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Criminal Intent and the Sherman Act: The Label Per Se Can’t Take Gypsum Away

By Thomas Patrick Sullivan*

In 1913, the United States Supreme Court confronted the question of whether the imposition of criminal penalties under section 1 of the Sherman Antitrust Act\(^1\) (Sherman Act) required a showing of criminal intent. Upholding the conviction in *United States v. Patten*,\(^2\) the Court rejected the defendant’s contention that specific intent must be proved, stating:

>[No] allegation of a specific intent to restrain such trade or commerce [is required], for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.\(^3\)

The holding in *Patten* was generally interpreted not only as negating a requirement of specific intent in criminal antitrust cases,\(^4\) but also as conclusively establishing that a defendant intends the necessary and direct consequences of his or her actions.\(^5\)

Sixty-five years after *Patten*, in *United States v. United

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1. 15 U.S.C. § 1 (1976). Section 1 provides: “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 one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.” *Id.*
2. 226 U.S. 525 (1913).
3. *Id.* at 543.
States Gypsum Co., the Court reconsidered its historical interpretation of section 1, holding that: "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."

Gypsum appears to have implicitly overruled at least that portion of the Patten decision which held that a defendant must be taken to have intended the necessary and direct consequences of his or her actions. The Supreme Court in Gypsum established a two-pronged test to determine intent in section 1 criminal actions. The first standard, to be applied when the defendant's conduct actually results in anticompetitive effects, requires that the government prove that the conduct was undertaken with knowledge of its probable consequences. The second standard, applicable in the absence of anticompetitive effects, requires proof by the government that the defendant acted with the conscious purpose of bringing about the proscribed result.

Despite these seemingly clear and categorical rules, several recent appellate court decisions involving section 1 criminal offenses have relied on a different part of the Gypsum decision to sustain convictions arrived at without a specific finding of intent. In each case, the reason for distinguishing Gypsum announced by the court was that the conduct it was examining, unlike the conduct in Gypsum, involved a per se violation of section 1.

This Note challenges the reasoning of these recent decisions, and in particular the courts' use of the per se concept to circumvent the Gypsum mandate of proof of intent. The Note begins with a review of the Supreme Court holding in Gypsum, including

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7. Id. at 435.
9. 438 U.S. at 444.
10. Id. at 444 n.21.
12. For a discussion of that portion of the Gypsum decision relied on by the courts of appeals, see notes 32-45 and accompanying text infra.
a discussion of that portion of Chief Justice Burger's opinion that has been interpreted as excepting per se violations of section 1 from the reach of the *Gypsum* standards. The Note then traces the historical development of the per se concept and examines the problems inherent in the per se approach. Lastly, the Note considers the function of the Sherman Act as a criminal statute and discusses the importance of a criminal intent requirement in light of Congress' recent amendment to section 1 elevating violations to the rank of felonies. The Note concludes that the basic unsoundness of the per se rules, coupled with the newly increased sanctions for criminal convictions, makes the *Gypsum* requirement of proof of intent mandatory in all section 1 criminal prosecutions.

**United States v. United States Gypsum Co.**

The defendants in *Gypsum* were six major manufacturers of gypsum board and certain of their corporate officials. The government's case at trial centered on the defendants' practice of telephoning competing producers to determine the price currently being offered on gypsum board to specific customers. The government contended that this price verification between sellers had the effect of stabilizing prices in violation of section 1 of the Sherman Act. The defendants responded to the allegations by claiming that the exchanges of price information were necessary to enable them (1) to take advantage of the "meeting competition" defense contained in section 2(b) of the Robinson-Patman Act and (2) to prevent customer fraud. The defendants argued that these pur-

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13. 438 U.S. at 429.
14. *Id.* at 429 n.4. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), forbids price discrimination between purchasers of commodities of like grade or quality where the effect may be to substantially lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition. Section 2(b) of the Robinson-Patman Act, *id.* § 13(b), provides that a seller may rebut a prima facie case of discrimination "by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." The defendants in *Gypsum* thus maintained that any exchanges of information that took place were for the purpose of establishing good faith in granting price reductions to specific buyers.

15. 438 U.S. at 429. The defendants' argument was that a buyer who is given a firm price quotation by a supplier for a specified quantity of merchandise in order to protect him or her against potential price increases during a construction project could misrepresent to another supplier that such price protection had not been received and thereby obtain extra supplies at a lower price. This argument was based on the holding in Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925), that even if the information exchanged
poses brought the case within a "controlling circumstance" exception to Sherman Act liability.16

The instructions given by the trial judge provided that the defendants' purposes for exchanging prices were essentially irrelevant if the jury found that the effect of the verification was to fix or stabilize prices.17 Using the language of Patten and its progeny,18 the trial judge charged the jury that: "The law presumes that a person intends the necessary and natural consequences of his acts [and] if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties . . . are presumed, as a matter of law, to have intended that result." Each of the defendants was subsequently found guilty of violating section 1 of the Sherman Act.

A divided Third Circuit reversed the convictions on appeal.20 The two judges who could agree on a common ground felt that if the defendants' sole purpose in exchanging price information was to establish a defense to price discrimination charges under the Robinson-Patman Act, they would have established a "controlling circumstance" which, under United States v. Container Corp. of America,21 would excuse what might otherwise constitute an antitrust violation.22

The Supreme Court rejected the argument that an interseller exchange of prices was necessary to establish a "meeting competition" defense under the Robinson-Patman Act.23 Nevertheless, the

tended to bring about uniformity in price, the defendants' good motive in guarding against fraud in the execution of particular job contracts exempted them from Sherman Act liability. See 438 U.S. at 448 & n.24.

16. In United States v. Container Corp. of America, 393 U.S. 333 (1969), the Supreme Court refused to overrule its previous stance in Cement Manufacturers, despite apparent rejection of the "good motive" defense. See note 15 supra. Instead, the Court elected to distinguish the price exchange in Cement Manufacturers, stating: "While there was present here, as in [Cement Manufacturers], an exchange of prices to specific customers, there was absent the controlling circumstance, viz., that cement manufacturers . . . exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job." 393 U.S. at 335 (emphasis added). See generally Note, United States v. United States Gypsum Co.: Putting a Lid on Container, 45 BROOKLYN L. REV. 417, 429 (1979).

17. 438 U.S. at 429-30.
18. See cases cited in notes 4-5 supra.
19. 438 U.S. at 430.
22. 550 F.2d at 126.
Court affirmed the Third Circuit's judgment, holding that the convictions could not stand because the trial judge had improperly instructed the jury on the crucial issue of intent.\textsuperscript{24} Speaking for the majority, Chief Justice Burger expressed the Court's unwillingness to construe the Sherman Act as providing for a "regime" of strict liability crimes.\textsuperscript{25} He noted that "intent generally remains an indispensable element of a criminal offense," and that this "is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense."\textsuperscript{26} The Chief Justice cited \textit{Morrisette v. United States}\textsuperscript{27} for the proposition that "at least with regard to crimes having their origin in the common law, [there is] an interpretative presumption that \textit{mens rea} is required."\textsuperscript{28} Although he recognized that strict liability offenses are not unknown to the criminal law,\textsuperscript{29} the Chief Justice stated: "[F]ar more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."\textsuperscript{30}

The Chief Justice then launched the discussion that has led, at least in part, to the appellate court decisions\textsuperscript{31} which have held that intent is not a required element of proof for \textit{per se} violations of section 1:

With certain exceptions for conduct regarded as \textit{per se} illegal because of its unquestionably anticompetitive effects, see, \textit{e.g.}, \textit{United States v. Socony-Vacuum Oil Co.}, 310 U.S. 150 (1940), the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. . . . The imposition of criminal liability on a corporate official . . . for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of

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24. The Court also held that the verdict could not stand for two other reasons stated by the Third Circuit. First, there had been an improper \textit{ex parte} communication between the trial judge and the foreman of the jury, \textit{id. at 459-62}, and second, the trial judge's instructions regarding withdrawal from the conspiracy were improper. \textit{id. at 462-65}.

25. \textit{Id. at 436}.

26. \textit{Id. at 437}.

27. 342 U.S. 246 (1952).

28. 438 U.S. at 437.

29. \textit{Id. See generally W. La Fave & A. Scott, Criminal Law} 222-23 (1972).

30. 438 U.S. at 438.

31. See note 11 & accompanying text supra.
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overdeterrence . . .

Relying on this language from Gypsum, the Third Circuit, in United States v. Gillen, upheld a conviction for conspiracy to fix prices despite the fact that the trial judge, sitting without a jury, failed to make a specific finding regarding intent. The Gillen court expressed the belief that "the Supreme Court's statement in Gypsum on intent was born out of a concern for borderline violations and was not meant to modify past precedent on price fixing conspiracies."

Although an isolated reading of the quoted excerpt from the Gypsum opinion might seem to support the Third Circuit's conclusion, a careful reading of the entire decision supports the contrary conclusion—that intent is an essential element of all criminal antitrust offenses. For example, the Supreme Court stated that "intent is an element of a criminal antitrust offense . . . and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent . . . ." The Supreme Court did not imply that any criminal antitrust offenses should be excused from its holding. Rather it stated unequivocally that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element."

The Third Circuit in Gillen gave misplaced importance to Chief Justice Burger's reference to United States v. Socony-Vacuum Oil Co., an earlier price fixing case, when it stated that the Supreme Court in Gypsum "did not intend any extraordinary change in the rules of law on price-fixing cases because by its very

32. 438 U.S. at 440-41.
34. Gypsum was decided one week after the trial judge in Gillen filed his Memorandum of Decision containing findings of fact and a verdict of guilty. On appeal, the Third Circuit stated: "We must nevertheless consider Gypsum because we must apply the law in effect as of the time we render this decision." 599 F.2d at 543.
35. Id. at 544.
37. 438 U.S. at 435.
38. Gillen Note, supra note 36, at 380 (citing United States v. Gillen, 599 F.2d 541, 548 (3d Cir.) (Adams, J., concurring), cert. denied, 444 U.S. 866 (1979)).
39. 438 U.S. at 443. The use of the signal "e.g." before the cite to Socony-Vacuum tends to indicate that the Court merely intended to offer an example of a case involving a per se violation. It does not indicate that the Court intended to dispense with proof of intent in per se cases.
40. 310 U.S. 150 (1940).
citation of Socony-Vacuum the Court acknowledged that price-fixing cases are an exception."41 The Third Circuit then erroneously concluded: "[I]n price-fixing conspiracies, where conduct is illegal per se, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy."42

Substantially the same language was used to sustain a conviction for bid-rigging in United States v. Brighton Building & Maintenance Co.43 Similarly, the court in United States v. Continental Group, Inc.44 cited Gillen as controlling on the issue of intent while sustaining a conviction for price fixing.45 An analysis of the significance of these decisions, including their potential for misapplication in the future, necessarily must begin with an examination of the per se concept.

Historical Development of the Per Se Concept

From the birth of the federal antitrust laws in 1890, strong forces have pressed for some automatic or per se rules of antitrust liability.46 These forces have combined over the years to contribute to the development of judicial rulings that certain specified practices are per se unlawful under the antitrust laws.47 None of the modern per se categories could have emerged, however, before the landmark decision of Standard Oil Co. v. United States48 in 1911.

In Standard Oil, the Supreme Court formulated the "rule of

41. 559 F.2d at 544.
42. Id. at 545.
43. 598 F.2d 1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979). The court stated: "There is a difference, however, between the case before the Supreme Court in Gypsum and the case before us. We consider the difference significant. . . . The conduct directly proved in Gypsum, the practice of price verification, was not per se unlawful. . . . A conspiracy to submit collusive, non-competitive, rigged bids is a per se violation of the statute. . . . We conclude that the issue of intent was adequately submitted here where the court instructed that, in order to convict it must be proved that defendants knowingly agreed or formed a combination or conspiracy for the purpose of rigging the bids, and intentionally assisted in its furtherance."
44. 603 F.2d 444 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980).
45. "Because we believe that Gillen controls this case, the inquiry becomes whether the district court adequately instructed the jury that the government had to prove that defendants knowingly joined or formed a conspiracy to raise, fix, stabilize or maintain prices. Accord, United States v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir. 1979)." 603 F.2d at 462.
47. Id. at 154-55.
48. 221 U.S. 1 (1911).
reason" test for Sherman Act liability. Recognizing that only unreasonable restraints of trade are illegal, the Court held that "the standard of reason which had been applied at common law . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided." Significantly, the Court then went on to distinguish, rather than overrule, several of its earlier decisions which did not discuss the reasonableness of the alleged violation. In so doing, the Court foreshadowed the advent of the per se doctrine.

Sixteen years after Standard Oil the per se doctrine made its initial appearance in the case of United States v. Trenton Potteries Co. The defendants in Trenton Potteries were charged under section 1 with conspiracy to fix and maintain uniform prices for the sale of bathroom fixtures. The trial judge instructed the jury that if it found the agreements or combinations complained of, it might return a verdict without regard to the reasonableness of the price fixed. The Second Circuit reversed, finding error in the trial judge's refusal to instruct the jury that only undue and unreasonable restraints of trade are unlawful. The Supreme Court reversed the Second Circuit and upheld the jury instruction given by the trial court, thereby establishing price fixing as the first per se violation of section 1.

Since the Trenton Potteries decision in 1927, at least four more per se categories have been recognized, the exact number varying from commentator to commentator. A major reason for the
disagreement among writers who have addressed the issue is that
the Court has never purported to catalogue exhaustively the recog-
nized categories of per se violations. The Court has never purported to catalogue exhaustively the recog-
nized categories of per se violations. With little definitive gui-
dance, lower courts are left with an enormous amount of discretion
to fit novel factual circumstances into existing per se categories.

Closely related to the problem of imprecise categorization is
the problem of inconsistent application. It is significant to note
that every practice that has been singled out for per se condemna-
tion has at one time or another, been upheld as lawful under the
antitrust laws. In the words of a leading commentator “[t]he doc-

and horizontal price fixing, (2) tying arrangements, (3) vertical and horizontal boycotts, (4)
vertical and horizontal divisions of markets, and (5) reciprocal dealings); Flittie, The Sher-
mans Act § 1 Per Se—There Ought to Be a Better Way, 30 Sw. L.J. 523, 530 (1976) [herein-
after cited as Flittie] (listing (1) price fixing agreements, (2) agreements to limit supply or
production, (3) horizontal territorial restrictions, (4) vertical territorial and customer restric-
tions where title has been passed from the supplier, (5) group boycotts, and (6) tying). Each
of these writers determined their respective categories before the 1977 decision of Continen-
Schwinn & Co., 388 U.S. 365 (1967)), which held that vertical territorial and customer re-
strictions are not illegal per se. For a discussion of the GTE decision, see text accompanying
notes 62-67 infra.

57. In White Motor Co. v. United States, 372 U.S. 253 (1963), the Supreme Court
identified tying, division of markets, group boycott, horizontal and vertical price fixing, and
horizontal territorial restrictions as per se illegal. Id. at 259-60. However, the somewhat cas-
ual manner in which these categories were listed militates against their elevation to the level
of judicial dicta cataloguing all per se violations. See Flittie, supra note 56, at 530.

58. Compounding this definitional problem is the existence of certain offenses, such as
tying arrangements, which have been subjected to a limited rule of reason analysis even
after being labeled per se violations. Tying arrangements are agreements by a party to sell
one product only on the condition that the buyer also purchase a different “tied” product,
or at least that he or she will not purchase the tied product from another seller. Although
the Supreme Court clearly marked tying arrangements as illegal per se in the cases of
Northern Pac. Ry. v. United States, 365 U.S. 1, 5-6 (1958), even proponents of the per se
approach have indicated that such arrangements should not be subject to the same inflexi-
bility as other per se categories. One set of commentators, for example, has said that tying
arrangements can best be described as “nearly” per se offenses. C. Kayser & D. Turner,
Antitrust Policy 144 (1959). This rather weak characterization appeared one year after the
decision in Northern Pacific and indicates that even the Supreme Court cannot by labels
convert what is actually a limited rule of reason analysis into an absolute test. See Flittie,
supra note 57, at 531.

59. For a review of cases demonstrating this lack of consistency in each of the major
per se categories, see Flittie, supra note 56, at 530-48.

60. J. Van Cise, Understanding the Antitrust Laws 158 (1976). See, e.g., Chicago
Bd. of Trade v. United States, 246 U.S. 231 (1918) (price fixing); United States v. Morgan,
18 F. Supp. 621 (S.D.N.Y. 1935) (same); Appalachian Coals, Inc. v. United States, 288 U.S.
344 (1933) (agreement to limit supply); National Ass'n of Window Glass Mfrs. v. United
States, 263 U.S. 403 (1923) (division of markets); United States v. National Football League,
trine that a per se offense can 'never' be justified [has] to be quali-
fied—as by the Captain of the Pinafore—with 'hardly ever.'”61

This is not to suggest that the Supreme Court will never re-
treat from an established per se category. Indeed, as the recent rul-
ing in Continental T.V., Inc. v. GTE Sylvania Inc.62 demonstrates,
the Court is not totally adverse upon reconsideration to aban-
don per se treatment for some offenses. Unfortunately, the GTE
case also demonstrates how qualifying language can rob a decision
of much of its force and effect.

The issue in GTE Sylvania was the viability of United States
v. Arnold, Schwinn & Co.,63 which held that vertical territorial and
customer restrictions64 were per se violative of section 1 of the
Sherman Act. The Court in GTE Sylvania, held that “the per se
rule stated in Schwinn must be overruled”65 and concluded that
“the appropriate decision is to return to the rule of reason that
governed vertical restrictions prior to Schwinn.”66 However, the
Court refused to close the door on the issue, stating: “we do not
foreclose the possibility that particular applications of vertical re-
strictions might justify per se prohibition . . . . But we do make
clear that departure from the rule-of-reason standard must be
based upon demonstrable economic effect rather than—as in
Schwinn—upon formalistic line drawing.”67

The Court's admonition against “formalistic line drawing” is
questionable in light of its decision in United States v. Topco As-

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61. J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 158 (1976) (quoting from
64. Vertical restrictions are restraints on distribution imposed by a seller (e.g., manu-
facturer), operating at one end of a particular industry, upon buyers (e.g., retailers) at a
lower level of that same industry. In contrast, horizontal restrictions are restraints on distri-
bution among sellers competing at the same level of distribution. See, e.g., United States v.
Topco Assocs., Inc., 405 U.S. 596 (1972) (discussed at notes 68-77 & accompanying text
infra).
65. 433 U.S. at 58.
66. Id. at 59.
67. Id. at 58-59.
sociates, Inc., four years before GTE Sylvania. In Topco, the Court steadfastly adhered to an established per se category and yet, at the same time, refused to deny that the conduct in question was not only reasonable but served to promote competition. The defendant in Topco was a cooperative association comprising twenty-five small and medium-sized regional supermarket chains operating in thirty-three states. Founded in 1940, the goal of Topco Associates was to obtain high quality staple items of grocery stock under its own label in order to compete more effectively with larger national and regional chains. At the time of trial, the total sales of Topco Associates were less than any one of the three largest chains.

In an effort to maintain the reputation and resulting business advantage that Topco had built up through costly promotion and quality control, the association restricted access to Topco-branded items in such a way that each of its twenty-five members was given an exclusive territory and was the only seller to have access to Topco-branded merchandise in that area. No attempt to fix prices was alleged.

The government maintained that this horizontal division of markets violated section 1 of the Sherman Act because it operated to prohibit competition in Topco-branded products among retail grocery chains. The district court disagreed and found that the intrabrand restraint was far outweighed “by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories.”

The Supreme Court, on direct appeal from the district court, did not disagree that the actions of Topco Associates may have created a net competitive advantage. Nevertheless, they reversed the district court’s decision solely on the grounds that a previous case had already determined that horizontal territorial restrictions were illegal per se. The Court went on to acknowledge an inher-

68. 405 U.S. 596 (1972).
69. Id. at 598.
70. Id. at 600.
71. Id. at 602.
72. Id. at 603.
74. Direct appeal was taken pursuant to § 2 of the Expediting Act, 15 U.S.C. § 29(b) (1976).
ent weakness of the per se approach in a statement that has been said to contain "awesome adverse implications to the maintenance of the competitive economy which is supposed to be the objective of the Sherman Act."76

Whether or not we would decide this case in the same way under the rule of reason used by the District Court 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.77

This statement is awesome not only in its economic implications but also in its potential effect on defendants in section 1 criminal prosecutions. Under the reasoning of Topco, a defendant could conceivably be convicted of a felony simply because the court wanted to avoid confronting "difficult economic problems."

Attempts to justify the per se rules based on the inability of courts to make difficult economic decisions are logically self-defeating. Given its admitted lack of expertise, how does the Court gain the even greater expertise needed to establish a per se rule in the first place, thereby precluding reasonable inquiry for the indefinite future?78 Furthermore, current rule of reason situations are undoubtedly just as difficult to analyze as current per se fact situations would be if left to a rule of reason analysis.79 Lack of economic expertise thus is an unsatisfactory reason for the application of per se rules.

Equally unsatisfactory are the two other common justifications for the per se doctrine: certainty of result and judicial economy.80 The inequitable result in Topco is probably sufficient, in and of

per se violations, noting that Sealy contained elements of the per se violation of price fixing. 608 U.S. at 616 n.3 (Burger, C.J., dissenting).

76. Flittie, supra note 56, at 526 (citing Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958), and Apex Hosiery Co. v. Leader, 310 U.S. 469, 469-93 (1940)).

77. 405 U.S. at 609-10.

78. Flittie, supra note 56, at 549. The dissenting circuit court judge in GTE Sylvania raised a similar question, stating: "I am puzzled by the notion that because the courts are not very well equipped to decide between conflicting notions of economic policy, they should pick one side of such an argument and erect it into a rule of per se illegality." GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 1030 (9th Cir. 1976) (Duniway, J., dissenting), aff'd, 433 U.S. 36 (1977).

79. Flittie, supra note 56, at 549.

itself, to demonstrate that certainty of result is not a valid justification for the per se rules. Further evidence, however, can be found at the opposite end of the spectrum—in the cases in which exceptions to the per se categories were recognized. These cases lend support to the proposition that results are “certain” only when the court decides not to find an exception.

The second justification for the per se rules, judicial economy, loses much of its appeal when it is recognized that the reason the per se categories are riddled with exceptions is that the federal district courts do develop evidentiary records and do find merit in the arguments of many defendants. These exceptions, coupled with the Supreme Court’s inconsistent conduct in defining and maintaining per se categories make the judicial economy argument much less persuasive.

The fate of a criminal antitrust defendant should not be made to depend on a concept so replete with problems as the per se rules. To allow the Gypsum requirement of proof of intent to be avoided by attaching the label of per se to a particular offense in a given case is to open the door, if only slightly, to the possibility that formal rules, and not the substantive facts of a case, will be used to obtain a guilty verdict. Admittedly, in many cases involv-

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81. See cases cited in note 60 supra.
82. See cases cited in note 60 supra.
83. Professor Handler has suggested “it is inconceivable that those who engage in conduct so pernicious that it is ‘conclusively presumed to be unreasonable’ would not know the probable effects of their actions.” Handler, Antitrust-1978, 78 COLUM. L. REV. 1363, 1399-1400 (1978) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)). Justice Stevens, concurring in part and dissenting in part in the Gypsum decision, expressed a similar view: “There is, of course, a theoretical possibility that defendants could engage in a practice of exchanging current price information that was sufficiently prevalent to have marketwide impact that they did not know about, but as a practical matter that possibility is surely remote.” 438 U.S. at 475 (Stevens, J., concurring and dissenting). Nevertheless Donald Baker, former Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice, has observed: “Occasionally defendants engage in per se price fixing, but their conduct clearly indicates that they had no idea they were violating the antitrust laws. There may, for instance, have been open and widely advertised public meetings among a group of naive businessmen without an antitrust counsel.” Baker, To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement, 63 CORNELL L. REV. 405, 417 (1978) [hereinafter cited as Baker]. See, e.g., United States v. Wholesale Tobacco Distrib., Inc., Crim. No. 77-131 (S.D.N.Y., filed Feb. 17, 1977).

Although Mr. Baker felt that in cases where the evidence shows that the defendants did not appreciate the consequences of their actions the bringing of criminal charges might be inappropriate, he did indicate that the decision whether or not to prosecute criminally was completely within the prosecutor’s discretion. Baker, supra, at 417-18. See note 100 infra. Thus, it remains entirely possible for a defendant to be criminally tried for price fixing
ing per se violations, an instruction on intent will be a mere formality imposing a burden on the prosecution that can readily be met. In such cases, the new test may be only verbally different from the old one. However, it is crucial to recognize that simply because at some time in the past the Supreme Court designated an offense as a per se violation does not mean that a specific finding of intent will necessarily be superfluous or that the requirement of such a finding should be abandoned.

Nevertheless, eleven months after Gypsum, the Seventh Circuit, in United States v. Brighton Building & Maintenance Co., indicated that proof of intent could be dispensed with when it acknowledged the government’s contention that “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.” Such an argument could well serve as the formula that turns all per se violations into strict liability offense once the initial conspiracy is shown. The courts need only insert the appropriate per se rule into the equation and it will be as if the Sherman Act read: “tying arrangements, or group boycotts, or horizontal territorial restrictions among competitors are illegal.” The flaw in this argument is that the per se rules are neither sufficiently consistent nor logically sound enough to be read into the Sherman Act in such a way. The Court in Gypsum pronounced that the Sherman Act was not intended to create strict liability crimes, and proof of intent should not be avoidable by implying new language notwithstanding his or her lack of criminal intent. Once it is recognized that a person can innocently become involved in price fixing, the most flagrant of all the per se offenses, it is easy to see how they could unintentionally violate one of the more ambiguous per se rules.

85. Id. at 1400.
86. 598 F.2d 1101 (7th Cir. 1979).
87. Id. at 1106.
88. In a conspiracy, two different types of intent must generally be shown. First, the basic intent to agree is necessary to establish the existence of the conspiracy. Second, the more traditional intent to effectuate the object of the conspiracy must be proved. The focus of the Gypsum decision was on the latter type of intent. 438 U.S. at 443 n.20.

Although this distinction was expressly recognized by the courts in Gillen, Brighton, and Continental, those courts reasoned that because they were dealing with per se offenses, only the first type of intent had to be proved. For a further discussion of the required degree of intent in § 1 conspiracies, see notes 107-114 & accompanying text infra.

89. 438 U.S. at 436. See text accompanying note 25 supra.
The Sherman Act as a Criminal Statute

As both a civil and a criminal statute, the Sherman Act is renowned for both its breadth and its brevity. The flexibility of the Act allows it to reach ever changing business conduct, including schemes never envisioned by its framers. This adaptability, however, is also its primary weakness, for “in its role as a criminal statute, the Act cannot provide the specific definitions typically associated with penal codes.”

Although the general language of the Sherman Act has withstood constitutional challenges for vagueness, the definitional problem has persisted. One attempt to add some clarity to the role of the Sherman Act as a criminal statute was the recommendation of the Attorney General’s National Committee to Study the Antitrust Laws in 1955: “[W]e 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.” The Antitrust Division of the Department of Justice, however, rejected the committee’s standards of “flagrant offense” and “plain intent” and instead adopted a more moderate stance on criminal prosecutions. Confusion persisted, however, and in 1967 the Antitrust

90. The recent amendment to the Sherman Act increasing the criminal penalties for violation of § 1 of the Sherman Act adds further strength to the contention that the Gypsum mandate of proof of intent should be applicable in all § 1 criminal prosecutions. See notes 101-18 & accompanying text infra.

91. See Baker, supra note 83, at 405.


93. Id. Senator Sherman himself evidently recognized this definitional problem when he opposed the inclusion of a criminal provision in the Act during congressional debates. See P. HADLICK, CRIMINAL PROSECUTIONS UNDER THE SHERMAN ACT 19-20 (1939).


95. THE ATTORNEY GENERAL’S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 349 (1955).

96. The Antitrust Division’s guidelines provided: “In general, the following types of offenses are prosecuted criminally: (1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) a less easily defined category of cases which might generally be described as involving proof of use of predatory practices (boycotts, for example) to accomplish the objective of the combination
Division refined its earlier guidelines:

[C]riminal prosecutions will be recommended to the Attorney General only against willful violations of the law, and... one of the two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established—describing per se offenses—willfulness will be presumed... Second, if the acts of the defendants show intentional violation—through circumstantial evidence or direct testimony it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct—willfulness will be presumed.97

It was against this background that the Gypsum Court reversed the long line of cases holding that the Sherman Act had the "same substantive reach in criminal and civil cases,"98 and imposed the requirement that evidence establish that criminal defendants acted willfully or knowingly. Although the 1967 report of the President's Commission was referred to in a footnote by the Supreme Court,99 nowhere in the Gypsum decision does the Court mention that such a "presumption of willfulness" in per se cases would be carried beyond the initial decision to prosecute and into the trial itself.100

or conspiracy; (4) the fact that a defendant has previously been convicted of or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense. There are other factors taken into account in determining whether to seek an indictment in any cases that may not fall precisely in any of these categories. The Division feels free to seek an indictment in any case where a prospective defendant has knowledge that practices similar to those in which he is engaging have been held to be in violation of the Sherman Act in a prior civil suit against other persons." Id. at 350 (statement of Stanley N. Barnes, Assistant Attorney General in Charge of the Antitrust Division).


98. 438 U.S. at 474 (Stevens, J., concurring and dissenting).

99. Id. at 440 n.15.

100. It is important to recognize that the guidelines set forth in the Attorney General's Commission Report of 1955, see note 95 & accompanying text supra, those asserted by the Antitrust Division Report of 1955, see note 96 & accompanying text supra, and those contained in the President's Task Force Report of 1967, see note 97 & accompanying text supra, are directed to the question of whether or not to bring criminal charges and are in no sense binding on the courts after an indictment has been sought and obtained. Thus, the "presumption of willfulness" mentioned in the President's Task Force Report is not a directive to the courts but rather a recommendation to the Assistant Attorney General. Furthermore, because the guidelines are merely recommendations, the Assistant Attorney General is free to accept or reject them at his or her discretion. Accordingly, former Assistant Attorney General Baker has stated: "Articulation and consistent application of principles for deciding the form of proceedings give parties some notice of the standards to which their
Lending further support to the *Gypsum* Court's requirement of intent and to the necessity of treating per se allegations the same as other criminal antitrust charges is the 1974 amendment to the Sherman Act.¹⁰¹ That amendment elevated section 1 offenses from misdemeanors to felonies and increased maximum jail sentences from one to three years. The amendment also increased the maximum fines from $50,000 to $1,000,000 for corporations and $100,000 for individuals.¹⁰²

One of the first decisions rendered after the 1974 amendment was *United States v. Nu-Phonics, Inc.*,¹⁰³ a district court opinion decided one year prior to *Gypsum*. The defendants in *Nu-Phonics* were a group of Detroit area hearing aid dealers charged with conspiracy to fix prices in violation of section 1. Before trial, the government moved for exclusion of certain defense evidence claiming that it was irrelevant because the offense charged was a per se violation of the Sherman Act and, therefore, inquiry into the reasonableness of the defendants' conduct was precluded.

In granting portions of the government's motion in *limine*, the court "felt bound by existing Sherman Act law."¹⁰⁴ At the same time, however, the court ventured that the recent amendment to the Sherman Act "warrants careful re-evaluation of the nature of proof that until 1974 had been thought sufficient to establish the offense."¹⁰⁵ Foreshadowing the holding in *Gypsum* the court concluded: "In light of the change in the Sherman Act violation, the settled Sherman Act law of *mens rea* and overt acts deserve reconsideration."¹⁰⁶

The *Nu-Phonics* court suggested that the Sherman Act should require the same elements of proof as the general conspiracy statute in the federal criminal code.¹⁰⁷ After *Gypsum*, several commen-

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¹⁰¹ See text accompanying note 90 supra. The *Gypsum* defendants were not prosecuted under the new penalty provisions because they were indicted prior to December 21, 1974, the effective date of the increased sanctions. 438 U.S. at 442 n.18.


¹⁰⁴ *Id.* at 1015.

¹⁰⁵ *Id.* at 1014.

¹⁰⁶ *Id.* at 1015.

¹⁰⁷ *Id.* The conspiracy statute, 18 U.S.C. § 371 (1976), requires proof of specific intent for a felony conspiracy conviction. *See generally* United States v. Féola, 420 U.S. 671,
tators have echoed this suggestion, pointing out that although the Supreme Court in *Gypsum* directly rejected the argument that specific intent must be shown to sustain misdemeanor convictions under the antitrust laws, the same cannot be said of felony convictions because the 1974 amendment did not apply to that case. They argue that "knowledge of probable consequences" as required by *Gypsum* is not enough, and that specific intent to restrain trade should be a required element of proof.

Essentially the same argument was advanced on appeal by the defendants in *United States v. Foley*. The *Foley* case differed from *Gillen, Brighton,* and *Continental* in that the instructions on intent give by the trial judge undoubtedly satisfied *Gypsum*. On appeal, the Fourth Circuit upheld the convictions stating: "In increasing the penalties for violating § 1 and redefining the offense as a felony, Congress did not intend to change the elements of the offense . . . . We consider the *Gypsum* rule, so far as statutory interpretation is concerned, still to apply to § 1 offenses." Whether or not *Gypsum*’s standard of intent is inadequate for current felony prosecutions is at least open to question. What does not seem

686 (1975).


109. Rejection of a specific intent requirement in *Gypsum* was made evident when the court stated that "[a] requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome." 438 U.S. at 446.

110. See note 101 supra.


112. 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980).

113. The trial judge’s instruction on intent provided essentially that the jury "must find beyond a reasonable doubt that defendants must have known that their agreement, if effectuated, would have an effect on prices; that they knowingly joined in a conspiracy whose purpose was to fix prices; and that in joining they intended to further that purpose." 598 F.2d at 1336.

The proposed jury instruction submitted by the defendants read as follows: "The indictment in this case charges a serious crime which requires proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than a general intent to commit an illegal act or to make an illegal statement. To establish specific intent in this case, the Government must prove beyond a reasonable doubt that the defendant knowingly did act or made statements purposely intending thereby to violate the antitrust law by fixing commission rates on listings of residential property. Such intent must be determined from all the facts and circumstances which you find from the evidence occurred." Defendants’ Requested Instruction No. 3 (copy on file with the Hastings Law Journal).

114. 598 F.2d at 1338.
open to question is that *Gypsum* sets forth a minimum standard requiring intent to be proven "by evidence and inferences,"115 not merely presumed.

A final observation is worth noting with regard to the 1974 amendment to section 1. Analysis of the history of the Sherman Act prior to 1974 reveals comparatively few periods of active criminal prosecutions, as opposed to civil litigation.116 Since the 1974 amendment to the Sherman Act, however, a marked charge in attitude has taken place at the Justice Department. On May 5, 1977, Donald Baker, then Assistant Attorney General in Charge of the Antitrust Division, announced a thirty percent increase in the number of pending antitrust grand juries since the enactment of the 1974 amendment.117 He made clear that this was an "affirmative choice" designed to make maximum use of the Sherman Act felony standards enacted by Congress.118 There has been no indication that the current Antitrust Division, under the leadership of John Shenefield, will slow this trend.

This shift in attitude by the Antitrust Division emphasizes the need for caution in the application of evidentiary shortcuts such as the per se rules. With felony convictions and prison sentences emerging as real possibilities for section 1 violations, the rights accorded an accused violator of the Sherman Act should be no less than the right accorded any other accused felon.

Ultimately, the Supreme Court will have to clarify its holding in *Gypsum*, outlining precisely the degree of intent necessary to find a section 1 violation and defining the role, if any, of the per se rules in making that determination. In the meantime, lower courts apparently remain free to utilize the per se rules as a shortcut to conviction.

**Conclusion**

The *Gypsum* decision established that intent is a required ele-

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118. Id.
ment of proof in criminal antitrust prosecutions. The two-pronged Gypsum test for measuring intent is not a difficult one for the government to satisfy, particularly when anticompetitive consequences have been demonstrated. At worst, total compliance with the Gypsum standard will result in the slight extension of a trial that has already lasted weeks or months. At best, it could mean the difference between conviction and acquittal.

No justifiable reason exists for allowing the rights of an accused felon to be subject to the possibility of abridgement by a concept such as the per se rules. The per se rules were developed to provide standards, for the courts and for potential violators of the Sherman Act, as well as to lend consistency to decisions and to furnish some measure of judicial economy. Whether or not it has succeeded on any of these counts is a matter of some debate.\(^1\)

Regardless of its historical efficacy in establishing the objective unreasonableness of particular conduct, however, the per se rules should not, after Gypsum, be used to shortcut proof of subjective intent in criminal antitrust cases.

Knowledge of probable anticompetitive consequences\(^2\) at a minimum should now be shown in addition to the required showing of an unreasonable restraint of trade.\(^3\) Merely because unreasonableness has ostensibly been established by the operation of a per se rule does not mean that intent has also been demonstrated. Finally, underlying this entire discussion is the consideration that convicted violators of section 1 will be guilty not of misdemeanors, but of felonies. This distinction is perhaps the most important reason why a finding of intent, as prescribed by Gypsum, should be mandatory in all criminal antitrust prosecutions.

\(^{119}\) See notes 78-82 & accompanying text supra.

\(^{120}\) This standard is applicable when anticompetitive results have been shown. Where no anticompetitive effects have been demonstrated, the elevated standard of “conscious purpose” must be satisfied.

\(^{121}\) For a discussion of the appropriateness of requiring “conscious purpose” rather than merely “knowledge of probable consequences,” regardless of whether anticompetitive effects have been demonstrated, see notes 107-114 & accompanying text supra.