeking private litigants, which raises the danger of overdeterrence and strategic misuse of the unpredictability created by multi-factored standards. There is still an important place in antitrust jurisprudence for defensive safe-harbors formed by bright-line rules. And, in order to maintain the expressive core of antitrust, a few per se prohibitions and per se rules of legality should be maintained.

Justice Marshall was wrong to view economic analysis of industrial practices as an untamable wild, but he was right to recognize the advantages of rules. We do not have to return to *Topco's* rigidity to preserve a space for dynamic rules in antitrust adjudication.