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The "Rule of Reason" in Antitrust Analysis: General Issues

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THE "RULE OF REASON" IN ANTITRUST ANALYSIS:

GENERAL ISSUES

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INTRODUCTION

The Sherman Act prohibition against "every" agreement in restraint of trade has been understood by the federal courts since the 1911 Standard Oil decision to forbid only "unreasonable restraints."[1] However, Standard Oil reconciled earlier categorical prohibitions with its own rule of reason by declaring some restraints "inherently unreasonable" or, as later courts put it, "per se unlawful." It is the main purpose of this brief essay to explain the ways in which the dichotomy between per se and rule of reason treatment is usually overstated and can confuse the unwary. We do so in Part III, after beginning by (I) addressing the components of the rule of reason inquiry, followed with brief comments on four common confusions (the significance of administrative convenience, state of mind, horizontal-vertical dichotomies and the necessity of "agreement", and (II) considering the rationale for per se rules by reference to the prohibition of price fixing.

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* This monograph is adapted from VI P. Areeda, Antitrust Law, Ch. 14 (forthcoming) which is the continuation of P. Areeda & D. Turner, Antitrust Law (5 vols., Little Brown & Co. 1978, 1980).

I.
ELEMENTS OF REASONABLENESS

A. Basic Inquiries.

How does one go about applying the "rule of reason"? It surely cannot be sufficient to see that collective action has restrained a party's future freedom of unilateral action. As Chicago Board of Trade[2] pointed out, every contract restrains. In an oft-quoted passage from that case, Justice Brandeis contrasted the regulation and perhaps promotion of competition with its suppression and perhaps destruction. The Court referred to the business characteristics of the particular market, the market conditions before and after the challenged restraint, actual or probable effects, the evil which the restraint was designed to correct and the purpose of the actors.

The inquiry seems three-pronged. (1) What harm to competition results or may result from the collaborators' activities? (2) What is the object they are trying to achieve and is it a legitimate and significant one? That is, what are the nature and magnitude of the "redeeming virtues" of the challenged collaboration? (3) Are there other and better ways by which the collaborators can achieve their legitimate objectives with fewer harms to competition? That is, are there "less restrictive alternatives" to the challenged restraint?

As difficult as they are, those inquiries are much easier than the final judgment which depends upon some kind of weighing and balancing of pluses and minuses.

Fortunately, a satisfying resolution is possible in a good number of cases where one of the three elements is significant and the others are not. Where, for example, the competitive harm seem likely to occur and to be significant in magnitude if it does occur, it is easy to condemn the restraint that serves no possible or significant redeeming virtue or for which there is a clearly preferable and less restrictive alternative. Similarly, it seems easy to permit that restraint which seems likely to achieve redeeming virtues of significant magnitude where the competitive effects seem either unlikely to occur or unlikely to be significant in magnitude if they do occur. But solutions are elusive where allowing the restraint would threaten competition with significant harm of substantial magnitude but where preventing it would apparently deprive society of significant and substantial benefits. When we are unable to quantify and weigh the harms and benefits in the particular case, we must consider administrative convenience in operating the judicial system or estimates about the balance of harm and virtue in the generality of similar cases.

B. Competitive Harm.

The importance of this inquiry cannot be exaggerated. Only after seeing the possible ways in which a challenged restraint might impair competition can one estimate the probability of occurrence, judge the likely magnitude, decide what evidence might be probative, or formulate tentative presumptions to guide the disposition of the case.

Sometimes the competitive threat will be rather obvious. When two formerly competing sellers distribute

their product through a single agent with the power to set the final price, they have eliminated price competition among themselves. On the other hand, the effects of product standardization are more subtle. Suppose that the producers of phonographs eliminate one or more possible products by, for example, agreeing that phonographs will be standardized at 33 rpm. Such standardization would deprive some consumers of a product they might like, might exclude a rival, and might ease the capacity of each producer to observe the other's price and thus facilitate oligopolistic pricing.[3]

As a more remote example, suppose that the three television networks agree that each would set aside two prime-time hours each week for "quality cultural programming" and also establish a procedure for non-competitive scheduling of such programs so that willing viewers would have an opportunity to watch all of them. The effect would be to deprive producers of customary programming of a portion of their previous market and also to deprive some consumers of the additional customary programming which they otherwise would have had. As this illustration makes clear, however, finding some possibility of competitive harm is not to find that the harm will be significant in character or magnitude. Perhaps the effects of the quality program set aside would seem insubstantial in view of the volume of customary programming remaining. Similarly, a joint sales agency or component standardization among firms involving a trivial percentage of the market would have no real effect in view of the very large number of remaining sellers.

C. Redeeming Virtues.

Some restraints are "naked" in the sense that they are totally lacking in any claim to redeeming virtue. In that event, even a modest tendency to impair competition may be sufficient for condemnation, because society loses nothing beneficial when it condemns the naked restraint.

Where the parties claim a purpose other than the suppression of competition for its own sake, we must ask whether the purpose is "legitimate," whether the restraint actually helps achieve that legitimate purpose, and whether that purpose could be achieved just as well by a substantially less restrictive approach. It is only a "legitimate" purpose that can redeem a restraint, and legitimacy lies in consistency with the law generally and consistency with the premises of the antitrust laws in particular.

Suppose that book publishers were to agree that they would publish only political works approved by a central committee which they established. Their stated purpose was to forego publishing defamatory, superficial, or unsound books. I suggest that such a purpose would be illegitimate, for it deprives the reading public of that diversity of publication for which we value competition and impedes that freedom of political debate which is vital in a democratic society.

Or consider the "splits" by which competing film exhibitors agree not to bid against each other for the right to exhibit motion pictures supplied by various distributors. Several courts have apparently thought that the object of obtaining a lower purchase price was desirable even when achieved by a conspiracy.[4] Such courts were making an elementary error: they were

assuming that the lowering of prices by conspiracy among buyers served consumer interests, forgetting that the object of the antitrust laws is not transitory cheapness but free market results. The court would not have made a similar mistake had it been faced with an agreement among law firms to "split" recruitment of young lawyers in order to reduce the price (salary) paid them.[5]

Appraising the legitimacy of a restraint's objective was the subject of the Supreme Court's decision in the Professional Engineers case.[6] Competing professional engineers agreed--in the form of a rule promulgated by their association--that they would not engage in price bidding for work but that a member would discuss price with a client only after he had been selected for a project. This restraint clearly reduced price competition among the engineers, and that indeed was their objective, for they defended the restraint on the ground that it prevented excessive price competition which would have led to inferior engineering work endangering the public safety. In condemning the restraint, the lower courts refused to make a finding of fact about the relationship of price competition to inferior engineering or of poor engineering to the public safety. This result and approach was affirmed by the Supreme Court.

Although the Court used rule of reason rather than per se terminology, its rejection of the defendant's claim of redeeming virtue clearly was not based on the facts of the particular case, because the Court affirmed the condemnation of the association's rule without any findings about whether price bidding would have led to quality degradation and harm to the public. The Court might have said, although it did not, that history teaches us that cartel price fixing is not generally

necessary to assure product quality; nor would it be sufficient to do so, given the fact that some marginal producers would be tempted to shade quality, no matter how high the price. The Court seemed to say that the quality-protection claim was illegitimate in principle because inconsistent with the the Sherman Act's mandate of competition. The defense itself rests on the premise that the restraint will in fact increase prices and thus rejects the Sherman Act's intrinsic premise that competition in price and quality is desirable.

This result is not the least bit surprising, but five members of the Court used broad language that might seem too categorical. The Court explained that the rule of reason is not hospitable to every claim within the realm of reason but only to matters bearing on the competitive significance of a restraint. The Court suggested that we are not to inquire whether the restraint accomplished an objective that was "in the public interest" but only whether the restraint actually served to increase competition. Such a ruling seems quite justifiable when appraising substantial restraints though perhaps too limiting when appraising slight restraints. Bear in mind that even a slight restraint can be unreasonable when unjustified. Whether the Court meant to be so categorical is not clear; in any event, the general language need not confine the courts when confronted with a case where the restraint is far less egregious than the engineers' clear attempt to keep prices high.

To indicate the possible implications of Professional Engineers language, return to the hypothetical agreement among the three networks to set aside time for quality program. Is the objective of more diverse television programming legitimate in principle under

Engineers? At first blush, it appeals to a broader claim of the "public interest" without obviously serving to increase competition. Yet, one might wonder whether that objective might be legitimate enough and substantial enough in the light of the relative modesty of the restraint created. The last query could be avoided if we may express "cultural diversity" in terms of increased competition. The economic argument would be that the television industry exhibits this "market failure": given that government allocation limits the number of channels and that each station or network seeks to maximize its advertising revenues and therefore its audience for each broadcast hour, cultural services that viewers and advertisers are ready to support are not offered (unlike newspapers which can simultaneously provide culture and comic strips). It would then be argued that the time set-aside for quality corrects this market failure and thereby brings about a more "competitive" result. Without necessarily adopting this argument, I am suggesting that the Engineers language may generate increased efforts to characterize various "public interest" justifications as "increasing competition" in the sense that they are correcting various kinds of "market failure."

D. Less Restrictive Alternatives.

Grant the defendants a legitimate objective. Grant that the restraint is necessary in the sense that it truly serves that legitimate objective. Still, one must ask whether there is a less restrictive way to accomplish that objective or, stated another way, whether the restriction is "reasonably necessary" to achieve it.

Some commentators have read the Supreme Court's Sylvania decision[7] as denying the significance of less retrictive alternatives. That case involved a so-called "location restriction" which prevented a dealer from selling the manufacturer's product from any location other than those approved by the manufacturer. From that location, however, the dealer was free to sell to any customer, wherever located. Although location limitations are less restrictive than customer or territorial limitations on those to whom one may sell, the Court held the former governed by the earlier Schwinn rule[8] forbidding the latter, and then overruled Schwinn. However, the Court's failure to make anything turn on the defendant's choice of the less restrictive limitation does not imply indifference to the relative severity of related restraints. Rather, the Court decided that such a difference was an insufficient basis for a per se condemnation of one while allowing the other. Both were to be treated by the rule of reason. But the Supreme Court itself did not decide the reasonableness of the restraint before it. On remand the restraint was held reasonable, partly on the ground that the location restriction was one of the least restrictive forms of controlling intrabrand competition.[9]

The key difficulty in examining less restrictive alternatives lies in deciding how refined a distinction to make among the possible alternatives available to the defendants. Imagine a joint research venture among the twenty equal-sized members of an industry and suppose that there would be significant benefits through the elimination of wasteful duplication and through the achievement of scale economies in research. Obviously, the possible competitive harm--impairment of rivalry in

research--would be reduced if the collaboration were in the form, say, of four joint ventures among groups of five firms each. In order to require that less restrictive alternative, how sure must we be that equal benefits would be achieved by such smaller-scale collaboration? And if the defendants had originally chosen to use four such ventures, should we require five of four firms each or ten of two firms each? That is, one can frequently conceive of a less restrictive approach. Yet, to require the very least restrictive choice might interfere with the legitimate objectives at issue without, at the margin, adding that much to competition. And that is why courts occasionally speak not of the "least" restrictive but merely of a "less" restrictive alternative. Even then, those objecting to a restraint can frequently imagine a less restrictive alternative. An alternative formula is perhaps clearer in calling only for rather gross comparisons between the course chosen by the parties and the other courses of action that might have been chosen. Some courts ask only that the challenged restraint be "reasonably necessary" to achieve a legitimate objective. It would not be if equal benefits could be obtained through substantially less restrictive routes. Yet, a restraint can be "reasonably necessary" even though some less restrictive alternative exists. This "reasonably necessary" formula thus highlights the need for a discriminating judgment about the allegedly less restrictive alternatives: how much worse for the parties; how much better for society; enough difference to be reasonable grounds for condemning what the parties did?

E. Intention.

In some ways, intention and purpose are the most confusing ideas in all of antitrust law. First, as a prerequisite to illegality in some situations, a requirement of a certain intention is frequently superfluous, for the competitive impact of the conduct can be fully judged without reference to the actor's state of mind. Second, even worse, talk of intention frequently masks a failure to analyze the conduct. The judge or jury seems more comfortable in looking to the defendant's state of mind rather than to the more complex analysis of whether his market behavior is desirable or not. Third, even when intention is relevant, the tribunal may fail to define what intention it is looking for: an intent to perform an act; an intent to do an act with knowledge that it will have a certain impact on the plaintiff or the market; an intent to affect the plaintiff; an intent to affect the trade in one's own product; or an intent to affect in an adverse way the overall market? Fourth, frequently the tribunal fails to distinguish properly between an illicit anticompetitive intent and a lawful competitive intent. Courts or juries sometimes act as if the desire to gain business or to win business from a rival is something other than lawful competition which is, after all, the process of trying to prevail over rivals. The fact which contaminates such an intent is the effort to prevail by improper means.

To be sure, purpose or intention can illuminate the propriety of the means chosen, especially where the conduct is competitively ambiguous. Thus, the tribunal confronted with a restraint may properly inquire into the defendant's purpose as a means of identifying

possible redeeming virtues. That is, the defendants are in the best position to tell us what legitimate objectives they claim. This search is not merely for the defendants' subjective intention but for a claim of justification. Without such a justification, one might say that the defendants' purpose in adopting a restraint must have been unlawful. But it seems more straight forward to say that a restraint is unreasonable when no redeeming virtue is claimed to justify it.

Suppose, however, that the defendants' subjective intention ("to harm rivals") seems to differ from the claimed objective ("to serve customers better"). Of course, the difference may be superficial: serving customers better does harm rivals. But imagine a subjective intention stated with utmost clarity: "our object is to harm rivals by means which we can plausibly claim to benefit customers but which we know do not." A court might reasonably decide to forego the complex inquiry into whether customers are benefited or not and simply accept the defendants' word that they are not.

Nevertheless, the question for judges is this: is such a "smoking gun" so rare in antitrust litigation that the search for it is not worthwhile? Bear in mind that it is such a search that so often makes antitrust litigation interminable with the massive discovery or trial that threatens to overburden the system. Yet judges are understandably reluctant to exclude anything that might be relevant. And it is even difficult to exclude the seemingly irrelevant fragment when a party promises to connect it up with some other seemingly irrelevant fragment about intention to paint a meaningful picture. At the very least, the courts can clearly go much further than they have in defining with greater clarity the nature of the unlawful intention in particular

circumstances and in turning directly to the appraisal of conduct.

One example of the last step under Sherman Act §2 is the Second Circuit decision in the Berkey case.[10] The lower court had allowed the jury to find certain conduct unlawful on the basis of an improper intent, while the Court of Appeals simply held the conduct to be privileged competition as to which intention was irrelevant.

In summary, a claim of legitimate business purpose may bear on the analysis of a challenged restraint in three ways. First, at a minimum, it shows that the defendant's intention is not wholly anticompetitive, prevents the inference of any anticompetitive intention from the challenged conduct alone, and probably helps resolve any other ambiguous evidence about intention in the defendant's favor. Second, a good intention, whether or not exculpatory as such, bears on the prediction of effects. A legitimate and innocent explanation of the challenged conduct shows that a rational defendant has a reason for acting other than attainment of an anticompetitive effect. Without necessarily proving the absence of such effects, a good intention reduces the likelihood that detrimental effects are present. Third, a good intention reduces the likelihood that the challenged conduct is, on balance, detrimental. Whatever the detrimental effects or tendencies might be, the challenged conduct cannot be unequivocally anticompetitive when it also serves legitimate business purposes.

F. Administrative Convenience.

Is "administrative convenience" in administering legal rules relevant to the wise formulation of the

appropriate legal rule? An affirmative answer seems clear both in principle and practice, especially when the issue is implicit. Once made express, however, the proposition that administrability properly affects rule formulation has apparently troubled several courts. For example, the marginal cost test for predatory pricing justifies its express departure from an ideal standard because there is no practicable way for the court to apply the ideal.[11] The Seventh Circuit recognized the utility of the marginal cost test but declared that the court could not countenance a departure from the ideal merely for the convenience of the courts.[12] The court then reached the same result as the marginal cost standard required. Another court took the same view and supplemented the marginal cost test with a search for an improper intent, which was not found.[13] The Sixth Circuit faced with a magazine distributor terminating a subdealer acknowledged the difficulty of forcing the defendant to appoint subdealers and of defining the terms of dealing.[14] Nevertheless the court declared that the administrative difficulty in deciding upon the terms of vertical dealing was insufficient ground for denying the plaintiff's "right".

There is here an obvious dilemma. On the one hand one must not burden the courts, litigants, or actors planning their affairs with rules whose application depends on that which cannot be known or determined effectively. On the other hand, administrative difficulties are always present and cannot serve as an excuse for ignoring all potentially serious anticompetitive threats. Indeed, judges are understandably reluctant to deny a right or remedy merely because of administrative difficulties. This judicial impulse has certainly been reflected in the courts' willingness to implement

constitutional mandates such as reapportionment or desegregated schooling notwithstanding enormous administrative difficulties. By comparison, difficulties in applying antitrust rules must seem mere child's play. Moreover, an otherwise superior legal rule surely ought not to be rejected merely because it is slightly more difficult to administer.

Yet, it is an unwise rule that cannot be consistently applied without chilling desirable competitive forces. A rule that cannot be intelligently applied invites confusion and quixotic results. Such tendencies produce results that are themselves contrary to the statutory purpose. It may also be pointed out that the statute of frauds, statute of limitations, laches, the parol evidence rule, and many similar doctrines reflect the altogether customary and hardly novel or exceptional notion that administrative convenience may itself be an element of justice. In the antitrust world in particular, the inability of the courts to make concrete judgments about particular matters in particular cases is frequently the basis either for per se rules which makes inquiry to those matters legally irrelevant or for powerful presumptions which allow exceptional proofs to control but which govern other cases--all in the name of administrative convenience.

The question is not one that can be resolved by an appeal to absolutes. It is rather a question of judgment about (1) the relative wisdom of alternative approaches or rules, (2) the relative administrability of each such rule, (3) the consequences of uncertainty or erroneous application on the parties' market behavior, on the burden of litigation, and on society, and, bearing on the last point, (4) the relative gravity of the antisocial consequences that might flow from uncon-

trolled behavior adjusted for its frequency, and (5) the relative gravity and frequency of the antisocial consequences of excessive or erroneous control of such behavior.

G. Horizontal-Vertical Classification.

Agreements restraining trade are customarily divided into "horizontal" agreements among competitors and "vertical" agreements between suppliers and customers. Horizontal agreements threaten the achievement of antitrust goals by eliminating competition among the participants and thereby allowing them to enhance their collective profits to the detriment of consumers. That same unhappy end might also be sought by horizontal agreements which preempt suppliers or outlets and thereby exclude other actual or potential competitors. The latter type of exclusion might also be practiced by the single firm through its vertical arrangement with suppliers or customers. And vertical restraints on the distribution of a single brand might have the effect of facilitating collaboration among manufacturers or of limiting competition that would otherwise occur at, say, the retail level. At the same time, the justification for some vertical restraints (for example, territorial limits on dealers' resale of a given brand[15]) sometimes resembles that for a related horizontal restraint (for example, territorial limits on sale of a branded good made by a joint venture formed by competing firms[16]).

Although many vertical arrangements have characteristics distinguishing them in important ways from the bulk of horizontal arrangements,[17] horizontal and vertical restraints do not always threaten competition

in different ways, or call for different analysis. The horizontal-vertical classification is often helpful and convenient. But there is no need to define watertight and mutually exclusive classes of restraints. Whether horizontal or vertical, the question is always one of competitive effects and redeeming virtues. The horizontal-vertical distinction is relevant only insofar as it bears on the assessment of competitive evils or justifications.

H. Common Purpose or Coerced Agreement.

We have been emphasizing and trying to understand the nature of the "unreasonable restraint of trade" that Sherman Act §1 is understood to prohibit. However, §1 does not forbid trade restraints as such but only the "conspiracy" (or "contract" or "combination") in restraint of trade. We cannot pursue the conspiracy issue here, but only note briefly that the courts have regularly embraced within the conspiracy concept that unilateral action which compels an "agreed" course of action by another. Consider the firm which threatens its rival, "Join with me in fixing price or be ruined." Reluctant assent by the rival forms a conspiracy. Similarly, consider the supplier who says to a customer, "I will not sell you gasoline unless you buy your tires from me." The buyer who assents has joined a conspiracy.

The language of conspiracy may seem odd, especially in the latter case, where we seem to observe unilateral exertion of power by the supplier. But my immediate purpose is not to justify the usage but only to remind the reader that the reach of §1's conspiracy provision can be quite broad. Indeed, it is sometimes stretched to reach entirely unilateral conduct by pretending that

the actor has conspired with those he has hired to carry out his will or with a member of the same corporate family, such as a wholly-owned subsidiary. But that is another story.[18]

II.
PER SE RATIONALE

Every reader of this monograph is aware that "price fixing is unlawful per se." This proposition is clear enough although we shall see in Part III that there are some difficulties in defining "price fixing" and that the kinds of inquiries excluded by the "per se" characterization may vary quite a lot. Here, we put those difficulties to one side and focus on hard core agreements among competitors fixing a minimum price or maximum output. Such an agreement will be condemned without proof that the defendants have affected price or have the power to affect price and with virtually no room for exculpation. That this is the case is briefly sketched below before turning to the question: why should the powerless conspiracy be condemned at all?

In 1897 the Supreme Court was faced with an agreement among eighteen railroads controlling rail traffic west of the Mississippi River. The railroads had created an association which would fix freight rates for all of them, thus undoubtedly restraining each member's subsequent freedom to trade. The Supreme Court condemned the restraint because §1 condemned "every" restraint without exception.[19] The Court then cut back the sweep of its condemnation of "every" restraint in three steps: it excepted indirect restraints,[20] suggested that restraints valid at common law were not Sherman Act "restraints" at all,[21] and then announced the so-called rule of reason in the Standard Oil case of

1911: "the standard of reason . . . was intended to be the measure . . . for . . . determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."[22]

But Standard Oil purported to reconcile the results of the early cases by proclaiming that the rule of reason did not save that which was "inherently unreasonable," and the case was so interpreted in Trenton Potteries, where the Supreme Court refused to be drawn into consideration of whether the prices fixed by a group of businessmen were or were not "reasonable."[23] Not only are the criteria of reasonableness elusive, but toleration of price fixing implies continuous supervision. The price or the circumstances may change such that yesterday's reasonable price is no longer reasonable today. The Supreme Court concluded that uniform price fixing by those controlling in any substantial manner a trade or business was prohibited despite the reasonableness of the particular prices agreed upon. Observe that the Trenton defendants did have market power, as did the price-fixing defendants in the famous Socony decision of 1940.[24] The defendants there were found to have affected prices. Nevertheless, the Court made clear that neither power nor effect was required to establish the violation.

But why should society invoke expensive prosecutorial machinery or impose burdensome sanctions on those who cause no harm? To be sure, the powerless conspiracy reflects an "attempt" to restrain trade, but Sherman Act §1 lacks an explicit attempt clause. In any event, the classic concept of attempt requires that there be power to bring about the forbidden result.

Of course, the conspirators believe that they have power, else they would not engage in the activity. In

that sense, the conspiracy demonstrates a dangerous proclivity. But that alone would not seem sufficient grounds for punishing those who are mistaken.

However, the critical point is not whether the law should or should not condemn the harmless restraint but how the law should proceed in the face of uncertainty. An inquiry into power is not socially costless, but requires the expenditure of social resources of courts and lawyers to prove or disprove the power of the parties. There is no good reason to make that expenditure if the conduct in question totally lacks redeeming virtue, such that the only thing to be said in the defendants' favor is that they tried to harm the public but might possibly have lacked the power to do so.

One immediately sees then that the presence or absence of redeeming virtues is the critical inquiry. If redeeming virtues are absent, then we know that society loses nothing by condemning the restraint, even without inquiring into the power of the collaborators. On the other hand, if redeeming virtues are present, then condemning the powerless collaboration would sacrifice those social benefits without increasing competition. Observe that the inquiry must be two-pronged: are there social benefits to be attained through price fixing either in the particular case or in the generality of cases? A negative answer for every case that we can think of creates a very strong base for condemning price fixing categorically.

Whether there are any social benefits to be achieved through private price fixing is not a topic that can be developed in this monograph. I refer the reader to a concise discussion elsewhere.[25] My conclusion is that social benefit from private price fixing is conceivable in some rare circumstances but is rather unlikely in

frequency or magnitude and is always hard to prove. Furthermore, the achievement of any such benefit is always premised on the existence of power to affect prices; otherwise, the asserted benefits could not be obtained at all. And where there is such power, it is likely to be exercised in the parties' interest rather than in the public's interest. Finally, the identification of such benefits in practice is exceedingly difficult. Whether or not the reader agrees with these conclusions, they are unquestionably at the heart of the per se condemnation of private price fixing.

To sum up, the premises for per se condemnation of private price fixing are these. (1) Such price fixing is tempting to businessmen but dangerous to society; that is, the conduct is highly pernicious. (2) The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversly to the public interest. (3) Toleration implies a burden of continuous supervision by the courts which consider themselves ill-suited for that purpose. (4) Although a social justification would seldom be vindicated in fact, even if sufficient in principle, it will be asserted in every case and thus complicate litigation and weaken the force of the prohibition. (5) A categorical prohibition offers a clear instruction to businessmen, warrants strong sanctions against violators, and thus diminishes the likelihood that the pernicious practice of price fixing will take place. The key points are the first two, and without them there is no justification for categorical condemnation.

Some courts have apparently justified a per se prohibition solely by reference to the administrative

inconvenience of trying to make a more refined judgment in the particular case.[26] But this seems clearly erroneous (just as it is also erroneous to fail to give weight to administrative convenience in rule formulation). The administrative difficulty of assessing a particular act's competitive merits or demerits can just as easily justify a rule of per se legality as a rule of per se illegality. One can only choose between them on the basis of a generalized judgment about the balance of harm or benefit in the preponderance of cases of the sort before the courts. Of course, such judgments will necessarily be rough in character and subject to revision over time in the light of improved knowledge or analysis.

There is no general formula by which one can say what balance of harms and benefits justifies categorical prohibition, although one can specify the questions that might be asked. Is there a reasonable likelihood that conduct of the kind in question can benefit the economy? Are pernicious effects likely to accompany most concrete manifestations of this kind of conduct? If pernicious effects are likely to be frequent, a relatively absolute prohibition might be justifiable whenever benefits are infrequent, or benefits likely to occur most frequently are relatively small, or any significant benefits that do occur are readily detectable (and therefore proper subjects of an exception to a general condemnation). Similarly, if significant social benefits are likely to be frequent, a relatively absolute permission might be justifiable whenever the harms are infrequent, or such harms are relatively small, or any significant harms are readily detectable (and thus grounds for an exception to the general toleration).

The more one examines per se rules and their premises, the clearer it becomes that they are a species of (1) stare decisis and of (2) presumptions of varying strengths.

III.
PER SE VS. RULE OF REASON

A. Core Contrasts; Categorization Impulses.

An obstacle to the sensible analysis of restraints of trade is the dichotomy between "per se" and "rule of reason" cases and the misconceptions of each which will be discussed in subsequent paragraphs.

The opposed concepts are clear enough in their core illustrations. An act that is unlawful whenever it occurs and regardless of the circumstances may be said to be "unlawful per se". By contrast, where legality depends upon an appraisal of the circumstances of a challenged act, the case is said to be governed by the "rule of reason." Thus defined, the two categories are indeed opposed. But use of these categories can have the pernicious effect of confusing the unwary. The confusion arises from several sources. The dichotomy between the per se and rule of reason categories is far less sharp than first appears. The courts often say that tying agreements are unlawful per se and yet recognize their legality in some circumstances. They say that a practice is subject to the rule of reason and yet condemn it very readily in most of its manifestations. They say that boycotts are unlawful per se and then manipulate the definition of "boycott" to exclude certain practices that seem to be boycotts.

We are not suggesting that the courts are being whimsical or faithless to their mission. Rather, they are responding quite intelligently to the classification

straitjacket with which they have bound themselves and which they have difficulty escaping for four interrelated reasons. First, the cause easiest for lawyers to see is precedent: the cases and especially Supreme Court cases use the per se idea and the rule of reason contrast and thus seem to impose that dichotomy on lower or later courts. Second, the posture of litigation often seems to require an early pigeon-holing instead of more refined analysis of how a challenged practice relates to antitrust goals. A plaintiff understandably wishes to allege and prove as little as possible. He will try to fit the defendant's conduct, of which he complains, into a per se category. The defendant will of course resist the classification in an effort to justify his conduct and perhaps even to end the suit of those plaintiffs who lack the energy, time, money, or evidence to allege and prove the existence of an "unreasonable" restraint of trade. Accordingly, the courts frequently find themselves dealing with alleged restraints in terms of classification schemes that are often argued about abstractly and without much relevance to the probable effects or justifications of the challenged conduct. Third, such abstract arguments about classification often assume little real understanding of the purposes of antitrust law or the competitive significance of particular practices. Such arguments are therefore congenial to those lawyers and judges who have not had the opportunity to probe very deeply into the analysis of antitrust problems.

Fourth, judges and litigants often have the misconception that the classification, per se or rule of reason, necessarily determines what must be alleged and proved in the particular case, what must be made the

subject of detailed findings, or what must be submitted to the jury.

In the next several paragraphs, we show that per se rules are much looser in their condemnation than is often supposed, that the rule of reason can be much more severe than is commonly assumed, and that the categorization does not determine, and often obscures, what should be alleged, proved, or submitted to the jury. To critcize classifications, however, is not to suggest that courts should be more hospitable to certain practices. Rather, it suggests that we should demystify antitrust jargon and do a better job of saying what we mean.

B. Per Se Rules: Variations, Qualifications, Exceptions, and Definitions.

Summary. Seeming inconsistencies in the application of per se rules and in the use of per se language can readily be explained. For one thing, "per se illegality" expresses quite different degrees of preclusion of certain facts or policies in the particular case. Secondly, exceptions to per se condemnations are expressly adopted. Thirdly, the conduct that is subject to a given per se rule will be defined with varying degrees of inclusiveness. Such definitions often reflect the factual inquiries and policy considerations which superficially seem to be precluded by the existence of a per se rule. Indeed, in each of the preceding three respects, the courts are responding in varying degrees to the factual inquiries and policy considerations that would be invoked in a rule of reason inquiry concerning the challenged conduct.

Varying intensity. At base, the notion of per se illegality excludes consideration--totally or beyond some degree--of some factor that might otherwise seem relevant. To characterize a restraint as unlawful "per se" may mean only that the court will dispense with proof of actual harmful effects in the particular case. Or it may mean that the court will not require any proof of power to create harmful effects. Or it can also go so far as to mean that the challenged conduct is unlawful without the possibility of any exculpation or justification in the particular case. At its fullest flowering, it might preclude consideration of everything beyond the name of the conduct. For example, price fixing among competitors is condemned with the greatest severity, although there may be exceptions and flexibility in the definition even there. Boycotts are also condemned severely, but with enormous flexibility in the definition of the category. Tie-ins are often said to be illegal per se, but some consideration of power and effect are built into the definition of the prohibited conduct. In each of these instances, moreover, the court's receptivity to exceptions and narrowing definitions varies widely with the particular nature of the challenged conduct, of its probable effect in the generality of cases, and the nature of the claimed defense.

It is hardly surprising that the nuances of such variations cannot be captured in a single contrast between a per se rule and the rule of reason.

Express exceptions. What is most surprising to the linguistic purist is that some conduct can be both "unlawful per se" and yet lawful in the particular case. That result can be stated in either of two forms

(I) "Y is unlawful per se, except that it is lawful in situation Z"; or

(II) "Y, which is defined to exclude situation Z, is unlawful per se."

A court's choice between these forms of statement depends upon the apparent room for maneuver in the definition, as illustrated below. Here we focus on the express exception, which highlights the nature of rule formulation very neatly.

Consider what an intelligent court could reasonably have in mind when it declares a certain practice unlawful per se. On the one hand, courts using this language clearly mean to address more than the specific actual situation before them. Indeed, the per se characterization usually emerges only after the courts have had some considerable experience in appraising a particular practice.[27] On the other hand, the reasonable judge condemning practice Y with per se language cannot mean to condemn, without specification or analysis, all unconsidered variations of that practice in every possible context. Even general formulations that attempt to define categories of factors that should be considered or excluded must be subject to the same reservations. Sensitive judges have no difficulty recognizing these points. And occasionally, a judge speaks expressly to it, as did Judge Van Dusen in the Jerrold Electronics case:

> "Any judicially, as opposed to legislatively, declared per se rule is not conclusively binding on this court as to any set of facts not basically the same as those in the cases in which the rule was applied. In laying down a rule, a court would be, in effect, stating that in all the possible situations it can think of, it is unable to see any redeeming virtue in . . . [the practice involved] which would make them reasonable. . . . Therefore,

> while the per se rule should be followed in almost all cases, the court must always be conscious of the fact that a case might arise in which the facts indicate that an injustice would be done by blindly accepting the per se rule."[28]

Does this mean that per se rules are merely rules of stare decisis, that only the precise practices previously adjudged without redeeming virtue can be condemned per se? In a sense, the answer is affirmative, but the per se idea is not quite so limited. Many practices are close enough to those previously condemned as without redeeming virtue and without any plausible new claim of redeeming virtue, that they can readily fit within the previous condemnation.

Jerrold is a frank recognition of the room for exceptions to an apparently applicable per se condemnation. It makes clear that so-called per se rules are simply examples of the presumptions that exist throughout antitrust law. Of course, presumptions come in various breadths and strengths, and so do per se rules, as we shall see.

Defining the conduct. The second demonstration of the flexible and barely presumptive character of per se rules lies in the definition of the covered conduct. Rules governing "price fixing," "boycotts," or "tie-ins" do not clearly define the conduct that will be so characterized, and the confusion increases as one moves away from the paradigm that generated the per se approach in the first place. That definitional problems are inevitable can be easily seen. Grant, for example, that virtually all horizontal agreements among competitors ultimately affect price in some way, that some of these effects will be beneficial, and at least some of the beneficial arrangements are readily identifiable and

uncontaminated by any harmful incidents. Accordingly, a categorical prohibition of all agreements affecting price would forbid identifiable and wholly beneficial arrangements that promote the goals of the antitrust laws. It follows that a sensible per se rule against price fixing cannot embrace all conduct affecting price. A necessary predicate for the rule, therefore, is a more narrow and precise definition of the categorically prohibited conduct.

Courts approach that definitional task in a variety of ways. One approach, clearly erroneous, is linguistic. It asks whether the conduct before the court can be reasonably described as, say, a "boycott." This linguistic approach may be the court's only recourse when interpreting a statutory term whose legislative purpose is far from clear.[29] But when applying a judge-made rule, the court is capable of recognizing the original rationale for the rule and is indeed duty bound to do so. Accordingly, the courts should, as many do, define the scope of a judge-made prohibitory rule in terms of the policies that gave it life and that continue to give it vitality. Two examples may be helpful here.

The court faced with an alleged tie-in that is said to be unlawful per se must, if there be any doubt about it, ask whether the challenged conduct ought to be condemned. That is, the court must decide whether the reasons for relatively categorical historical condemnation of tie-ins apply to the situation before it. If the answer is negative, the court may hold that the challenged conduct does not constitute a tie-in at all. Thus, a package transaction with substantial justifications or with few apparent harmful effects may be said not to be a "tie-in".[30] Of course, it might be cleaner and clearer to say that harmful effects are a

prerequisite for illegality or that justified tie-ins are lawful, but the immediate point is that courts achieve the same end by varying the definition of a per se classification. Of course, this creates some confusion because the definitional perimeters do not always correspond closely with the policy judgment about needed effects or permitted justifications.

The courts applying anti-tying rules are often seen to be applying a rigid rule in a mechanical linguistic way. Sometimes they are doing just that. More often, they utilize any obvious flexibility in the definition, or create some less obvious flexibility, in the effort to conform the scope of the prohibition to the underlying policies at issue. And, as we have suggested, the courts sometimes create express exceptions to so-called per se rules.

The sensible approach is to put in the per se category that which belongs there--namely that conduct whose balance of harm and virtue is always predominantly harmful. The Supreme Court said just that in its recent BMI decision:

> "To the Court of Appeals and CBS the blanket license involves price fixing in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally 'fixed' a price. As generally used in the antitrust field, 'price fixing' is a short-hand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is

> one of those types or that it is 'plainly anti-competitive' and very likely without 'redeeming virtue'. Literalness is overly simplistic and often overbroad. . . . It is only after considerable experience with certain business relatiohips that courts classify them as per se violations. . . . We have never examined a practice like this one before . . . ."[31]

Of course, one must be wary about the judicial freedom allowed by BMI. Once freed by BMI from the per se vise, a court may be too easily persuaded of redeeming virtues that do not exist. An example of the latter is the Ninth Circuit's Catalano decision.[32] The court held that it was not unlawful per se for beer wholesalers to agree to eliminate deferred payment terms previously granted:

> "The fixing of credit terms . . . is not 'manifestly anti-competitive.' . . . [A]n agreement to eliminate credit could sharpen competition with respect to price by removing a barrier perceived by some sellers to market entry. Moreover, competition could be fostered by the increased visibility of price made possible by the agreement to eliminate credit. . . . [Such agreements may violate the Sherman Act] when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition. . . . At this juncture of the proceedings it has not been established that the agreement was entered into with the purpose, or had the effect, of restraining price competition in the industry. . . . We cannot say that credit term fixing 'would always or almost always tend to restrict and decrease output.'"[33]

The court seemed wrong on several grounds. First, it is almost impossible to prove that the effects are beneficial or detrimental without a considerable period of observation; over time, however, other forces would obscure the meaning of the data. Furthermore, fixing credit terms would almost always tend to restrict or decrease output, because limiting credit is identical in its economic effect to increasing price, which does tend to have output-depressing effects. With respect to the possible justifications, moreover, one would doubt that the collaborators were engaged in this practice for the purpose of increasing their price competition. In principle, the court's apparently-accepted justification permits an agreement eliminating competition on credit, warranties, and every other terms of the transaction except nominal price. But it is those very elements of the transaction on which some modicum of competition is likely to occur in an otherwise oligopolistic market. The court's economic analysis therefore seems erroneous.

(Accepting the court's perception of possible justifications, however, a better statement of the approach might be this: the alleged conspiracy to eliminate credit is presumptively unlawful, unless the defendants can bear the very substantial burden of persuasion that the effect of the conspiracy is to increase competition. Unless the defendant is able to make a strong preliminary showing, I would say that no material issue of fact has been presented and would grant summary judgment for the plaintiff.)

In any event, the Ninth Circuit decision was correctly reversed per curiam by the Supreme Court.[34]

Another Ninth Circuit decision, now pending before the Supreme Court, presents a more difficult issue. In

Arizona v. Maricopa County Medical Society,[35] the court refused to grant summary judgment condemning per se certain actions by a group of physicians that arguably put a maximum lid on charges made to health insurers. Now one might condemn the defendants out of hand on the ground that the fixing of a maximum price distorts the market and therefore ought to be condemned. On the other hand, there has been an obvious explosion of medical costs, partly attributable to the existence of third party insurers, such that neither the patient nor the insurer has a strong incentive to resist excess charges. One might therefore think there was some virtue in an effort, even among physicians, to put a ceiling on medical charges.

Unfortunately, one may doubt the bona fides of physicians acting in their own self-interest. And even if one were persuaded that they had acted selflessly--perhaps on proof that the prescribed prices were lower than previously prevailing prices--how could the court be assured that future adjustments would not transform the original maximum into a non-competitive minimum, unless the court itself were to decide from time to time upon the amount of a "reasonable price?" There may be no reasonably administrable standard for supervising the defendants' activities. In that event, given the ever-present danger that producers with power will fix prices in their selfish interest rather than in the public interest, an absolute condemnation may remain appropriate. (Again, the reader will observe the relevance of "ease of administration" in formulating a legal rule.)

Thus, we see again that conduct arguably within a general per se category may have a plausible or even persuasive claim to redeeming virtue in the particular

circumstances. Of course, the particular pro-competitive impact may be adjudged illegitimate in principle, unlikely to be achieved in practice by the restraint, always or most always achievable in a less restrictive way, or perhaps so rare and so difficult to identify in practice or to control as not to be worth inquiring into.

Conclusion. We thus see that so-called per se rules are nothing more mysterious or special than presumptions of varying strength and breadth. And we are about to suggest that the so-called rule of reason also contains within itself numerous presumptions of varying strength and breadth. The thrust of this discussion is two-fold. First, the antitrust tribunal should not be automatically fearful either of considering a fact or factor in a per se case or refusing to consider it in a rule of reason case. Second, we might clarify our thinking and enhance the understanding of bar and business by dropping per se and rule of reason terminology altogether. It would be much clearer, for example, to say that "agreed prices among competitors will be condemned without proof of power or effect, without consideration of the price magnitude, and with no defense for the party's desire to eliminate competition for its own sake, but power and effect and justification will be considered when, say, the elimination of price competition among the collaborators facilitates lower cost production or distribution."

We do not mean to suggest that the quoted proposition is totally free of ambiguity or capable of automatic application. But it does focus attention on something more than the delusive simplicity of "price fixing" and it indicates that the appraisal of what constitutes a legitimate justification will be a critical element in

many cases. Too often, invocation of a "per se" formula invites only befuddlement.

C. Rule of Reason Can Be Severe: Limiting Factual Inquiries and Jury Role.

Any contrast of paradigms overstates the difference between a per se rule and the rule of reason. Just as the former is not always so tightly prohibitive as is usually supposed, the rule of reason is not so open textured and hospitable to a claim or defense as is often thought. That something is not unlawful per se does not always require refined fact finding or balancing; indeed, a particular defense may be rejected categorically or presumptively within the general ambit of a rule of reason. Similarly, the fact that conduct may be unlawful under the rule of reason does not necessarily mean that merely alleging that conduct should be sufficient to resist a summary disposition of such a claim.

Instantaneous judgment. The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic joint selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification

actually probable in fact or strong enough in principle to make this particular joint selling arrangement "reasonable" under Sherman Act §1. (We need not argue at the moment that the judge can take "judicial notice" of such obvious truths and give judgment against the arrangement on the pleadings alone; the summary presentations appropriate to a motion for a summary judgment would be sufficient to establish the points necessary for such immediate condemnation.) The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.

Categorical or presumptive rules within the rule of reason. The rule of reason does not necessarily or repeatedly welcome every argument within the realm of reason. Some claims or defenses--or some aspects of them--will be seen as inconsistent with the premises of the antitrust laws and will therefore be rejected in principle. Others will be seen as acceptable in principle but deficient enough in some respect for the generality of cases to be categorically or presumptively rejected. We pause briefly on a few illustrations.

Illegitimate objective. The rejection of a defense in principle can be illustrated by the Fashion Originators Guild of America (FOGA)[36] and Professional Engineers cases. Although the former case spoke in per se language, both illustrate a single decisional process.

FOGA involved a combination of clothing designers who collectively refused to deal with distributors, or manufacturers dealing in unauthorized "copies." The restraints were both severe and intrusive. The key issue before the Supreme Court was whether the Federal Trade Commission had erred in refusing to admit evidence about the respondent's purposes and about the evils of "design pirating." The Court's language is often

interpreted to say that such conduct is always illegal and entirely without regard to the actors' purposes. Although this reading may be indeed the correct one, the Court spoke in narrower terms dictating the identical condemnation of the FOGA actors under the rule of reason. Even without detailed evidence about the evils of design pirating, the Court declared that even if it were a tort under the law of every State, its elimination would not justify the intense restraint before the Court. Indeed, it later came to be held that copying was affirmatively protected by federal law against any contrary State law.[37]

The point is that the rule of reason does not always require detailed admission of evidence about an alleged justification in order to decide upon its legitimacy in terms of the purposes of the antitrust laws. In the FOGA situation, the results can be the same, regardless of whether one talks per se or rule of reason language. The difference is that the court can be clearer and more sharply focused in ruling wisely on the particular justification before it rather than trying to speak more generally of practices not analyzed in the instant case. By the same token, when the court does use per se language, the presumption against legality is probably stronger in subsequent cases, although we have suggested that it does not preclude later exceptions and qualifications.

A similar illustration is provided by the Professional Engineers case discussed earlier in this paper.

Other categorical or presumptive rules. Legitimacy in principle does not necessarily mean that a defense should be heard in a particular case. Suppose, for example, that a certain patent would not be licensed at all unless the licensor were permitted to impose a

certain restraint on the licensee's use of that patent. Assume also that the license restriction has no effect other than limiting the competition made possible by the license. Such a license restriction would not eliminate any competition that would otherwise occur. But an essential predicate for that conclusion was the assumed refusal of the patentee to grant an unrestricted license. Nevertheless, a court might appropriately refuse to hear evidence about the patentee's state of mind--not because it is irrelevant or unacceptable in principle, but because it is difficult to prove or disprove in the generality of cases. Apart from limited objective data, the patentee's own testimony would be the usual evidence, and it may be too contaminated by bias to be reliable. For the moment we need not decide the ultimate issue. It is enough to see that a court might appropriately consider whether the patentee's state of mind should generally be ignored in appraising a license restriction.[38]

Tie-ins offer another illustration. The supplier of a machine may be allowed to require the customer to buy a second product from that supplier where truly necessary to guarantee the proper functioning of the machine. But the courts will not hear this quality control defense to a tie-in when proper functioning can be achieved through a less restrictive alternative. Where the supplier can define specifications of the second product to ensure proper functioning of the machine, that less restrictive alternative will be preferred by the courts, which will then reject the quality control defense. Not only will the court impose the general rule that an adequate less restrictive alternative eliminates the defense. It will also adopt general guidelines defining what constitutes an adequate

less restrictive alternative. To be sure, doubtful cases will remain and will have to be judged on their peculiar facts, but the courts will and should develop general rules that will dispose summarily--without trial or refined fact-finding--of many cases. As an example, the quality control defense will not be further considered once it appears in the pleadings or affidavits that the necessary characteristics of the second product can be defined with a specification comprehensible to an industrial user of a machine, if adequate functioning with an appropriate second product has been accepted in the marketplace.

Once again, the point is that a general willingness to hear a particular defense does not and should not preclude the courts from adopting general rules governing the application or rejection of that defense in specified classes of cases.[39]

"Facial unreasonableness". Another illustration of the speedy application of the rule of reason is the Fifth Circuit decision in the Realty Multi-List case.[40] Defendant realtors exchanged listings of property available for sale such that all the participants could make all the properties available to all prospective purchasers. Any realtor who was not allowed to participate could not serve his buyer or seller clients as well as participants could and was therefore at a competitive disadvantage. Under the so-called Associated Press rule,[41] the participants would be required under certain market conditions to admit competing realtors on reasonable terms. Defendants admitted realtors who maintained full-time offices open during usual business hours, who were determined by the defendants to be financially responsible, and who subscribed $1000 to the multi-list organiza tion. On summary judgment, the

court held each restriction unreasonable on its face: one could be a responsible broker without having an office fully attended; there was no need for greater trustworthiness than state licensing required (and perhaps vague private standards were too open to abuse); and the $1000 was unrelated to the organization's costs. Although certain market conditions were to be explored on remand, the Court applied the rule of reason quite summarily.

Claims. The propositions discussed above are just as applicable to claims as to defenses. The fact that alleged conduct can violate the antitrust laws under some circumstances within the rule of reason suggests to some courts and commentators that detailed findings or trial are required once a complaint names the conduct and states the legal conclusion that it unreasonably restrains trade (or monopolizes or whatever). But this is just as erroneous as allowing a defendant to have a trial on his quality control defense without first showing the kinds of facts that would allow it. The court should insist that a claimant specify those more particular facts, circumstances or theories which would be sufficient to lead the tribunal to hold that the challenged restraint is unreasonable. Even a desire to give a plaintiff full opportunities for discovery should not save him from having to state one or more theories to sustain his suit. And at least after a reasonable time for discovery, summary disposition is appropriate if the facts developed through discovery fail to support a claim or defense.[42]

Conclusion: qualify the impulse to categorize: Of course, one understands the impulse to speak categorically. To leave any opening is to leave room for defendants to claim justification for rather clearly

unlawful restraints, and to demand submission of the issues to the jury in damage or criminal cases. But that impulse can disappear once the judges realize that they have the authority to define what is a legitimate objective capable of redeeming an unlawful restraint. And just as the judges can say that protection against quality degradation cannot justify an agreed rule against competitive bidding, they can also say that quality protection is (or might be) an excuse for some limited restraints but not for others. The point is that a rule of reason inquiry and conclusion can, and largely should, be (1) made by the judge and (2) often without need for detailed evidence or evidentiary findings. Those results can be accomplished without categorical language. And although categorical language does not prevent later qualification, it tends to confuse lower court judges and to steer them into sterile definitional inquiries and away from purposive analysis of the objects of the antitrust laws. In particular, categorical propositions about the scope of permitted justification may be entirely correct when applied to serious restraints but inappropriate when applied to very modest restraints.

One final complication in the use and application of per se rules needs to be highlighted: their relationship to the respective roles of judge and jury in the trial of antitrust cases.[43] Some courts seem to think that conduct not governed by a "per se" rule must be judged entirely by the jury, when there is one. But that view seems wrong. Even in criminal cases, the courts have not hesitated to deny the jury the power to decide, for example, that price fixing is lawfully reasonable. The judge with that power also has the authority to create lesser presumptions that, say, a

particular justification is or is not adequate in principle to excuse otherwise unlawful conduct or is not powerful enough, even if proved, to excuse the particular conduct challenged in the instant case. That is, the fact that something is not unlawful per se does not necessarily mean that every question of its effect, justification, or available alternatives must be decided by the jury.

NOTES

1. Standard Oil Co. v United States, 221 U.S. 1 (1911).

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

3. See P. Areeda, Antitrust Analysis ¶262 (3d ed. 1981).

4. Admiral Theatre Corp. v. Douglas Theatre Co., 437 F.Supp. 1268, 1293 (D Neb. 1977), aff'd on other grounds, 585 F.2d 877, 893 (8th Cir. 1978).

5. For a brief analysis of buying cartels see Areeda book, note 3, at 343 n.20.

6. National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

7. Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977).

8. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

9. Continental T.V. v. GTE Sylvania, 461 F.Supp. 1046 (N.D. Cal. 1978).

10. Berkey Photo v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

11. See III P. Areeda & D. Turner, Antitrust Law ¶715 (1978).

12. Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980).

13. Richter Concrete Corp. v. Hilltop Basic Resources, _____ F.Supp. _____ (S.D. Ohio 1981).

14. Byars v. Bluff City News Co., 609 F.2d 843, 864 n.57 (6th Cir. 1979).

15. See Continental case, note 7.

16. See United States v. Topco Associates, 405 U.S. 596 (1972).

17. See Areeda book, note 3, at ¶¶502-503.

18. See id. at ¶334.

19. United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897).

20. Hopkins v. United States, 171 U.S. 578 (1898).

21. United States v. Joint-Traffic Assn., 171 U.S. 505 (1898).

22. Standard Oil case, note 1.

23. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

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

25. See Areeda book, note 3, at 322-329.

26. E.g, Topco case, Note 16.

27. For example, in White Motor Co. v. United States, 372 U.S. 253 (1963), the Supreme Court reversed the lower court's holding that the restraints involved were unlawful per se. The Court said, "we do not know enough of the economic and business stuff out of which these arrangements emerge to be certain [of their purpose or effect] . . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they . . . should be classified as per se violations of the Sherman Act."

28. United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 556 (E.D. Pa. 1960), aff'd mem., 365 U.S. 567 (1961).

29. This seemed to be the case in St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978), where the Supreme Court read "boycott" very broadly. This severely narrowed an express exception to a statutory exemption from the antitrust laws.

30. E.g., Principe v. McDonald's Corp., 631 F.2d 303 (4th Cir. 1980), cert. denied, ___ U.S. ___ (1981).

31. BMI v. CBS, 441 U.S. 1, 8-10 (1979).

32. Catalano v. Target Sales, 605 F.2d 1097 (9th Cir. 1979).

33. Id. at 1099-1100.

34. 446 U.S. 643 (1980).

35. 643 F.2d 553 (9th Cir. 1980), cert. granted.

36. Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

37. Sears, Roebuck & Co. v. Steiffel Co., 376 U.S. 225 (1964).

38. This is not to say whether a particular patent license restriction should be allowed or prohibited. It is only to suggest that prohibition or permission could generally depend on factors other than the particular patentee's state of mind.

39. There is a mildly analogous issue of the proper role of appellate judges in reviewing decisions of trial courts or of the Federal Trade Commission. Reviewing courts should not be reluctant to define relevant presumptions, to detail the elements of what is relevant, and where necessary for clarity to make the final judgment of "reasonableness" of conduct for the purposes of the antitrust laws.

40. United States v. Realty Multi-List, 629 F.2d 1351 (5th Cir. 1980).

41. Associated Press v. United States, 326 U.S. 1 (1945).

42. See Areeda & Turner book, note 11, at ¶¶314-318.

43. Id. at ¶315.

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