COMMENT

PER SE ANTITRUST PRESUMPTIONS IN CRIMINAL CASES

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The 2020 William Howard Taft Lecture's focus on the per se concept in Sherman Act Section One antitrust cases came at a timely point given the recent interest in antitrust jurisprudence. This Comment looks at perspectives from each of the three branches of government in the development of current per se practice in criminal prosecutions, tracing from the sparse legislative text through the convoluted judicial history of per se illegality to its current use by the Antitrust Division of the Department of Justice in criminal cases. Recognizing that much of the development occurred in the context of a misdemeanor statute and before clarity on relevant constitutional requirements, I demonstrate that the Constitution proscribes the current use of per se illegality in criminal cases because—in the guise of a presumption of illegality—the per se concept substitutes judicial fact-finding using ever-changing and difficult-to-apply standards for fact-finding by a jury in derogation of the right to trial by jury, the separation of powers, and various aspects of the right to due

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process. I then show how each branch of government could remedy the current infirmity and warn of the potential to lose all ability to apply the Sherman Act criminally given the vague text and interpretations based on administrative convenience.

I. INTRODUCTION

Per se illegality under antitrust law is illusive both in (1) when it applies and (2) how it applies, but one thing is clear: per se illegality in criminal antitrust prosecutions violates fundamental constitutional protections. It substitutes a judicial presumption for jury fact-finding in violation of due process, the right to trial by jury, and the separation of powers. Moreover, the per se concept thrusts into the law a changing and complex criminal legal standard that lacks the required definitional clarity to withstand scrutiny under the constitutional void-for-vagueness doctrine—a doctrine that may apply to invalidate all criminal antitrust prosecution.

All three branches of government have played a role in creating the problem and could take steps to correct it. This paper summarizes the actions taken by each branch, examines the issues created with a focus on their constitutional dimensions, applies the relevant concepts to a hypothetical example, and suggests some possible avenues of redress.

From the scant, unclear congressional text of the Sherman Act, the Supreme Court developed the elements of a criminal offense and, as a means to ascertain whether a contemplated restraint of trade was unreasonable, a concept of per se illegality. The per se concept rests on administrative convenience and has changed with twists, turns, and about-faces.[1] But the executive branch weaponizes per se illegality to deny jury consideration of the key criminal elements of intent and unreasonableness.[2] This conclusive presumption directly contradicts Supreme Court decisions (1) rejecting substitution of judicial fact-finding or presumptions for elements of an offense and (2) showing that proof of the unreasonable restraint element may require considerable fact-finding, even for conduct literally classified as per se illegal.[3] In recent times, the Court has emphatically

[1] *See infra* Section III.B.2.i.
[2] *See infra* Section IV.C.
[3] *See infra* Part V.

emphasized the constitutional dimensions of the defense rights at stake.[4]

Notably, the constitutional infirmities of a conclusive presumption do not apply to the per se concept operating only as an interpretation of cognizable defenses. Some arguments rejected today on the basis that conduct is per se illegal could be rejected instead by interpreting what factors can make a restraint "unreasonable" or "reasonable." For example, by themselves, defenses that collusive prices are set at a reasonable level or that competition can be ruinous would not make a restraint reasonable. The scope of cognizable defenses is beyond this paper, but elimination of conclusive presumptions about criminal elements would not impair trial practices that deny defense reliance upon certain justifications of restraints.[5]

Now is a particularly apt time to address the unconstitutional application of per se illegality in criminal cases because some in Congress are crying for new antitrust legislation,[6] the newly reconstituted Supreme Court may

[4] *See infra* Section V.A.1.

[5] Judge Wood of the Seventh Circuit has argued that this use of per se precedents should be the only aspect of the per se concept relevant to criminal prosecutions. Diane P. Wood, Cir. Judge, U.S. Ct. of Appeals for the 7th Cir., The Incredible Shrinking *Per Se* Rule: Is an End in Sight? 4 (2004) (on file with the Columbia Business Law Review); *see also* Thomas G. Krattenmaker, Commentary, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 GEO. L.J. 165, 178 (1988); U.S. DEP'T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (2021), https://www.justice.gov/file/810261/download [https://perma.cc/MGM9-A7G4] ("[Per se violation] means that where . . . a [certain type of] collusive scheme has been established, it cannot be justified under the law by arguments or evidence that, for example, the agreed-upon prices were reasonable, the agreement was necessary to prevent or eliminate price cutting or ruinous competition, or the conspirators were merely trying to make sure that each got a fair share of the market.").

[6] *See* SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 393 (2020) (calling for codification of "bright-line rules and presumptions" and decrying what some see as a "shift away from bright-line rules in favor of 'rule of reason' case-by-case analysis."); Competition and Anti-Trust Law

change the direction of the antitrust laws,[7] and diminishing international cartel leniency applications[8] may move the Antitrust Division of the Department of Justice (DOJ) to loosen prosecutorial self-restraint.

II. THE LEGISLATED ANTITRUST LAW[9]

The Sherman Act was enacted in 1890. After a few large trusts took control of oil, steel, railways, and other drivers of the economy, the desire to ensure competition prompted enactment of antitrust laws[10] to protect our capitalist economy and ensure the primacy of competition over collaboration.[11]

Enforcement Reform Act, S. 225, 117th Cong. (2021) (proposing amendments to merger restrictions).

[7] *See* Bob Connolly, The End Is Near for the *Per Se* Rule in Criminal Sherman Act Cases 4–8 (Apr. 17, 2019) (unpublished manuscript) (on file with the Columbia Business Law Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356731 (predicting that the Court's conservative, textualist approach will ensure the demise of criminal per se presumptions).

[8] *See* Ben Remaly, *Cartel Enforcement Turns Inward, Report Says*, GLOB. COMPETITION REV. (Jan. 15, 2020) (on file with the Columbia Business Law Review), https://globalcompetitionreview.com/cartel-enforcement-turns-inward-report-says (describing enforcement authorities' increasing domestic focus).

[9] There are numerous antitrust laws and issues of interpretation not addressed herein. This paper highlights only those most relevant to the constitutional concerns of per se illegality in criminal cases.

[10] The "sugar trust" so concerned the House of Representatives in the period surrounding the enactment of the Sherman Act that a committee called the Attorney General before them to demand an explanation for why he had not brought criminal charges against its organizers. H.R. REP. NO. 52-2618, at 1 (1893). Eventually, the concept of trust-busting created the term "antitrust," which others in the world call by the more intelligible designation of competition law. *See* FED. TRADE COMM'N, FTC FACT SHEET: ANTITRUST LAWS: A BRIEF HISTORY 1, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf [https://perma.cc/D2KF-BU6E].

[11] *Justice Manual Title 7: Antitrust*, U.S. DEP'T OF JUST., https://www.justice.gov/jm/jm-7-1000-policy [https://perma.cc/EGH5-M36B] (last updated Feb. 2020) ("The U.S. antitrust laws represent the legal embodiment of our nation's commitment to a free market economy in which the competitive process of the market ensures the most efficient allocation of our scarce resources and the maximization of consumer welfare."); *see also* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)

Section 1 of the Sherman Act[12] has provided the only antitrust law basis for criminal prosecutions for over 40 years.[13] In its entirety, it currently states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[14]

This scant text (the "Act") specifies an offense with three elements: (1) a combination or agreement,[15] (2) in restraint of trade, (3) involving the requisite commerce. The act of creating an improper agreement or combination forms the fundamental predicate for the offense, with the second element explaining how an agreement becomes improper. No

("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress[.]").

[12] 15 U.S.C. § 1 (2018).

[13] Anticompetitive conduct may be prosecuted under other statutes, including other antitrust statutes, but since 1977 the DOJ has filed criminal charges only under § 1. *See Antitrust Division Public Documents: Division Operations*, U.S. DEP'T OF JUST. (on file with the Columbia Business Law Review), https://www.justice.gov/atr/division-operations (last updated Oct. 8, 2020) (click the hyperlinks under "Historic Workload Statistics").

[14] 15 U.S.C. § 1.

[15] Thus, unilateral conduct does not violate the Act, which requires conduct by two or more persons. A "person" may be either an individual or a state-constituted artificial person, typically a corporation. After some judicial flip-flopping, a parent company and its subsidiaries now are considered a single entity when determining if the requisite duality exists. *See* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984).

actions need be taken in conformity with that agreement, and no element demands proof regarding its success or failure.

Congress has tinkered with the Act a few times, passing amendments to increase its penalties. Notably, a 1974 amendment to the penalties switched the violation from a misdemeanor to a felony.[16] Congress twice since has increased the penalties in the Act[17] and has added a statute that permits even higher fines than those specified in the Act—to the extent of double the loss or gain from a violation.[18]

Congress also established civil remedies.[19] Textually, what constitutes a violation is identical for both civil and criminal liability.[20] Notably, however, Congress recognized from the inception of the Act the lack of clarity inherent in a flexible law based on economic policy.[21]

[16] Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, sec. 3, §§ 1–3, 88 Stat. 1706, 1708 (1974).

[17] Antitrust Amendments Act of 1990, Pub. L. No. 101-558, sec. 4(a), § 1, 104 Stat. 2879, 2880; Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), Pub. L. No. 108-237, sec. 215(a), § 1, 118 Stat. 661, 668.

[18] 18 U.S.C. § 3571(d). Congress has enacted other legislation related to the Act. ACPERA, first enacted in 2004 as a temporary measure and made permanent in 2020, provides rewards for those who apply for criminal leniency under the DOJ's policy. ACPERA sec. 213. The Foreign Trade Antitrust Improvements Act qualifies when foreign conduct can violate the Act and, like the Act, has posed serious issues of interpretation. 15 U.S.C. § 6a; *see also* Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 337–41 (2007) (discussing interpretive issues).

[19] 15 U.S.C. §§ 15, 15a, 25, 26. Section 4 of the Clayton Act provides for civil treble damages plus recovery of attorneys' fees for those injured by the antitrust laws. *Id.* § 15; *see also* Federal Trade Commission (FTC) Act, 15 U.S.C. § 57b (describing civil enforcement of prohibitions on unfair practices). For a comprehensive review of the antitrust laws and their enforcement, see 1 ANTITRUST LAW DEVELOPMENTS §§ 8–9 (8th ed. 2017), LexisNexis [hereinafter ALD]; 2 *id.* § 10.

[20] A criminal conviction provides prima facie evidence of civil liability. 15 U.S.C. § 16(a). The only difference in the civil and criminal elements of the offense stems from a judicially-inferred mens rea component, which I discuss in more depth *infra* Section III.C.

[21] In the context of advocating legislation to combat anticompetitive practices, Senator Sherman stated, "In the present state of the law it is

III. JUDICIAL DEVELOPMENT OF THE LAW

The Act cannot be understood absent recourse to judicial interpretation, and the Supreme Court has recognized that the Act's broad, imprecise terms may chill procompetitive conduct.[22] Given the text of the statute, the Supreme Court has acknowledged that the language cannot mean what it says on its face and requires interpretation to define what is proscribed.[23] Thus, the implementation of antitrust law has

impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment," and also observed,

> I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law[.]

21 CONG. REC. 2456, 2460 (1890). In more contemporary times, Congress felt so acutely the need to avoid chilling certain beneficial competitor collaborations from full antitrust liability that it passed the National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815 (codified as amended at 15 U.S.C. §§ 4301–05), and the National Cooperative Research and Production Act of 1993, Pub. L. No. 103-42, 107 Stat. 117 (codified as amended at 15 U.S.C. §§ 4301–06) (amending the National Cooperative Research Act of 1984).

[22] *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422, 441 (1978) ("[S]alutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." (first citing 2 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW 29 (Little, Brown 1978)); then citing ROBERT H. BORK, THE ANTITRUST PARADOX 78 (Basic Books 1978); and then citing Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 441–442 (1963)).

[23] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63 (1911) (without the standard of reason to limit the language, "the statute would be destructive of all right to contract or agree or combine in any respect whatever"); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) ("One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says."); *U.S. Gypsum*, 438 U.S. at 438 ("The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it

proceeded as the development of a common law regulating competition in a process similar to constitutional law interpretation, with antitrust law evolving along with business behavior and revised understandings of it, and particularly with the refinement of economic principles perceived to govern such behavior.[24]

After qualifying the elements of the offense under the Act, the courts developed the concept of per se illegality without definitional distinction between civil claims and criminal charges, although the Supreme Court has never considered a challenge to the use of per se illegality as a conclusive presumption to obtain a felony conviction. The only judicial development differentiating the civil and criminal elements of liability is an inferred mens rea component.

A. Restraint Must Be Unreasonable

By 1911, the Supreme Court clarified that the Act should not be read literally and prohibits only those agreements "unreasonably restrictive of competitive conditions."[25] The

proscribes. . . . Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits[.]" (footnote omitted)).

[24] Congress intended the term "restraint of trade" to have "changing content" and authorized courts to oversee the term's "dynamic potential." *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731–32 (1988), *abrogated on other grounds by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). The Sherman Act's broad prohibitions "turn over exceptional law-shaping authority to the courts," for which reason the Court has "felt relatively free to revise [its] legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences." Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461–62 (2015); *see also Leegin*, 551 U.S. at 899 ("*Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act." (citing State Oil Co. v. Khan, 522 U.S. 3, 20 (1997))); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("[T]he [Sherman Act] has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

[25] *Standard Oil*, 221 U.S. at 58–60 ("[I]t was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining

"restraint of trade" language of the Act, rather than limiting the scope of the law with a precise definition, leaves the standard "to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute."[26] The Court in 1918 explained the "true test of legality" embodied in the "restraint of trade" element as "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[27]

B. Approaches to Determine Reasonableness

1. Full-Blown Rule of Reason

The "rule of reason" terminology may refer both (1) to the definition of "restraint of trade" and (2) to the manner of classifying restraints. Directly following its articulation of "the true test of legality," the Court described what is often denoted as "full-blown rule of reason" analysis:

> To determine [whether a restraint is legal] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[28]

This still embodies the presumptive means to determine reasonableness.[29]

whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.").

[26] *Id.* at 63–64; *see also* United States v. Am. Tobacco Co., 221 U.S. 106, 178–81 (1911).

[27] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

[28] *Id.*

[29] *See Bus. Elecs.*, 485 U.S. at 726. Notably, given the DOJ's practice, this does not apply today in criminal cases. *See infra* Section IV.C.

2. Per Se Illegality

The per se concept developed soon after the rule of reason as an alternative means of ascertaining reasonableness that would avoid administrative burden.[30] The rationale of administrative convenience is well recognized, along with the corollary that per se classifications always entail some arbitrariness and overbreadth: "Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."[31] Consequently, "[f]or the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown [sic] inquiry might have proved to be reasonable."[32]

Sometimes referred to as a "rule," a "standard," a "doctrine," a "type of analysis," a "mode of analysis," or an

[30] *See* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990) ("*Per se* and rule-of-reason analysis are but two methods of determining whether a restraint is 'unreasonable,' *i.e.,* whether its anticompetitive effects outweigh its procompetitive effects."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978) ("[T]he purpose of [both per se rules and the rule of reason] is to form a judgment about the competitive significance of the restraint[.]"); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 (1984) ("[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."); United States v. U.S. Gypsum Co., 438 U.S. 422, 476 (1978) (Stevens, J., concurring in part and dissenting in part) ("[R]ule-of-reason analysis is not distinct from '*per se*' analysis. On the contrary, agreements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restrain trade[.]").

[31] Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977); *see also Atl. Richfield*, 495 U.S. at 342 ("Actions *per se* unlawful under the antitrust laws may nonetheless have *some* procompetitive effects[.]").

[32] Arizona v. Maricopa Cnty. Med. Soc'y., 457 U.S. 332, 344 (1982); *see also Atl. Richfield*, 495 U.S. at 344 ("[T]he *per se* rule permits the prohibition of efficient practices in the name of simplicity[.]"); *Bus. Elecs.*, 485 U.S. at 723 (stating that per se rules condemn conduct that "would always or *almost always* tend to restrict competition and decrease output" (emphasis added) (internal quotation marks omitted) (quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289–90 (1985))).

"approach," per se treatment today is not entirely clear in its meaning. No bright line differentiates what it means to apply a per se label from the process for classifying an agreement as per se illegal, but separating those issues in the review below helps show why per se illegality in a criminal context violates constitutional principles.

i. What Per Se Means

In 1927, in *United States v. Trenton Potteries Co.*, the Court declared:

> [Price-fixing agreements] may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.[33]

The Court concluded broadly (and famously): "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."[34] It is worth emphasizing that this initial formulation of what became known as per se illegality related to the burden of proof needed to show reasonableness. The Court did not indicate it was creating a conclusive presumption; "may well be held" suggests otherwise. The Court evaluated the sufficiency of the evidence and found that the government met its burden of proof regardless of the reasonableness of the "particular price" agreed upon; the Act would not function as a means of price regulation.

The practice of summarily condemning price-fixing agreements followed, labeling as per se illegal not just agreements on a price or any component of it,[35] but also

[33] 273 U.S. 392, 397–98 (1927).

[34] *Id.* at 397.

[35] *See, e.g.*, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980) (per curiam) ("[A]greement to terminate the practice of giving credit

agreements among competitors that were intended to and did affect pricing.[36] As elaborated below, courts found per se illegal bid-rigging, market allocation (via division of territories, products, customers, or quantity of sales), group boycotts (refusals to deal), and various other schemes deemed to affect prices.

In 1940, the Court pronounced in *United States v. Socony-Vacuum Oil Co.*, "Under the Sherman Act a 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 is illegal per se."[37] Note that this oft-referenced formulation included both a finding of "purpose" and of "effect." While language in a footnote omitted the purpose and effect language,[38] the Court did not dispense with analysis of those points. Instead, the Court focused on the types of justifications offered in defense of the challenged agreement, holding that "elimination of so-

is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing.").

[36] The scope of the per se rule against agreements with only indirect price effects has varied, but the nuance is often lost because concerted conduct among competitors with indirect price effects may be sufficient to sustain an inference that there was a direct price-fixing agreement. For example, in *United States v. U.S. Gypsum Co.* the indictment charged price-fixing, and the evidence at trial related to price verification exchanges. 438 U.S. 422, 427–28 (1978). The Court in a footnote observed that an information exchange agreement would be evaluated under the rule of reason, and not the per se rule. *Id.* at 441 n.16 ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act." (first citing United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 113 (1975); and then citing United States v. Container Corp. of Am., 393 U.S. 333, 338 (1969) (Fortas, J., concurring))).

[37] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

[38] *See id.* at 224 n.59 ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.").

called competitive evils is no legal justification."[39] Thus, the Court condemned a joint program among gasoline companies to buy surplus gasoline to set a floor for market prices, finding both the purpose to destroy and effect of destroying competition, while rejecting the defendants' claims that circumstances made the conduct reasonable to ensure their economic viability.[40]

In 1958, the Court described per se violations as "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[41] Then, the breadth of the per se rule's application reached its pinnacle in the late 1960s and early 1970s, removing more from the reasonableness inquiry and placing greater focus on the "conclusively presumed" language.

In *United States v. Container Corp. of America*, in eleven short paragraphs, the Court reversed the dismissal of a civil complaint in which the price-fixing charge rested upon an agreement among competitors—in a market for fungible products dominated by a few sellers—to exchange price information whenever requested, which had the effect of stabilizing prices.[42] The Court did not use the per se label in its opinion, but it summarized what had become the per se concept: "We held in [*Socony*] that all forms of price-fixing are *per se* violations of the Sherman Act."[43] This statement ignored *Socony*'s language (and findings) relating to "a combination formed *for the purpose and with the effect*" of fixing prices,[44] instead embracing the footnote version of the case's holding on per se illegality.

[39] *See id.* at 220–21 (rejecting also as legal justifications "[f]airer competitive prices" and avoiding "[r]uinous competition, financial disaster, [and the] evils of price-cutting").

[40] *See id.* at 223.

[41] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[42] United States v. Container Corp. of Am., 393 U.S. 333, 337 (1969).

[43] *Id.* at 338 n.4 (citing *Socony*, 310 U.S. at 220–21).

[44] *Socony*, 310 U.S. at 223 (emphasis added). Notably, as in many of the Court's opinions regarding reasonableness, sharp divisions among the

Consistent decisions followed. In *United States v. Sealy, Inc.*, the Court condemned as per se illegal defendant manufacturers' establishment of a jointly controlled subsidiary that set mattress specifications, controlled the Sealy trade name and trademark, and entered into license agreements with the manufacturers that restricted the licensees to selling the Sealy brand products in designated territories at prices set by the subsidiary.[45] The Court found this type of arrangement unlawful "without the necessity for an inquiry in each particular case as to [its] business or economic justification, [its] impact in the marketplace, or [its] reasonableness."[46] Thus, the Court rejected any inquiry into business or economic justifications.

Similarly, in *United States v. Topco Associates*, the Court found its per se shortcut applicable as a "rigid rule[]" to ban market divisions, even those involving significant non-price-related dependencies among the parties.[47] Topco was an association of independent regional supermarket chains that acted as a purchasing agent and developed a private label program for its members.[48] Topco granted each member a license to sell Topco brand products only in an exclusive territory and prohibited members from selling such goods to other retailers.[49] The Court condemned this arrangement as a "classic" per se violation—"an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition."[50] Overruling the lower court, which found procompetitive benefits, the Supreme Court explained,

Justices demonstrate the difficulty of this fact-finding. Justice Abe Fortas did not read the Court as having applied a per se rule, Container Corp., 393 U.S. at 340 (Fortas, J., concurring), and three justices dissented in *Container Corp.* on the basis that the conduct was not unreasonable under either the per se or the rule of reason approach. *Id.* at 340–47 (Marshall, J., dissenting).

[45] United States v. Sealy, Inc., 388 U.S. 350, 351–52 (1967).

[46] *Id.* at 357–58.

[47] United States v. Topco Associates, 405 U.S. 596, 609–10 (1972).

[48] *Id.* at 598.

[49] *Id.* at 602–03.

[50] *Id.* at 608.

> [w]hether or not we would decide this case the same way under the rule of reason . . . is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.[51]

Changing course somewhat, the Court in *National Society of Professional Engineers v. United States* carefully examined the origins, purpose, and likely effect of a trade association's canon of ethics prohibiting professional engineers from discussing prices with potential customers until after negotiations and an initial selection of an engineer.[52] After acknowledging that the provision was "not price-fixing as such," and only after engaging in elaborate analysis, the Court couched its conclusion in per se terms:

> no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding . . . . [T]he ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services."[53]

But the ultimate conclusion of illegality rested principally upon rejection of the defense of ethical fairness and the justification that eliminating competition would promote higher quality work.[54]

[51] *Id.* at 609–10 (footnote omitted).

[52] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 683–84 (1978).

[53] *See id.* at 693–95 (quoting United States v. Nat'l Soc'y of Pro. Eng'rs, 404 F. Supp. 457, 460 (D.D.C. 1975), *aff'd*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679).

[54] *See id.* at 693–94, 696.

A year later, in its watershed opinion in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*),[55] the Court instructed that per se analysis demands fact-finding even in price-fixing cases. The Court explicitly held that competitor arrangements that "literally" fix prices still require an assessment of their competitive purposes and effects.[56] The Court warned against overbroad per se treatment, explaining that "easy labels do not always supply ready answers" and establishing a preliminary fact-finding inquiry to determine whether conduct should fall within the per se category (presumably cutting off further inquiry) or, in the alternative, whether the conduct would increase efficiency and promote competition.[57] This formulation rejected the exclusion of facts regarding purpose and effect from the reasonableness determination.

Making a preliminary inquiry, the Court held that per se treatment should not apply to a combination of holders of copyrights to music compositions by which they fixed the fee for a blanket license encompassing all of their compositions.[58] Weighing heavily in the Court's analysis was the finding that the agreement was necessary for a new product to come into existence: the blanket license.[59] In essence, the Court completed a circle back to acknowledging the relevancy of evidence of purpose and effect in determining reasonableness.

The Court's jurisprudence of tying arrangements (agreements to sell a product conditioned on the purchase of another product) further confuses what per se illegality means. The Court labels these arrangements per se illegal but accepts that procompetitive justifications and various other characteristics should be considered.[60] Per se classification of

[55] 441 U.S. 1 (1979).

[56] *See id.* at 9.

[57] *See id.* at 8, 19–20.

[58] *See id.* at 23–25.

[59] *See id.* at 20–23.

[60] *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9–11 (1984), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 461–62 (1992). For a comprehensive review of how per se rules apply

tying arrangements does not mean that all tying arrangements are conclusively presumed illegal.

ii. How to Classify as Per Se

BMI muddles any distinction between what per se illegality means in its application and what to classify as per se illegal; there is only one fact-finding mission: to determine reasonableness. In criminal cases, however, the per se designation matters because it affects (improperly) who performs the fact-finding mission. Moreover, viewing the case law from the perspective of how to classify an agreement teaches that the per se label is flexible and unpredictable: what fits in the classification has and will continue to evolve over time,[61] inconsistent with the fundamental constitutional due process requirement that the legislature must define crimes to give clear notice of what can subject a person to a penalty.

Articulations of the standards for creating per se categories do not provide clarity. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, the Court, in the context of group boycotts, recognized not only "confusion about the scope and operation of the *per se* rule,"[62] but also that "[e]xactly what types of activity fall within the forbidden category is . . . far from certain."[63] Explored below are a few key approaches to per se classification identified by the Court and cast in terms of oppositions: (1) lack of redeeming virtue versus procompetitive justification; (2) vertical versus

differently in the context of tying arrangements, see 1 ALD, *supra* note 19, § 1.D.2.a.

[61] *See* Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 349 n.19 (1982) ("[A] *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." (citing White Motor Co. v. United States, 372 U.S. 253 (1963), *abrogated by* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977))).

[62] Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294 (1985) (internal quotation marks omitted) (quoting LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 229–30 (1977)).

[63] *Id.*

horizontal; (3) dominance versus absence of market power; and (4) naked versus ancillary. Each of these approaches reinforces that the process of per se classification constitutes fact-finding to determine whether a restraint is reasonable and that judicial application of the classification is inconsistent.

a. Lack of Redeeming Virtue Versus Procompetitive Justification

Dating back to the origin of the reasonableness standard, violations of the Act have depended upon fact-finding that balances procompetitive and anticompetitive effects.[64] The approach asking whether a restraint lacks "any redeeming virtue" or whether it has a procompetitive justification plainly involves fact-finding and balancing, and it has played a significant role in determining when the Court has applied a per se classification.

In *Northwest Wholesale Stationers*, the Court described per se illegal boycotts, highlighting that "the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote."[65] The Court then found that the buying cooperative sub judice was "designed to increase economic efficiency and render markets more, rather than less, competitive."[66] Thus, the per se

[64] *See supra* notes 25–27 and accompanying text.

[65] *Nw. Wholesale Stationers*, 472 U.S. at 294; *see also GTE Sylvania*, 433 U.S. at 54 (finding that "redeeming virtues" precluded per se classification).

[66] *Nw. Wholesale Stationers*, 472 U.S. at 295 (internal quotation marks omitted) (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (*BMI*), 441 U.S. 1, 20 (1979)). Similarly, a year prior in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, the Court held the per se rule inapplicable to horizontal price and market allocation restraints in league sports where the "horizontal restraints on competition are essential if the product is to be available at all." 468 U.S. 85, 101–02 (1984).

approach was inapplicable.[67] This mode of analysis does not differ materially from the analysis of categories of agreements evaluated under the rule of reason approach. Both analyses focus on the defense's justifications to determine if an agreement has procompetitive attributes.

b. Vertical Versus Horizontal

Agreements between a buyer and a seller are referred to as "vertical" agreements because the parties sit on different levels of the distribution chain. An archetypal vertical agreement is a purchase and sale arrangement. In contrast, competitors are horizontally aligned in their businesses, so agreements among them are "horizontal." The distinction between horizontal and vertical often is a key component in the analysis of a restraint's reasonableness and today is a means of classifying conduct as per se illegal or not.

Notably, the DOJ has not criminally prosecuted vertical agreements for at least four decades,[68] but neither the legislature nor the courts have exempted such arrangements from criminal enforcement. The judicial history of the per se illegality of vertical agreements dramatically shows the difficulty of classifying what is per se illegal and how that classification has morphed and flipped.

A seller agreeing with a buyer upon the price for the purchased product obviously does not violate the Act, but for almost a century, a distributor agreeing with its supplier about the minimum price that the distributor would charge when reselling the product was per se illegal because it fit the category of price-fixing. The Court first condemned minimum

[67] *Nw. Wholesale Stationers*, 472 U.S. at 295–97.

[68] The last DOJ enforcement against vertical price-fixing was a civil action in 1980. United States v. Cuisinarts, Inc., No. H80-559, 1981 WL 2062, at *1 (D. Conn. Mar. 27, 1981) ("Plaintiff, United States of America, . . . filed its Complaint herein on September 17, 1980[.]"). A vertical agreement may be relevant as a payoff in the context of a horizontal bid-rigging agreement. There have been numerous indictments charging that potential bidders agreed that one would not bid or would give an intentionally high bid in exchange for a subcontract. *See* U.S. DEP'T OF JUST., *supra* note 5, at 3–4.

resale price maintenance in 1911,[69] and in 1968 it upheld per se treatment for maximum resale price setting, concluding that "agreements to fix maximum prices 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'"[70] The Court reversed itself first regarding maximum resale prices (in 1997)[71] and then regarding minimum resale prices (in 2007).[72] The per se label now applies only to horizontal price-fixing.[73]

Similarly, in *Continental T. V., Inc. v. GTE Sylvania Inc.*,[74] the Court overruled *United States v. Arnold, Schwinn & Co.*,[75] subjecting vertical, non-price market allocations to the rule of reason. Notably, *Arnold, Schwinn* itself essentially had overturned the decision on the same issue delivered four years earlier in *White Motor Co. v. United States*.[76] The Court in *GTE Sylvania* rejected its earlier finding that vertical territorial arrangements were "obviously destructive of competition,"[77] recognizing that there is little support for the proposition that non-price vertical restraints harm competition and considerable support for the proposition that they have procompetitive effects.[78] Thus, the *GTE Sylvania* opinion made it difficult to classify a vertical agreement as "manifestly anticompetitive" or devoid of "redeeming virtue"

[69] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408–09 (1911), *overruled by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[70] Albrecht v. Herald Co., 390 U.S. 145, 152 (1968) (quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984)), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

[71] *State Oil*, 522 U.S. at 7.

[72] *Leegin*, 551 U.S. at 881–82.

[73] Some state laws reach a different result. *See* 1 ALD, *supra* note 19, § 1.D.1.a(1)(a).

[74] 433 U.S. 36 (1977).

[75] 388 U.S. 365 (1967), *overruled by GTE Sylvania*, 433 U.S. 36.

[76] 372 U.S. 253 (1963), *abrogated by Arnold, Schwinn*, 388 U.S. 365, *overruled by GTE Sylvania*, 433 U.S. 36.

[77] *Arnold, Schwinn*, 388 U.S. at 379.

[78] *See GTE Sylvania*, 433 U.S. at 47–49.

and, therefore, deserving of a per se label.[79] Yet precedent still places a per se classification on some vertical restraints, such as tying agreements.[80]

Moreover, no bright lines always differentiate horizontal from vertical agreements because agreements can involve players on multiple levels of the distribution chain. For example, a hub-and-spoke conspiracy typically refers to a producer joining a horizontal agreement among distributors. If the agreement involves setting prices, courts may classify it as a horizonal, per se illegal price-fixing agreement.[81] On the other hand, a manufacturer dictating to all of its distributors what they should do in standard distribution contracts creates a cluster of agreements that are not only vertical but also legal under the Act because the manufacturer has set those terms unilaterally.[82]

c. Dominance Versus Lack of Market Power

In *Trenton Potteries* the Court pointed to the "power to control the market"—demonstrated by the "power to fix prices"—as an important reason why further proof of the unreasonableness of the fixed prices was unnecessary to find

[79] *See* Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 34–35 (1984) (O'Connor, J., concurring in the judgment) ("The '*per se*' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement. . . . The law of tie-ins [should] thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever." (footnote omitted)), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

[80] *See supra* note 60 and accompanying text.

[81] *See* United States v. Gen. Motors Corp., 384 U.S. 127, 145 (1966); 1 ALD, *supra* note 19, § 1.D.1.b(5) n.1045.

[82] United States v. Colgate & Co., 250 U.S. 300, 307 (1919); *see also* 1 ALD, *supra* note 19, § 1.B.1.b(4).

the price-fixing agreement illegal.[83] The admitted setting of prices demonstrated market power.

In more contemporary times, in *Northwest Wholesale Stationers*, the Court described group boycotts designated per se illegal as frequently involving "firms [that] possessed a dominant position in the relevant market."[84] Market power also remains an ingredient for per se condemnation of a tying arrangement.[85] This factor, however, is not determinative of per se illegality despite the critical role it can play in a full-blown rule of reason analysis.[86]

d. Ancillary Versus Naked

The terms "ancillary" and "naked" have played an important role in the interpretation of the Act.[87] Today, the courts widely apply the "ancillary versus naked" approach to reclassify a combination that, because it involves an

[83] United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927). Also important was that the reasonableness of any particular price could change over time. *Id.*

[84] Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294 (1985); *see also* Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 458 (1986) ("[T]he per se approach [to group boycotts] has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor[.]").

[85] Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 17 (1984), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (eliminating a market power presumption in patent cases).

[86] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (finding that the combination was able to affect prices directly and thus was per se illegal without regard to market power: "Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces"). The *Socony* formulation echoes the *Trenton Potteries* holding that a purpose to affect or an effect on price demonstrates sufficient market power. 273 U.S. at 397, 402.

[87] For a more comprehensive discussion of this "doctrine of naked and ancillary restraints," see ROBERT H. BORK, THE ANTITRUST PARADOX 30 (Free Press 1993). Judge Taft, later Chief Justice and President, first used the "ancillary" concept to define what is reasonable under the Act in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898).

agreement among competitors to affect pricing, would otherwise be per se illegal.[88]

The prototypical example of an "ancillary" restraint is a seller's agreement not to compete with the sold business for a period of time. Such non-competition covenants ensure that the buyer receives the value of the purchase, and the common law accepted them before Congress enacted the Sherman Act.[89] Not surprisingly, despite their facial anticompetitiveness, the courts consistently have found such ancillary covenants legal when reasonably limited in time and scope to fulfill their purpose.[90]

In contrast, a "naked restraint[] of trade [has] no purpose except stifling . . . competition."[91] True "nakedness" requires that the combination have no dimensions other than the per se illegal restraint, as when competitors agree that they will set their prices jointly with no further agreements and nothing contemplated beyond avoiding price competition.

Unfortunately, a large swath of business behavior lies between the two examples given. Moreover, "ancillary" and "naked" may mean different things in different contexts. For example, in *Topco* the Court proclaimed that all horizontal territorial restraints were "naked restraints of trade," yet the private label program conditions found per se illegal were not "naked" under the definition above;[92] the restrictions were part of a broader arrangement that the lower court had found procompetitive.[93]

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[88] *See* Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006) (describing "the ancillary restraints doctrine" and applying it in dicta). As explained *infra* Part VI, the DOJ has embraced this methodology fully.

[89] *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 729 n.3 (1988), *abrogated on other grounds by* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[90] *See* 1 ALD, *supra* note 19, § 1.C.5.b.

[91] White Motor Co. v. United States, 372 U.S. 253, 263 (1963), *abrogated on other grounds by* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[92] United States v. Topco Assocs., 405 U.S. 596, 608–610 (1972).

[93] *Id.* at 610. The Court in *Topco* admitted that, had the per se label not applied, it might have reached a different result. *See id.* at 609.

While the *Topco* dispute might well yield a different result after *BMI*, "nakedness" remains difficult to recognize.[94] In a different context, and post-*BMI*, the Court found per se illegal an agreement among trial lawyers to stop representing indigent criminal defendants unless the government increased compensation. Despite the acknowledged "expressive component" aimed at influencing government action, the agreement "was unquestionably a 'naked restraint' on price and output."[95] Notably, that result seems to hearken more to the idea of per se illegality as a rule regarding cognizable defenses rather than the idea of per se illegality as a conclusive presumption based on whether a restraint is "naked."

3. Quick Look

The quick look method, an approach in between the rule of reason and per se approaches, is not applicable in current criminal practice. The Court has looked at the method only in civil cases and would have no opportunity to apply it in criminal matters due to the DOJ's current practice.[96] Nonetheless, understanding the sliding scale for the quantum and types of evidence needed to establish the reasonableness of a restraint helps to see more clearly that the concept of per se illegality cannot be applied to criminal cases to take fact-finding away from the jury.

In *Federal Trade Commission v. Indiana Federation of Dentists*, the Court accepted the middle ground "quick look"

[94] Not only has *Topco* not been overruled, the DOJ and courts today routinely rely upon it to find allocation agreements per se illegal. For a fuller discussion, see *infra* notes 155–58 and accompanying text.

[95] Fed. Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 423, 431 (1990).

[96] This is because of the DOJ's policy to bring only per se criminal cases. *See Justice Manual Title 7: Antitrust*, *supra* note 11 ("When it comes to enforcement, the [DOJ's] policy, in general, is to proceed by criminal investigation and prosecution in cases involving horizontal, "per se" unlawful agreements such as price fixing, bid rigging, and market allocation.").

approach.[97] Acknowledging "what has come to be called abbreviated or 'quick look' analysis under the rule of reason,"[98] the Court in *California Dental Ass'n v. Federal Trade Commission* restricted this approach to cases in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"[99]—a formulation that sounds strikingly similar to some formulations of per se illegality.[100]

Labels aside, "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."[101]

C. Criminal Intent is Required

The last judicial development critical to understanding the constitutional problems with per se illegality in criminal cases is the inference of a criminal intent requirement. The timing of this development is important because the vast bulk of the Court's per se illegality jurisprudence, including the Court's introduction of the conclusive presumption concept, occurred prior to the Court's 1978 addition of the intent element.

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[97] Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986) ("Application of the Rule of Reason to these facts is not a matter of any great difficulty.").

[98] Cal. Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 770 (1999).

[99] *Id.* at 769–70. Referencing the complicated burdens of persuasion in antitrust suits, Justice Stephen Breyer, joined by three other justices, would not have required more analysis because standard judicial practices "place the burden of procompetitive justification[s] on those who agree to adopt them." *See id.* at 771.

[100] *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U. S. 85, 103–04 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." (citing Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 & n.25, 16 (1984), *abrogated on other grounds by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006); Arizona v. Maricopa Cnty. Med. Soc'y., 457 U.S. 332, 350–51 (1982); Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977))).

[101] *Id.* at 104.

In *United States v. U.S. Gypsum Co.*,[102] the Supreme Court distinguished the elements of a criminal antitrust offense from those of a civil offense by adding the element of criminal intent. The case arose as a challenge to the following jury instruction:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.[103]

The Court then reviewed extensively whether an antitrust crime requires intent. Relying in part on *Morissette v. United States*,[104] the Court found that it does.[105] The Court held "that an effect on prices, without more, will not support a criminal conviction under the Sherman Act" because

> a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.[106]

The Court disavowed the relevance of civil precedent regarding the framing of the instruction and made it clear that only criminal prosecutions require the intent element.[107]

"Having concluded that intent is a necessary element of a criminal antitrust violation," the Court turned to "the practical aspects of this requirement."[108] It framed its task as determining

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[102] 438 U.S. 422 (1978).

[103] *Id.* at 430 (internal quotation marks omitted).

[104] 342 U.S. 246 (1952).

[105] *U.S. Gypsum*, 438 U.S. at 437 ("Indeed, the holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that *mens rea* is required.").

[106] *Id.* at 435

[107] *Id.*

[108] *Id.* at 443.

> whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow.[109]

The Court saw that "the difference between these formulations is a narrow one" but held in favor of the latter: "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws."[110]

Thus, the Court found that the jury instruction's disputed presumption invaded the province of the fact finder.

Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference. Therefore, although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of fact alone.[111]

D. Summarizing the Judicial Landscape

As this abbreviated review indicates, case law has not provided a single way to parse evidence in evaluating what to classify as per se illegal or when the per se label should preclude further analysis. Instead, the case law flexibly applies per se illegality to bar further inquiry only after the court has considered whatever evidence seems relevant in the particular context. It is consistent only in barring justifications that argue merely that competition itself is bad

[109] *Id.* at 444.
[110] *Id.*
[111] *Id.* at 446.

or that reasonable prices render a restraint reasonable.[112] While a per se determination is often referred to as the point to stop further inquiry and conclusively presume illegality, that meaning does not consistently apply; instead, *BMI* instructs that the label may apply even before the decision to cut off further inquiry and warns against the use of labels as opposed to analysis.[113]

The judicial developments thus reinforce the conclusion that per se analysis remains a method to determine whether a restraint is unreasonable. Initially, "per se" may have denoted the sufficiency of the evidence to sustain a finding of unreasonableness (i.e., that unreasonableness could be inferred from certain types of agreements because a rational person more likely than not would see them as destructive of competition).[114] For a period of time at the zenith of the per se concept, this morphed into a conclusive presumption of illegality for certain rigidly defined categories of agreements in misdemeanor and civil cases.[115] More recently, the Court has refined the concept in recognition of its potential overbreadth, using the label for judicially-defined suspect categories that nevertheless demand further fact-finding before they can be condemned.[116] In civil cases, this form of per se illegality sometimes has operated as a mechanism for the judiciary to find the unreasonable restraint element of an antitrust offense, undertaking the requisite fact-finding in the context of a summary judgment motion.[117] In criminal cases, however, per se illegality operates differently.

[112] *See supra* Section III.B.2.i.

[113] *See supra* notes 55–57 and accompanying text.

[114] *See supra* text accompanying notes 33–35.

[115] *See, e.g.*, *supra* notes 47–51 and accompanying text (discussing *Topco*).

[116] *See supra* notes 55–57 and accompanying text.

[117] *Cf.* United States v. U.S. Gypsum Co., 438 U.S. 422, 435 (1978) (distinguishing the civil and criminal contexts); *supra* notes 30–32 and accompanying text (discussing administrative efficiency rationales derived from civil cases).

IV. EXECUTIVE APPLICATION OF PER SE ILLEGALITY

The Department of Justice, Antitrust Division is responsible for criminal antitrust prosecutions.[118] Like the other branches of government, the executive branch recognizes the lack of clarity in the Act,[119] as well as the difficulty of distinguishing its criminal from its civil enforcement.[120] It further recognizes that the per se concept rests on savings of "time and expense"[121] and creates the

[118] *Justice Manual Title 7: Antitrust*, *supra* note 11 ("To ensure a consistent national, Department-wide policy on antitrust questions, the Assistant Attorney General for the Antitrust Division is responsible for supervising all federal antitrust investigations[.]").

[119] *See U.S. Gypsum*, 438 U.S. at 439 ("Modern business patterns moreover are so complex that market effects of proposed conduct are only imprecisely predictable. Thus, it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures. With this hazard in mind, we believe that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." (internal quotation marks omitted) (quoting ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST L., U.S. DEP'T OF JUST., REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955))).

[120] Instances arise "[w]here it is unclear whether the conduct in question would be a civil or criminal violation," and "there are some situations where the decision to proceed by criminal or civil investigation requires considerable deliberation." U.S DEP'T OF JUST., ANTITRUST DIVISION MANUAL, at III-12 (5th ed. 2020), https://www.justice.gov/atr/file/761166/download [https://perma.cc/Z8XJ-75SB]; *see also Justice Manual Title 7: Antitrust*, *supra* note 11 ("There are a number of situations where, although the conduct may appear to be a 'per se' violation of law, criminal investigation or prosecution may not be appropriate.").

[121] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [https://perma.cc/PX3F-HCXY] ("Certain types of agreements are so likely to be harmful to competition and to have no significant procompetitive benefit that they do not warrant the time and expense required for particularized inquiry into their effects. Once identified, such agreements are challenged as per se unlawful." (citing Fed.

potential for overenforcement that chills procompetitive conduct.[122] Nevertheless, the DOJ uses per se concepts in its exercise of prosecutorial discretion but also weaponizes per se case law to deprive the defense of evidence at trial and to direct the jury to presume illegality conclusively.

A. DOJ Recognition of the Need for Fact-Finding

The Collaboration Guidelines published by the Federal Trade Commission and the DOJ provide the most comprehensive description of how the DOJ perceives per se illegality:

> Agreements of a type that always or almost always tends to raise price or to reduce output are per se illegal. The Agencies challenge such agreements, once identified, as per se illegal. Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects.[123]

The Guidelines do not stop there; they then embrace an ancillary restraints doctrine and explain that rule of reason analysis applies to "agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity."[124] The Guidelines describe

Trade Comm'n v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 432–36 (1990))).

[122] *See id.* at 1 ("In order to compete in modern markets, competitors sometimes need to collaborate. . . . Nevertheless, a perception that antitrust laws are skeptical about agreements among actual or potential competitors may deter the development of procompetitive collaborations.").

[123] *Id.* at 3.

[124] *Id.* at 4.

how the DOJ interprets the complicated fact-finding this analysis requires:

> In an efficiency-enhancing integration, participants collaborate to perform or cause to be performed . . . one or more business functions, such as production, distribution, marketing, purchasing or R&D, and thereby benefit, or potentially benefit, consumers by expanding output, reducing price, or enhancing quality, service, or innovation. . . . The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation. The integration must be of a type that plausibly would generate procompetitive benefits cognizable under the efficiencies analysis set forth [in a different section] . . . .
>
> An agreement may be "reasonably necessary" without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary. . . .
>
> . . . Some claims—such as those premised on the notion that competition itself is unreasonable—are insufficient as a matter of law, and others may be implausible on their face. In any case, labeling an arrangement a "joint venture" will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative.[125]

The Guidelines do not address who should perform this analysis or when they should perform it in civil or criminal cases. But the quoted analysis starkly illustrates that serious, complicated fact-finding is necessary before labeling any conduct per se illegal regardless of whether the conduct

[125] *Id.* at 8–9 (footnotes omitted).

literally would fall into the categories of price-fixing, bid-rigging, or market allocation.[126]

B. Prosecutorial Discretion

The DOJ's use of the per se concept to guide the exercise of prosecutorial discretion does not involve constitutional infirmities but does reflect upon why the DOJ's conclusive presumption practice involves such infirmities and how the DOJ could cure them.

The current DOJ manual "general[ly]" limits criminal antitrust prosecutions to "per se [conduct] such as price fixing, bid rigging and [market] allocations."[127] By the twenty-first century, the DOJ had added the adjective "hardcore" to describe criminal conduct under the Act.[128] For example, in rejecting the notion that the law could ensnare innocent

[126] *See* Statement of Interest of the United States of America at 24–25, Seaman v. Duke Univ., No. 15-CV-462, 2019 WL 4674758 (M.D.N.C. Mar. 7, 2019) (explaining that the per se rule does not apply to all "no poach" agreements and the factual analysis necessary to determine when they are "ancillary").

[127] *See* U.S DEP'T OF JUST., *supra* note 120, at III-12.

[128] *See* Belinda A. Barnett, Senior Couns. to the Deputy Assistant Att'y Gen. for Crim. Enf't, Antitrust Div., U.S. Dep't of Just., Criminalization of Cartel Conduct – the Changing Landscape 1 (Apr. 3, 2009) https://www.justice.gov/sites/default/files/atr/legacy/2009/07/10/247824.pdf [https://perma.cc/75LK-THB6] ("It is well known that the Division has long advocated . . . [stiff prison sentences] for hard core cartel activity, such as price fixing, bid rigging, and allocation agreements[.]"); Thomas O. Barnett, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Criminal Enforcement of Antitrust Laws: The U.S. Model 1–2 (Sept. 14, 2006), https://www.justice.gov/atr/file/518376/download [https://perma.cc/GV23-7LZF] ("The fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification; therefore, antitrust authorities properly regard cartel behavior as *per se* illegal and a 'hard core' violation of the competition laws. . . . [P]rosecutors should focus on 'hard core' collusive activity."); FED. TRADE COMM'N & U.S. DEP'T OF JUST., *supra* note 121, at 3 ("The Department of Justice prosecutes participants in hard-core cartel agreements criminally."); Scott D. Hammond, Dir. of Crim. Enf't, Antitrust Div., U.S. Dep't of Just., The Fly on the Wall Has Been Bugged—Catching an International Cartel in the Act 2–3 (May 15, 2001), https://www.justice.gov/atr/file/519061/download [https://perma.cc/3LPN-HSNT].

business persons, the head of criminal enforcement explained that "the cartels that we have prosecuted criminally have invariably involved hardcore cartel activity—price fixing, bid-rigging, and market- and customer-allocation agreements."[129] He further explained that "[t]he conspirators ha[d] discussed the criminal nature of their agreements" and otherwise showed that they knew their conduct was illegal.[130] With these explanations, "hardcore," often combined with "naked," appeared to add a gloss on the basic per se label guiding DOJ criminal prosecutions.[131]

Today DOJ officials continue to emphasize that they criminally prosecute only per se restraints but appear to have dropped the adjective "hardcore."[132] It is unclear whether this signals a change in policy or merely a recognition of the difficulties inherent in trying to identify when an agreement does or does not warrant criminal prosecution given that the statute attempts no differentiation and that the judiciary

[129] Hammond, *supra* note 128, at 2–3.

[130] *Id.* at 3.

[131] The use of "hardcore" in the Collaboration Guidelines further reinforces this conclusion, especially as the Guidelines do not appear to treat "hardcore" as an application of the ancillary restraint analysis. Moreover, deriving terms from the lexicon of pornography seems particularly apt given Justice Potter Stewart's oft-quoted definition: "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[132] *See, e.g.*, Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the Procurement Collusion Strike Force Press Conference (Nov. 5, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike [https://perma.cc/K2WZ-QTAL] ("When competitors in any given industry collude and conspire to rig bids, fix prices, or allocate markets . . . [they] commit criminal antitrust violations[.]"); Bill Baer, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Prosecuting Antitrust Crimes 1 (Sept. 10, 2014), https://www.justice.gov/atr/file/517741/download [https://perma.cc/P5Z7-Z5LS] ("[M]y focus [in this speech] is on criminal enforcement—on our approach to companies and executives that conspire to fix prices, rig bids, or allocate markets.").

distinguishes civil and criminal offenses only through the criminal intent element.[133]

C. Criminal Trial Practice: Conclusive Presumption

The DOJ typically charges "a combination [or] conspiracy to suppress and eliminate competition by fixing prices, rigging bids, [and/or] allocating markets."[134] It may also embed in the indictment its determination of per se illegality: "The combination and conspiracy engaged in by the defendants and other co-conspirators was a *per se* unlawful, and thus unreasonable, restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act."[135] Then the DOJ seeks to exclude all defense evidence related to the reasonableness of the restraint on the basis that the offense is conclusively presumed illegal.

Further, the DOJ requests the court to instruct the jury in a manner that precludes the jury from any fact-finding regarding reasonableness, both in determining whether the

[133] DOJ policy can and does change over time. A previous versions of the DOJ Manual included language, now deleted, reflecting the enforcement director's earlier emphasis on the defendant's awareness of the wrongfulness of their action, stating that it "may not be considered appropriate" to bring a criminal antitrust prosecution when, inter alia, "there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action." U.S DEP'T OF JUST., ANTITRUST DIVISION MANUAL, at III-16 (3d ed. 1998).

[134] *See, e.g.*, Indictment at 1–2, United States v. Evans Concrete, LLC, No. 20-cr-00081 (S.D. Ga. Sept. 2, 2020).

[135] *See, e.g.*, *id.* at 2. Notably, the DOJ's incorporation of the per se label in the indictment appears to be a recent practice; it has not included it in the majority of its felony indictments even when it contends that the criminal conduct is per se illegal. *See, e.g.*, Indictment at 2, United States v. Lischewski, No. 18-cr-00203, 2020 WL 6562311 (N.D. Cal. May 16, 2018) [hereinafter Lischewski Indictment] (charging that the "defendant and coconspirators knowingly entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing prices for packaged seafood sold in the United States. The combination and conspiracy engaged in by the defendant and coconspirators was an unreasonable restraint of interstate commerce in violation of Section 1 of the Sherman Act[.]"). The DOJ has not explained whether it is changing its practice in framing indictments nor given any reason for the change.

agreement constituted an unreasonable restraint of trade as well as in determining the intent that *U.S. Gypsum* requires. The precise language of jury instructions varies in different cases, but typically the DOJ's instructions explicitly ask the jury to "conclusively presume" illegality. For example:

> The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be an unreasonable restraint on trade and are [always] illegal, without inquiry about the precise harm they have caused or the business excuse for their use. . . . Therefore, if you find that the conspiracy charged in the Indictment existed and that [the] Defendant[] was a member of that conspiracy, you need not be concerned with whether the agreement was reasonable or unreasonable, or the justifications for the agreement, or the harm done by it.[136]

These DOJ practices cannot withstand constitutional scrutiny.

V. CONSTITUTIONAL CRIMINAL LAW PROSCRIPTIONS

Various Fifth Amendment due process protections[137]—including the presumption of innocence, the reasonable doubt standard, and the void-for-vagueness doctrine—as well as the Sixth Amendment right to a jury trial[138] and the fundamental separation of powers,[139] separately and together require an

[136] United States' Proposed Final Jury Instructions at 31, United States v. Atlas Iron Processors, Inc., No. 97-00853-CR (S.D. Fla. 1999), *aff'd sub nom.* United States v. Giordano, 261 F.3d 1134 (11th Cir. 2001) (quoting AM. BAR ASS'N, SAMPLE JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 149 (1984)). Even without the explicit reference in the first sentence, the second, by itself, operates as a conclusive presumption of the element of unreasonable restraint of trade.

[137] U.S. CONST. amend. V.

[138] U.S. CONST. amend. VI.

[139] *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("The Constitution assigns '[a]ll legislative Powers' in our federal government to Congress. It is

end to the current practice of conclusively presuming illegality based on a per se label.[140] Per se illegality, in its various permutations, developed either in civil cases or before enforcement of the Act as a felony.[141] Intent, of course, is not an element in civil claims, and thus has played no role in the

for the people, through their elected representatives, to choose the rules that will govern their future conduct. Meanwhile, the Constitution assigns to judges the 'judicial Power' to decide 'Cases' and 'Controversies.' That power does not license judges to craft new laws to govern future conduct, but only to 'discer[n] the course prescribed by law' as it currently exists and to 'follow it' in resolving disputes between the people over past events. From this division of duties, it comes clear that legislators may not 'abdicate their responsibilities for setting the standards of the criminal law,' by leaving to judges the power to decide 'the various crimes includable in [a] vague phrase.' For 'if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,] [t]his would, to some extent, substitute the judicial for the legislative department of government.'" (fourth and fifth alterations in original) (citations omitted) (first quoting U.S. CONST. art. I, § 1; then quoting *id.* art. III, § 2; then quoting Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824); then quoting Smith v. Goguen, 415 U.S. 566, 575 (1974); then quoting Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting); and then quoting Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983))).

[140] A separate but related aspect of due process, the rule of lenity, also may dictate that the jury employ rule of reason analysis. The rule of lenity resolves statutory ambiguity in favor of the criminal defendant and "applies only when, after consulting traditional canons of statutory construction, [the court is] left with an ambiguous statute." United States v. Shabani, 513 U.S. 10, 17 (1994); *see also* United States v. Bass, 404 U.S. 336, 347–49 (1971). Given the ambiguity in the per se classification, lenity also dictates abandonment of criminal per se illegality, at a minimum in favor of a rule of reason analysis.

[141] Due to the five-year statute of limitations and the prohibition against post hoc application of the felony amendment, the 1974 change in the law, see *supra* note 16 and accompanying text, did not begin to have a significant impact until the end of the 1970s and the beginning of 1980s. This is particularly significant as some constitutional protections either do not apply to misdemeanor offenses or involve a balancing of the severity of the penalty with the due process interest at issue. For example, the Supreme Court long has held that the right to trial by jury applies only to serious and not petty crimes. Baldwin v. New York, 399 U.S. 66, 68 (1970); Schick v. United States, 195 U.S. 65, 71 (1904).

civil cases.[142] The DOJ cites and relies upon those civil cases and their sweeping language to justify its practice, but the Supreme Court's decisions regarding the constitutional rights of the defense flatly condemn the application of per se illegality to criminal trials. Moreover, the void-for-vagueness doctrine may invalidate the criminal felony enforcement of the Act.

A. Presumption of Elements of the Offense

1. The Constitutional Proscription

In *Morissette*, after inferring an intent requirement in a statute silent on the point, the Court focused on the use of a conclusive presumption of intent in criminal cases.[143] The Court found unequivocally that taking the issue of intent away from the jury "would conflict with the overriding presumption of innocence."[144]

> Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. . . .
>
> . . . [T]he trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.[145]

[142] *Cf.* Charles D. Weller, *The End of Criminal Antitrust's Per Se Conclusive Presumptions*, 58 ANTITRUST BULL. 665, 669 (2013) (noting that *U.S. Gypsum* only required intent in criminal cases). Weller also traces constitutional defects in the criminal per se rule and argues that the DOJ's practice violates the defense's right to indictment by a grand jury. *See id.* at 667–75.

[143] *See* Morissette v. United States, 342 U.S. 246, 275 (1952).

[144] *Id.*

[145] *Id.* at 274.

Indeed, the opinion in *U.S. Gypsum* relied upon *Morissette* and its cousins to reject the conclusive presumption instruction on the charge of price-fixing.[146]

Further, in 1970, the Court in *In re Winship* interpreted the Constitution to require the jury to use the reasonable doubt standard for each element of a criminal offense.[147] The Court explained that the "standard plays a vital role in the American scheme of criminal procedure" and "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[148] After examining prior cases, the Court proclaimed: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, *we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged*."[149]

In a series of more recent cases, the Court has doubled down on this principle,[150] observing that labels can mislead

[146] United States v. U.S. Gypsum Co., 438 U.S. 422, 436–38 (1978). The Court did observe in a footnote that the rule of reason applies to an information exchange, *id.* at 441 n.16, but this observation played no role in the Court's extensive analysis of why an intent requirement should be inferred and the invalidity of the disputed jury instruction. Indeed, the indictment in *U.S. Gypsum* charged a "price fixing" agreement. *Id.* at 427. Thus, it would appear that the prosecution was requesting an inference of a price-fixing agreement from the evidence of an agreement to exchange information, not alleging that the illicit agreement was solely to exchange information. Not surprisingly, the difference between these two formulations continues to create confusion today, with the DOJ and others maintaining that a per se price-fixing agreement can be inferred from evidence of an agreement to exchange information. *See* 1 ALD, *supra* note 19, § 1.C.1 ("[S]hared information sometimes has served as evidence of a per se illegal conspiracy to fix prices.").

[147] *In re* Winship, 397 U.S. 358, 364 (1970).

[148] *Id.* at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

[149] *Id.* at 364 (emphasis added).

[150] *See* Jones v. United States, 526 U.S. 227, 239–40 (1999) (invoking constitutional avoidance doctrine as a reason to reject an interpretation of a statute in tension with *Winship*); Apprendi v. New Jersey, 530 U.S. 466,

with elusive distinctions.[151] Most notably, the Court in *Apprendi* rejected judicial fact-finding related to sentencing factors. The Court observed, "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'"[152] Reciting a portion of the above quote from *Winship*, the Court reiterated that constitutional "rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[153] It explained that "the historical foundation for our recognition of these principles extends down centuries into the common law."[154]

494–95 (2000) (applying *Winship* to sentencing factors); Blakely v. Washington, 542 U.S. 296, 313–14 (2004) (holding that *Apprendi* applied to a "deliberate cruelty" finding); United States v. Booker, 543 U.S. 220, 243–44 (2005) (Stevens, J.) (two majority opinions) (extending *Blakely* to the federal sentencing guidelines); Cunningham v. California, 549 U.S. 270, 293 (2007) (applying *Booker* to strike down California sentencing guidelines); Alleyne v. United States, 570 U.S. 99, 117–18 (2013) (requiring a jury to find under the reasonable doubt standard that defendant "brandish[ed]" a firearm).

[151] *Apprendi*, 530 U.S. at 494.

[152] *Id.* at 493.

[153] *Id.* at 477 (alteration in original) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

[154] *Id.* Similarly, in *Booker*, Justice John Paul Stevens confirmed:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

543 U.S. at 230 (citations omitted) (first quoting *In re* Winship, 397 U.S. 358, 364 (1970); and then quoting *Gaudin*, 515 U.S. at 511).

2. Application to Antitrust Cases

As detailed in Part III, per se analysis is but a means of fact-finding to evaluate an element of the offense under the Act. Thus, the Constitution demands that the jury engage in that fact-finding. Nevertheless, the lower courts generally have permitted the DOJ's per se criminal practice, although typically the defense has not argued this constitutional barrier.[155] In some criminal cases the defense has challenged the per se classification on the basis of the facts of the case but has not raised its constitutional infirmity.[156] In response, the

[155] *See e.g.*, United States v. Usher, No. 17 Cr. 19, 2018 WL 2424555, at *7 (S.D.N.Y. May 4, 2018) ("Defendants argue that the Government's prosecution violates their due process rights for two reasons as follows: (1) Defendants' conduct did not have a sufficient nexus to the United States . . .[,] and (2) Defendants did not have notice that their conduct was criminal because the 'Indictment is premised on an unprecedented theory of criminal Sherman Act liability.'" (emphasis deleted) (quoting Memorandum of Law in Support of Defendants' Motion to Dismiss the Indictment at 34, *Usher*, 2018 WL 2424555 (No. 17 Cr. 19))). The court disagreed, adopting the government's view that "ample precedent supports [and gives notice of] the Government's charge in this case." *Id.* (internal quotation marks omitted) (quoting The United States' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Indictment at 30, *Usher*, 2018 WL 2424555 (No. 17 Cr. 19)).

[156] *See e.g.*, *Usher*, 2018 WL 2424555, at *4–5 (relying upon *Socony*, *Topco*, *National Collegiate Athletic Ass'n*, *Maricopa*, and two civil class action cases in the Second Circuit—all either misdemeanor or civil cases—to find that the indictment alleged a per se violation). In *United States v. Kemp & Associates* (*Kemp I*), the district court initially agreed with the defense that the disputed conduct could not be classified as per se, No. 16CR403, 2017 WL 3720695, at *3 (D. Utah Aug. 28, 2017), *rev'd and remanded*, 907 F.3d 1264 (10th Cir. 2018), but after the Tenth Circuit advised to the contrary (while holding that the issue was not before it), the district court upon remand found that the charged conspiracy should be classified as per se illegal. United States v. Kemp & Assocs. (*Kemp III*), No. 16CR403, 2019 WL 763796, at *5 (D. Utah Feb. 21, 2019). The Tenth Circuit had observed, "The per se rule is not a different cause of action than the rule of reason, but rather only an evidentiary shortcut through the rule of reason morass." United States v. Kemp & Assocs. (*Kemp II*), 907 F.3d 1264, 1272 (10th Cir. 2018) (citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982)). It then cited *Topco*'s "classic example" language and noted that it was "undisputed" that horizontal market allocations are per se offenses. *See id.* at 1273 (quoting United States v. Topco Assocs., 405 U.S. 596, 608

only Supreme Court precedents on which the lower courts have relied are misdemeanor and civil cases—particularly *Topco* with its "rigid rule,"[157] even though *BMI* debunked this.[158]

The Ninth Circuit did directly address the constitutional issue in 1972—at the height of the expansionist view of the per se rule, prior to the Act becoming a felony, and before the Court's holdings in *U.S. Gypsum* and *BMI*.[159] Noting that the most recent Supreme Court antitrust case was *Topco*, the Ninth Circuit offered a circular argument, rejecting the application of *Morissette* on the grounds that "unreasonableness" and "per se" described two different interpretations of the statute and that the conclusive presumption was not a presumption:

> Roughly restated, the *per se* rule establishes a conclusive presumption that certain types of conduct are unreasonable . . . .
>
> . . . The per se rule does not operate to deny a jury decision as to an element of the crime charged, since "unreasonableness" is an element of the crime only when no *per se* violation has occurred. To put it differently . . . . [w]hen the Court describes conduct as *per se* unreasonable, they do no more than circumscribe the definition of "reasonableness."
>
> . . . The *per se* rule does not establish a presumption. It is not even a rule of evidence.[160]

Shortly thereafter, following one of the first felony antitrust convictions, the defense challenged instructions that

(1972)) (citing United States v. Suntar Roofing, Inc., 897 F.2d 469, 473 (10th Cir. 1990)). Defendants did not raise constitutional objections to per se treatment.

[157] *See, e.g.*, *supra* note 156.

[158] *See supra* notes 55–57 and accompanying text.

[159] United States v. Mfrs.' Ass'n of the Relocatable Bldg. Indus., 462 F.2d 49 (9th Cir. 1972). For a persuasive argument that the Ninth Circuit erred, see generally James J. Brosnahan & William J. Dowling III, *The Constitutionality of the Per Se Rule in Criminal Antitrust Prosecutions*, 16 SANTA CLARA L. REV. 55 (1975). Discussions of *U.S. Gypsum* and *BMI* appear *supra* Sections III.B.2.i, III.C.

[160] *Mfrs.' Ass'n*, 462 F.2d at 52.

essentially told the jury that "to convict it must find that defendants were knowing members of a conspiracy whose purpose was to effect an unreasonable restraint . . . and that [the charged] bid-rigging is regarded as unreasonable *per se*."[161] But the Seventh Circuit accepted the government's argument: "Since the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: An agreement among competitors to rig bids is illegal."[162]

Yet any argument that the application of per se illegality is not a presumption, but rather a matter of substantive law, contradicts the Supreme Court's description and the language of the DOJ's requested jury instructions.[163] The argument also ignores the irrelevance of the description of the per se rule as a substantive or evidentiary rule: "the relevant inquiry is one not of form, but of effect."[164] Courts use the per se rule to direct the jury to accept a conclusive presumption of intent and unreasonableness and to deny the jury any fact-finding on those two critical elements of the offense.[165] Moreover, the

[161] United States v. Brighton Bldg. & Maint. Co., 598 F.2d 1101, 1106 (7th Cir. 1979). Notably, the defense theory in the case appears to have grounded on the absence of agreement, but the court found sufficient evidence to support the verdict on that element. *See id.* at 1107. *See also* Rep. & Recommendation at 6, United States v. Gaines, No. 20-20, 2020 WL 5204284 (D. Minn. Sept. 1, 2020) (per se rule "not an invalid 'evidentiary presumption' but rather a legitimate substantive interpretation of the Sherman Act itself" and the ancillary restraints doctrine is only an affirmative defense to per se conduct).

[162] *Id.* at 1106 (internal quotation marks omitted). *But see* Connolly, *supra* note 7, at 4–5 (demonstrating the inconsistency of *Brighton Building* with modern textualism).

[163] *See, e.g.*, Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 344 (1982) ("[To per se illegal] restraint[s] . . . the Court . . . applie[s] a conclusive presumption that the restraint is unreasonable. . . . [f]or the sake of business certainty and litigation efficiency[.]"); United States' Proposed Final Jury Instructions, *supra* note 136, at 31 (quoting AM. BAR ASS'N, *supra* note 136, at 149) (giving one such instruction).

[164] Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

[165] Of course, if any rational juror would recognize that a given agreement is obviously unreasonably anticompetitive, the DOJ has no need either for the instruction directing a conclusive presumption or for a

Court has invalidated substantive laws that purport to give the courts the task of determining elements of an offense,[166] and the judicial development of per se rules shows that fact-finding is necessary even to classify an agreement as subject to per se treatment.[167] Notably, the Tenth Circuit recently rejected the DOJ's argument that the per se rule and the rule of reason constitute distinct theories of liability, quoting *Atlantic Richfield* for the proposition that both are merely means to establish unreasonableness.[168]

The per se concept may have applications in a civil context, and the concept has sometimes operated to determine whether a proffered defense is cognizable (and thus whether certain evidence is relevant).[169] But the Constitution prohibits using the per se concept in a criminal case to prevent the jury, as fact-finder, from evaluating the unreasonableness of a restraint and the defendant's understanding that the probable consequence of the restraint would be unreasonable. These are two distinct elements of the offense, and the defendant has the right to have the jury perform all fact-finding regarding them. While the judge must instruct the jury on the legal elements of the offense and any defenses, the judge may not circumvent the fact-finding by "leapfrogging" from a particular type of agreement to an irrebuttable presumption that the agreement is unreasonable and that the defendant knew this fact.

This prohibition on conclusive presumptions is especially important in the antitrust context because the Court has recognized that applying the "per se" label to an agreement is a matter of administrative convenience subject to

general rule of law that can be invoked on the basis of the allegations in the indictment.

[166] *See supra* notes 150–53 and accompanying text.

[167] *See supra* Section III.D.

[168] United States v. Kemp & Assocs. (*Kemp II*), 907 F.3d 1264, 1275 (10th Cir. 2018) ("But as the Supreme Court has noted, 'per se and rule-of-reason analysis are but two methods of determining whether a restraint is 'unreasonable,' *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects.'" (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990))).

[169] *See* Krattenmaker, *supra* note 5, at 172–73.

reevaluation; it does not remove the need for further fact-finding on the proper characterization of the agreement and the possibility that the agreement is reasonable under the circumstances.[170]

B. Void-for-Vagueness

"Today's vague laws . . . can invite the exercise of arbitrary power . . .[,] leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up."[171] In response, as a matter of basic ethics, the void-for-vagueness doctrine requires that a person can know what conduct may bring punishment.[172] This doctrine has particular application to antitrust cases because of their potential to chill procompetitive conduct.[173]

[170] *See supra* notes 55–59 and accompanying text.

[171] Sessions v. Dimaya, 138 S. Ct. 1204, 1223–24 (2018) (Gorsuch, J., concurring in part and concurring in the judgment); *see also id.* at 1212 (plurality opinion) ("[T]he [void-for-vagueness] doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." (citations omitted) (first citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); and then citing *id.* at 358 n.7)).

[172] *See* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[T]he terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (first citing Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914); and then Collins v. Kentucky, 234 U.S. 634, 638 (1914))); United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (citing Champlin Refin. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 242–43 (1932))).

[173] *See* Bouie v. City of Columbia, 378 U.S. 347, 362 n.9 (1964) ("In order not to chill conduct within the protection of the Constitution and having a genuine social utility, it may be necessary to throw the mantle of

Alone, the morphing and flipping of the per se classification demonstrate that the classification is unpredictable, and *BMI* settles that per se categories cannot even be understood literally.[174] If the tortuous judicial development of the per se rule were not sufficient, Justice Thurgood Marshall's words in *Container Corp.* illustrate why the vagueness doctrine proscribes the rule's application to a criminal case under the Act: "*Per se* rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result."[175]

Nor can a vast body of precedent explaining per se illegality provide sufficient notice to potential defendants when that precedent reflects changing common-law interpretations,[176] and when the precedents are civil or misdemeanor cases that did not involve the severe criminal penalties of today's law.[177]

protection beyond the constitutional periphery, where the statute does not make the boundary clear." (internal quotation marks omitted) (quoting Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 540 (1951)); *see also supra* note 22 and accompanying text.

[174] *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979).

[175] United States v. Container Corp. of Am., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

[176] The Constitution does not permit common-law crimes. Liparota v. United States, 471 U.S. 419, 424 (1985) (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)). *But see* Brief of Amicus Curiae U.S. Chamber of Commerce Supporting Defendants' Motion to Dismiss the Indictment, United States v. Surgical Care Affiliates, LLC, No. 3-21-cr-00011-L (N.D. Tex. Apr. 2, 2021) (arguing that Sherman Act criminal prosecutions of per se conduct are not unduly vague, but rule of reason conduct is unconstitutionally vague).

[177] For a sample of misdemeanor cases, see, for example, Nash v. United States, 229 U.S. 373, 378–79 (1913); United States v. Miller, 771 F.2d 1219, 1225 (9th Cir. 1985) (reviewing conviction for conspiracy to fix gasoline prices and finding fair notice argument "frivolous" because "price-fixing has repeatedly been held to be per se illegal" (first citing Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 345 (1982); then citing N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); and then citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940))); United States v.

Early in the twentieth century, in *Nash*, the Court found the vagueness doctrine inapplicable to the Act in its entirety,[178] but the vagueness of the per se illegality concept presents a distinguishable constitutional issue. And, most importantly, the Court did not address the issue of the conclusive presumption; the decision came before the development of per se illegality. Nor has the Court since addressed a direct vagueness challenge to the per se rule—before or after the introduction of ambiguity in *BMI* and the addition of the criminal intent element in *U.S. Gypsum*.[179]

The more interesting issue is whether the unreasonable restraint element itself is too vague and arbitrary for a criminal offense. *Nash* should not be considered controlling precedent in this determination. First, the *Nash* holding involved a misdemeanor and did not apply to the current felony statute with its extraordinarily severe penalties. Second, the analysis at the time was questionable, purporting to rely on a precedent that had rejected, not accepted, the use of "reasonableness" as a criminal standard.[180] Third, the Court's view of constitutional due process protections has evolved in more recent times, as has the Court's interpretation

Cinemette Corp. of Am., 687 F. Supp. 976, 979 (W.D. Pa. 1988) (rejecting fair notice argument because "substantial case law holding that restrictions upon competitive bidding constitute . . . a *per se* violation of the Sherman Act" gave clear notice).

[178] *Nash*, 229 U.S. at 378–79.

[179] United States v. U.S. Gypsum Co., 438 U.S. 422, 435 (1978).

[180] In *Nash*, the Court rejected the "proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable,'" finding "no constitutional difficulty in the way of enforcing the criminal part of the act." 229 U.S. at 377–78 (citing Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 109 (1909)). In *Waters-Pierce Oil* the Court examined a state antitrust statute that was far more specific than the Act, holding that when the required intent and dangerous probability of a successful attempt exist, the criminal statute can apply "not only [to the] acts which accomplish[] the prohibited result, but also [to] those which tend or are reasonably calculated to bring about the things forbidden." 212 U.S. at 111. But *Waters-Pierce Oil* had found that "the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in . . . cases cited." *Id.* at 109.

of the Act.[181] Finally, the Court has observed that judicial construction of a vague statute may not cure the due process concern.[182]

VI. AN EXAMPLE FOR PERSPECTIVE

In a recent advertising supplement designed to boost visits to a quaint, local downtown area, a toy retailer boasted that there was another toy shop opening in the area but also advised customers not to worry that they would see duplicative products because the shopkeepers in the town "collaborated" with each other to avoid a nasty competitive environment.[183] Hypothetically, assume that, when confronted by the DOJ, at least one toy store retailer admitted that the retailers agreed among them which shops should carry which types of products.[184] Consider whether this confessed market allocation could or should lead to a criminal antitrust charge with an instruction requiring the jury to presume the combination illegal.

The obvious justification for the allocation is that the retailers thought their consumers would see the collaboration as beneficial, contributing to a lovely atmosphere and a better selection of toys. Of course, preserving the downtown area's economic viability by avoiding price competition also may have played a role in the arrangement. In addition, the parties likely would want to show how dividing the limited product

[181] *See supra* Sections III.B.2, V.A.

[182] *Cf.* Bouie v. City of Columbia, 378 U.S. 347, 353 (1964) (rejecting, at least, retrospective judicial expansions of statutory bans).

[183] This is not a hypothetical but serves as a base upon which to embroider hypothetical facts in order to examine a potential criminal prosecution.

[184] Perhaps the first retailer approached by the DOJ knew enough to ask for leniency under the DOJ's Leniency Policy. *See* U.S. DEP'T OF JUST., CORPORATE LENIENCY POLICY (1993), https://www.justice.gov/atr/file/810281/download [https://perma.cc/WAT9-FF7T]. The policy acts as a powerful incentive to confess and to cooperate with the DOJ because, in return, the cooperating party receives amnesty from criminal prosecution. *See id.* at 1–3. "Cooperation" must not involve perjury, but whether a party has cooperated lies within the discretion of the DOJ, and the potential for semantic juggling to please the DOJ might arise. *See id.* at 4–5.

space among them, in fact, had the effect of expanding the selection of products available to consumers and increasing the stores' total output without affecting prices. Perhaps the Walmart in a nearby suburb carried all of the popular toys which were the subjects of the arrangement, and the toy retailers would have lost sales and profits if they had priced their products any higher.

Topco's "rigid rule" for market allocations would deem this a naked per se illegal restraint with no further evidence relevant.[185] *BMI*, however, requires that we first understand whether there is any procompetitive justification to determine if further inquiry is necessary.[186] And the Collaboration Guidelines direct that we look at whether the market allocation agreement is ancillary to a procompetitive agreement and reasonably necessary to enable its procompetitive effect.[187]

The DOJ, however, might well characterize the arrangement as falling within a historical per se category and not as a restraint ancillary to a procompetitive agreement under the Collaboration Guidelines.[188] A DOJ-drafted indictment then likely would charge a per se illegal conspiracy to allocate markets.[189] The defendant could seek to dismiss the indictment,[190] but federal courts are reluctant to dismiss indictments and, given the wealth of case law, have given

[185] *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

[186] *See supra* notes 55–57 and accompanying text.

[187] *See supra* notes 124–26 and accompanying text.

[188] It is not clear whether any "hardcore" gloss on the per se rule or other considerations might factor into the case selection process, but potentially the market allocation could fit within the guidelines to make a criminal charge. *See supra* text accompanying notes 127–33.

[189] *See, e.g.*, Indictment at 4–5, United States v. Harwin, No. 20-cr-00115 (M.D. Fla. Sept. 23, 2020) (charging conspiracy to allocate medical oncology treatments "was a *per se* unlawful, and thus unreasonable, restraint").

[190] If the DOJ does not include the per se label in the indictment, the court could deny the motion to dismiss simply on the basis that the law would permit a rule of reason criminal case. *See* United States v. Kemp & Assocs. (*Kemp II*), 907 F.3d 1264, 1274–75 (10th Cir. 2018) (holding that a determination that an indictment does not allege a per se offense does not require a dismissal of the indictment).

short shrift to arguments that price-fixing and market allocations are not per se illegal.[191] Moreover, most indictments also include language about the purpose and effect of the arrangement,[192] and it is critical to remember that a motion to dismiss is solely about what is on the face of the indictment: no evidentiary hearing comprehensively explores defense evidence even for a *BMI* preliminary judicial determination.[193]

Next, the DOJ may make a motion in limine based on the per se presumption to exclude any defense evidence related to the effect of the agreement or its justifications.[194] Again, even if the court had not already decided to apply the per se rule upon the motion to dismiss, case law provides numerous quotes, like *Topco*'s "rigid rule" barring further inquiry

[191] *See supra* note 177.

[192] *See e.g.*, Lischewski Indictment, *supra* note 135, at 3 (alleging both purpose—"for the purpose of reaching agreements on prices"—and effects—"[the conspirators] accepted payments . . . at collusive and noncompetitive prices"). When an indictment alleges "purpose," this would seem another basis for permitting evidence on that issue, apart from any per se issues.

[193] In a civil motion for summary judgment, evidence must be adduced and evaluated, *see* FED. R. CIV. P. 56, whereas a court must review an indictment on its face, asking whether a rational juror could find a violation beyond a reasonable doubt, drawing all inferences in favor of the prosecution. *See* AM. BAR ASS'N SECTION OF ANTITRUST L., AM. BAR ASS'N, CRIMINAL ANTITRUST LITIGATION HANDBOOK 224–25 (2d ed. 2006); *cf. also* FED. R. CRIM. P. 12(b)(3)(B) (permitting a motion to dismiss the indictment for failure to state an offense but nowhere providing for judicial review of evidence).

[194] *See* AM. BAR ASS'N SECTION OF ANTITRUST L., *supra* note 193, at 254–53. If the motion in limine did not rely upon a presumption of illegality but instead sought to exclude defenses based on relevancy, a different approach could apply. Even without instructing the jurors that they may not consider the element of unreasonable restraint because it is conclusively presumed, the court could find ample ammunition in the case law to reject evidence of a justification based on the idea that the policy of competition is bad—i.e., that the Act is wrong. The "facilitating economic viability" justification and the "nasty competition" justification appear to fall into this category. Thus, the court might preclude the defense from having an economist testify that, if the conspirators had competed, the rivals would have been poorer or driven out of business. Few would disagree with that decision.

whenever there is a market allocation, favoring the DOJ's request.

But the defense might seek to put in evidence from an economist that the agreement did not affect prices or output. This could involve showing that the boundaries of any relevant market allegedly allocated included the Walmart and hence the lack of market power of the conspirators. It also could involve a before-and-after comparison of prices, an analysis of shelf space constraints, and a report of the agreement's effects on the selection of products available in the market area. Similarly, the defense might want to provide testimony from local artisans explaining how the drive to source additional products led them to create new toys that they had not previously produced and would not have produced without the additional distribution outlet.[195] The defendant may want to testify that they did not see how this conduct could affect prices or output.[196] This evidence would seem to go directly to the issues of unreasonableness and the

[195] There are myriad circumstances that can pose complicated evidentiary challenges for the defense's explanation. Assume that a common owner who rents the premises that both toy retailers occupy dictated to them as a condition of leasing to the new toy shop that they could not compete. Or assume that a downtown association of shopkeepers and restaurateurs, with the goal of creating and maintaining a unique and quaint downtown area, required the toy retailers to coordinate as a condition of their membership. In both circumstances, the prosecution and defense may clash over whether the agreement is "horizontal," as "vertical" allocation agreements today are not considered per se illegal. *See supra* Section III.B.2.b.ii. Potentially, the common owner or the other members of the downtown association would be considered co-conspirators or charged as aiding and abetting an illegal conspiracy. In the case of such a charge, allowing justifying evidence would seem particularly important.

[196] The new toy retailer may dispute the existence of an agreement, claiming that the collaboration with the other toy retailer involved only requests for information used to make a unilateral decision about which products to carry. This testimony may open the door for broader defense evidence regardless of per se presumptions because per se illegality does not bear on the existence of the agreement element of the violation. *See supra* note 168 and accompanying text (explaining that the per se rule is a means of determining whether an agreement is an unreasonable restraint of trade).

intent of the parties, triggering constitutional protections entrusting related fact-finding to the jury.[197]

The DOJ's proposed jury instructions, by contrast, would direct application of a conclusive presumption that the restraint was unreasonable, and if the jury found the defendant entered into the charged agreement, it would make the Act's jurisdictional commerce requirement the jury's only further consideration.[198]

Judicial review of the sufficiency of the evidence in a criminal prosecution arises only after rulings have limited the evidence and after a jury has convicted the defendant.[199] In the DOJ's per se practice, the jury will have convicted without considering whether the agreement was reasonable or whether the defendant knew that the probable consequence of the agreement was an unreasonable restraint.[200] If there is sufficient proof to show beyond a reasonable doubt an agreement to allocate the products sold, then, according to the DOJ, the inquiry ends.

This example with its hypothetical ramifications amply demonstrates how the DOJ's practice weaponizes per se illegality through conclusive presumptions that deprive the defense of its rights. Market allocation agreements fall within per se labeling, but the fact inquiry does not end with that

[197] *See supra* Section V.A.1.

[198] *See, e.g.*, United States' Proposed Final Jury Instructions, *supra* note 136, at 31 (quoting AM. BAR ASS'N, quoting AM. BAR ASS'N, *supra* note 136, at 149). Notably, when the indictment itself charges that the agreement was a per se illegal market allocation, the defense should be able to argue that the indictment leaves open for jury consideration whether the particular agreement fits the per se classification. The DOJ likely would disagree, claiming that the judge should determine this issue as a matter of law, but that argument would involve precisely the shifting of fact-finding from the jury to the judge that the Constitution proscribes. *See supra* Section V.A.1.

[199] *See* 7 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.2(a), Westlaw (database updated Dec. 2020). Of course, there is no review of the evidence if the court disagrees with a jury acquittal because the court may not substitute its judgment for that of the jury. *See id.* § 27.3(a).

[200] *See* United States' Proposed Final Jury Instructions, *supra* note 136, at 31 (quoting AM. BAR ASS'N, quoting AM. BAR ASS'N, *supra* note 136, at 149).

label, and the Constitution entrusts the jury with that inquiry.

VII. CORRECTION OF THE CONSTITUTIONAL DEFECTS

Each of the three branches of government could fix the constitutional defects in the DOJ's practice. This Part provides thoughts on what each of the branches could do.

A. Legislative Fix

Congress could enact legislation that would resolve the constitutional concerns identified above and avoid the reliance on prosecutorial discretion that currently exists. The simplest solution would amend the Act so that it applies only civilly.[201] Alternatively, Congress could attempt to describe in clear terms the specific elements that constitute a criminal antitrust offense instead of relying upon a common-law approach interpreting the "unreasonable restraint" standard. Specifying for criminal enforcement only a few narrowly-defined categories might work either as a standalone solution or in conjunction with other makeovers, like a new regulatory regime for more complex practices.

It is difficult to favor any one alternative over another without defined options, but dropping all criminal enforcement of the Act has significant appeal. While the loss of criminal enforcement against hardcore cartel conduct would eliminate a powerful method of deterrence as well as arguably some investigative tools that have proven extremely effective,[202] removing criminal enforcement of the Sherman

[201] And at the same time, Congress could perform additional clean-up to discard criminal enforcement of other antitrust laws rather than continue relying on prosecutorial discretion. For example, the DOJ long ago abandoned criminal enforcement of § 2 of the Sherman Act, 15 U.S.C. § 2 (2018), which deals with monopolization issues, and has abandoned all enforcement of the Robinson-Patman Act, which deals with price discrimination but continues to provide criminal penalties. *Id.* § 13a. On the DOJ's prosecution practices, see *supra* note 13 and accompanying text.

[202] The threat of jail time creates a serious incentive for legal compliance. Civil charges against individuals are rare, William E. Lawler,

Act would not preclude criminal enforcement of the conduct that is now prosecuted under the Act.

Virtually everything that the DOJ chooses to charge as a criminal violation of the Act also could be prosecuted criminally under different laws.[203] In addition to mail and wire fraud and criminal conspiracy, an array of criminal options are available to combat collusion.[204] In the area of government procurement, which is the setting for a large number of current antitrust grand juries, an even broader array of statutes can apply, including perjury prohibitions as applied to the non-collusion affidavits required in all competitive federal procurement.[205] Indeed, the DOJ not

III & Jeremy Keeney, *DOJ's Yates Memorandum: Focus Enforcement Efforts on Individuals*, 83 DEF. COUNS. J. 200, 205 (2016) ("DOJ enforcement of the . . . antitrust laws is at an all-time high, but there has been little civil enforcement against individuals[.]"), especially because joint and several liability means damages can be collected from one or more of the companies involved, which have much deeper pockets. *See In re* Uranium Antitrust Litig., 617 F.2d 1248, 1257 (7th Cir. 1980) ("Anti-trust liability under Section 1 of the Sherman Act is joint and several." (citing Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977))). Moreover, search warrants, various international cooperation measures, and other tools are available only for the enforcement of criminal charges. *See, e.g.*, FED. R. CRIM. P. 41(c) (describing the proper subjects of search warrants).

[203] *See* Connolly, *supra* note 7, at 13; *cf. also* Hammond, *supra* note 128, at 2 (describing cartel price-fixing as brazen "theft").

[204] *See* U.S. DEP'T OF JUST., *supra* note 5, at 1 ("[C]ollusion among competitors may constitute violations of the mail or wire fraud statute, the false statements statute, or other federal felony statutes, all of which the Antitrust Division prosecutes.").

[205] As of October 2020, the DOJ had opened nearly twenty-four grand juries based on its Procurement Collusion Strike Force initiative. Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., "Video Killed the Radio Star": Promoting a Culture of Innovation 11 (Oct. 8, 2020), https://www.justice.gov/opa/speech/file/1326111/download [https://perma.cc/NF52-K8DX]; *see also* ANTITRUST DIV., U.S. DEP'T OF JUST., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 9 (2018), https://www.justice.gov/atr/page/file/1091651/download [https://perma.cc/BV68-RXWE] ("The prosecution of criminal antitrust violations also may be accompanied by charges of: mail or wire fraud (18 U.S.C. §§ 1341, 1343); conspiracy to commit an offense or to defraud the United States (18 U.S.C. § 371); conspiracy to defraud the government with respect to claims (18 U.S.C. § 286); making false, fictitious or fraudulent claims (18 U.S.C. § 287); making false statements to a government agency

infrequently uses other statutes to supplement charges under the Act[206] and has proceeded using only these other options.[207] Many of these other laws, including the mail fraud and obstruction of justice statutes, allow for longer sentences than the Act does.[208]

With the fluidity of and potential innovations in business practices, imperfect economic understanding, and the potential for injustice that could chill beneficial conduct, Congress would face major challenges constructing a better legislative alternative than the elimination of criminal penalties. And as Professor Kovacic explained in the Taft Lecture, trying to determine a good criminal test would be a frightfully difficult task.[209]

B. Judicial Fix

Constitutional precedent compels the conclusion that the Supreme Court would invalidate the use of the per se rule in criminal cases, rejecting the conclusive presumption in jury instructions and the use of the presumption as the basis to

(18 U.S.C. § 1001); and a wide variety of other federal statutes, including the Racketeer Influenced and Corrupt Organizations (RICO) law (18 U.S.C. §1962(c)).”); Federal Acquisition Regulation, 48 C.F.R. §§ 3.103-1, 52.203-2 (requiring a “Certificate of Independent Price Determination” in federal procurement).

[206] *See, e.g.*, Press Release, Antitrust Div., U.S. Dep’t of Just., Engineering Firm and Its Former Executive Indicted on Antitrust and Fraud Charges (Oct. 23, 2020), https://www.justice.gov/opa/pr/engineering-firm-and-its-former-executive-indicted-antitrust-and-fraud-charges [https://perma.cc/3P8D-B7L7]; Information at 3, 5, United States v. Camara, No. 19-cr-00189 (D. Conn. July 17, 2019) (charging bid-rigging and price-fixing under the Act and the wire fraud statute).

[207] *See e.g.*, Indictment at 1, United States v. Detloff Mktg. & Asset Mgmt., Inc., No. 18-CR-00197, 2019 WL 2511890 (D. Minn. Aug. 15, 2018) (charging bid-rigging conduct under 18 U.S.C. §§ 2, 1341, 1343, 1349 (2018) but not the Act).

[208] *See* 18 U.S.C. § 1341 (setting maximum sentence for mail fraud of twenty years or, under certain circumstances, thirty years); *id.* § 1343 (providing similar terms for wire fraud); *id.* §§ 1503–05 (specifying a variety of penalties for obstruction of justice).

[209] *Cf.* William E. Kovacic, *The Future Adaptation of the Per Se Rule of Illegality in U.S. Antitrust Law*, 2021 COLUM. BUS. L. REV. 33, 41.

exclude defense evidence. There does not appear to be a high likelihood of lower courts correcting the problem. So far, the lower courts generally permit the improper instructions.[210] This likely has impacts beyond actual trial practice, pushing defendants to plead guilty rather than take cases to trial when they believe the jury will not see critical defense evidence.[211]

The difficulty of judicial correction lies in getting the matter before the Supreme Court. There are practical problems, including issues related to whether the case would warrant certiorari. Cases raising these issues are sparse. Defense counsel often either do not challenge per se jury instructions or do not focus on the issue.[212] An important reason for this is that it is strategically difficult to argue that there was no conspiracy or that the defendant did not join it, and at the same time argue that the alleged conspiracy was reasonable because necessary to accomplish a procompetitive purpose.[213] The intent analysis magnifies this dilemma. Moreover, the government can rely on arguments of past practice, longstanding per se precedent,[214] and citations to the "conclusively presumed" language.[215]

A more intriguing and challenging issue is whether the Supreme Court would go further and invalidate criminal antitrust prosecutions under the void-for-vagueness doctrine. As explained above, there are serious arguments to support this.[216]

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[210] *See supra* Section V.A.2.

[211] *See, e.g.*, United States v. Kemp & Assocs. (*Kemp III*), No. 16CR403, 2019 WL 763796, at *2 (D. Utah Feb. 21, 2019). The vast majority of criminal antitrust cases are resolved through plea agreements. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 466 (2008).

[212] *See supra* note 155 and accompanying text.

[213] The Antitrust Division has noted this dilemma in the context of a civil "no poach" case. *See* Statement of Interest of the United States of America, *supra* note 126, at 5 ("[A labor allocation agreement] is *per se* unlawful unless the facts show that it is reasonably necessary to a separate, legitimate collaboration . . . . [Defendant] cannot establish such reasonably [sic] necessity while also arguing the agreement never existed.").

[214] *See supra* Section III.B.2.i.

[215] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[216] *See supra* Section V.B.

C. Executive Fix

Unfortunately, there is no strong basis to conclude that the DOJ will reform its per se criminal enforcement practices. Nothing precludes the DOJ from using the per se concept in its case selection process although, in reality, the DOJ's case selection has relied little on classifying conduct as per se illegal.[217] But if the DOJ would stay within its general mode of prosecuting only hardcore, naked agreements, it could fix the constitutional problem with little fear of different results. The DOJ simply could stop asking for jury instructions including a per se presumption and stop using presumed illegality in moving to limit evidence. If the DOJ limits its prosecutions to those agreements truly manifestly anticompetitive and without redeeming virtue, instructions to presume reasonableness should be unnecessary for rational jurors.[218]

Another method the DOJ could use to fix the Act's constitutional infirmities is similarly simple. As explained above, the DOJ could use different laws to prosecute the offenses now pursued under the Act.[219] While the DOJ more typically has used these statutes for supplemental charges, it has also charged collusion offenses directly under these other statutes and could make this the exclusive mode for proceeding in criminal cases.[220]

[217] The DOJ focuses directly on price-fixing, bid-rigging, and market allocation and then applies an ancillary restraints review as the it has defined it. *See* U.S DEP'T OF JUST., *supra* note 120, at III-12; FED. TRADE COMM'N & U.S. DEP'T OF JUST., *supra* note 121, at 7–9; *Justice Manual Title 7: Antitrust*, *supra* note 11 (considering other factors, such as the certainty of the case law and avoiding novelty).

[218] In general, the DOJ's exercise of its prosecutorial discretion in recent times is laudable, but exceptions to its typical restraint can be expected, whether from changed policy, prosecutorial zeal, overly ambitious competitors seeking leniency, or factual misinterpretation.

[219] *See supra* notes 203–08.

[220] *See supra* notes 206–07 and accompanying text.

VIII. CONCLUSION

Conclusive presumptions that accompany the application of per se rules are inappropriate in criminal antitrust prosecution. In the Sherman Act, the legislature provided an unclear, overbroad text. The judiciary attempted to correct the overbreadth by inferring an "unreasonableness" qualifier of the restraint element and thereafter has grappled with creating modes of analysis to interpret that qualifier. Per se illegality emerged and has developed chaotically in misdemeanor and civil cases, with judicial creation of new per se categories and elimination of others.

Then, after the offense under the Act became a felony, unequivocal Supreme Court holdings invalidated the substitution of judicial presumptions for jury fact-finding of any element of a criminal offense. The justifications for per se illegality—administrative convenience and cost savings—as well as its disadvantages—the condemnation of some conduct which would not be condemned with a more comprehensive consideration of evidence and, relatedly, the potential chilling of procompetitive conduct—do not fit well in criminal prosecutions. But despite the constitutional law, the DOJ continues to apply the per se rule in its criminal trial practice. Unfortunately, with most criminal cases resolved by plea agreement, the full impact of this unconstitutional practice expands well beyond those cases that go to trial.

Each of the branches of government could cure the constitutional infirmities. The quickest remedy lies with the DOJ, but the most comprehensive lies with Congress dropping criminal enforcement from the Act. The difficulty with a judicial fix stems from challenges to placing the issue before the Supreme Court; if the case were presented to the Court, its precedent makes clear the invalidity of per se presumptions in criminal cases. But everyone should seek to ensure that the violation of constitutional protections does not continue.