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TO INDICT OR NOT TO INDICT: PROSECUTORIAL DISCRETION IN SHERMAN ACT ENFORCEMENT*

Donald I. Baker†

The Sherman Act is indeed "the Magna Carta of free enterprise"[1]—a statute famed for its breadth and brevity. The recent removal of the "fair trade" provisos[2] restored section 1 to its original simplicity: "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."[3]

Despite its brevity, section 1 in fact functions as two statutes. One is a criminal statute dealing with hard-core violations—price fixing, market allocation, and similar conduct—complete with a set of strengthened felony sanctions added in 1974.[4] The second statute—the other section 1—is a civil statute of extraordinary breadth and flexibility; it invites the judiciary to develop creative equitable remedies responsive to changing restraints in a changing economy.[5]

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

[2] *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801 (codified at 15 U.S.C. § 1 (Supp. V 1975)).

[3] 15 U.S.C. § 1 (1970 & Supp. V 1975).

[4] Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (1974) (codified at 15 U.S.C. § 1 (Supp. V 1975)).

[5] As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirahle in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.

Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

This Article focuses on the line dividing the two statutes—the line that determines when the Antitrust Division brings only a civil case and when it brings a criminal case.[6] As Justice Holmes was so fond of noting, whenever a legal distinction is made between two extremes, a line must be drawn to mark where the change takes place.[7] However, as Justice Frankfurter was equally fond of pointing out, "the fact that a line has to be drawn somewhere does not justify its being drawn anywhere."[8] This Article identifies where the line between criminal indictment and civil complaint was drawn while I headed the Justice Department's Antitrust Division and explains why I think it should be drawn there.[9]

We all know what a plain, old-fashioned criminal case looks like. When competitors meet in a smoke-filled hotel room and agree on prices for future sales, they run foursquare into the Sherman Act's clear criminal prohibition of horizontal price fixing.[10] There is nothing new about either price fixing or its per se status. Adam Smith observed in 1776 that most meetings of businessmen end up by their reaching agreement on prices.[11] The

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[6] The Antitrust Division normally files a companion civil case with any indictment against conduct which has not clearly terminated. Such civil cases seldom have great practical importance because they lead only to an injunction restating the per se rule in the context of the particular industry. What the Antitrust Division does not do is file a civil case, without obtaining a criminal indictment, against hard-core conduct (such as price fixing) where the Government's evidence is weak. In other words, the Division has no intermediate category for cases where it can prove its case by a "preponderance of the evidence," but not "beyond a reasonable doubt." If it does not think it can meet the "proof beyond a reasonable doubt" standard for hard-core conduct, the Justice Department simply does not bring the case.

[7] "Where are you going to draw the line?—as if all life were not the marking of grades between black and white." I HOLMES-LASKI LETTERS 331 (M. Howe ed. 1953).

[8] Pearce v. Commissioner, 315 U.S. 543, 558 (1942) (dissenting opinion, Frankfurter, J.). Justice Holmes himself made essentially the same point many years earlier:

> I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis.

Haddock v. Haddock, 201 U.S. 562, 631-32 (1906) (dissenting opinion).

[9] My standards for drawing the line appear to be substantially the same as those of my predecessor, Thomas E. Kauper, and those of my successor, John H. Shenefield. Accordingly, I believe this Article describes the modern practice in the Antitrust Division generally, rather than just what occurred during my relatively brief tenure.

[10] "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*." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). This message has been repeatedly re-emphasized. *See, e.g.*, Citizen Publishing Co. v. United States, 394 U.S. 131, 135 (1969); United States v. Masonite Corp., 316 U.S. 265, 276 (1942).

[11] *See* A. SMITH, WEALTH OF NATIONS 59 (4th ed. 1850).

Sherman Act was passed 114 years later to deal with price fixing and other offenses. Thirty-seven years after its enactment, the famous *Trenton Potteries* case[12] resolved any doubt as to the per se illegality of price fixing.

We also know what a typical Sherman Act section 1 civil case looks like: a case against restrictive membership rules,[13] a merger case,[14] a case against a patent pool or patent misuse,[15] a tie-in case,[16] a territorial case,[17] or a case against information exchanges that restrict competition.[18] Such cases may involve a full factual inquiry under the rule of reason,[19] or may be subject to one of the "soft core" per se rules (such as the tie-in prohibition or the non-coercive boycott rule).[20] What differentiates civil cases from crimi-

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[12] United States v. Trenton Potteries Co., 273 U.S. 392 (1927). The Supreme Court's decision in Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), created some confusion concerning the continued vitality of *Trenton Potteries*. The distressed conditions of the Great Depression, however, obviously influenced the result in *Appalachian Coals*. Seven years later, in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the Court fully reestablished the *Trenton Potteries* rule.

[13] *See, e.g.*, Associated Press v. United States, 326 U.S. 1 (1945).

[14] *See, e.g.*, United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

[15] *See, e.g.*, United States v. Line Material Co., 333 U.S. 287 (1948); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944).

[16] *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).

[17] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); White Motor Co. v. United States, 372 U.S. 253 (1963).

[18] *See, e.g.*, United States v. Container Corp. of America, 393 U.S. 333 (1969).

[19] The true test of legality is 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. To determine that question 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.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). *See also* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977).

[20] Under the traditional Sherman Act learning, two categories of cases exist: (1) those involving per se prohibitions, applied without regard to surrounding facts; and (2) those involving "rule of reason" inquiries which require a complete examination of all relevant surrounding facts. The Supreme Court has greatly expanded the number of situations to which the per se label applies. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). This has created a practical problem for the courts, as per se rules have been extended to conduct which at least *sometimes* enhances competition.

As a result, I suggest, the courts have in fact recoguized three working categories. The first I call "hard core" per se cases—involving straight price fixing and market allocations. Here the per se concept applies strictly, creating a bright-line prohibition against the activity without regard to surrounding circumstances. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The second category includes what I call "soft core" per se cases. Here the court takes a general look at the conduct nominally subject to a per se prohibition *and* its surrounding circumstances. If it finds the scheme anti-competitive, it

nal cases is that in civil cases the challenged conduct generally has less serious competitive impact, does not involve outright predation, and sometimes is subject to more flexible legal standards.

Of course the two statutes overlap. Some conduct is close enough to the hard-core area that one prosecutor might responsibly prosecute it as criminal, while another would seek only a civil remedy. Similarly, there are long unchallenged categories of conduct that, although properly regarded as "criminal," may warrant only a civil suit initially because of the need to provide fair notice to those affected. How the Department of Justice proceeds in this middle area—the area of overlap between the civil and criminal statutes—is important to the public and challenging to the decisionmakers.

Decisions of the Antitrust Division regarding the proper form of proceeding have been criticized as arbitrary. But in my experience they are not, except in the sense that many honest judgment calls are inevitably so when the question posed is very close.[21] At

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pronounces the conduct illegal per se. *See, e.g.*, Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (1969). Courts tend to apply "soft core" per se rules to various vertical arrangements and noncoercive boycotts, and to various aspects of joint ventures. Where the court finds the challenged arrangement to be pro-competitive or potentially procompetitive, it will tend to define the conduct out of the per se category so as to subject it to a "rule of reason" inquiry. *See, e.g.*, Worthern Bank & Trust Co. v. National Bank-Americard Inc., 485 F.2d 119 (8th Cir. 1973) (reversing district court holding that joint venture membership restriction constituted "boycott" and hence per se illegal). The third general category comprises traditional "rule of reason" cases, in which all facts are relevant. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

The Supreme Court seems to have rejected any attempt to create an explicit middle category. In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the government argued for a rule of "presumptive illegality" for certain types of vertical territorial restrictions, comparable to existing categorizations in the merger area. Brief for the United States at 41, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). The Court rejected this argument because it had not been argued below (388 U.S. at 374 n.5) and imposed a per se prohibition on territorial restrictions in sale-resale arrangements. Ten years later the Court reversed its position on the per se illegality of territorial restraints. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). *See generally* Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?*, 44 ANTITRUST L.J. 537, 543-49 (1975).

[21] In each case, the decision to bring an indictment on a civil case is based on an elaborate memorandum (normally running several hundred pages) prepared by the trial staff in conjunction with their section chief and recommending a particular course of conduct. The memorandum and recommendation are reviewed by the Office of Operation (*see* note 39 *infra*). That office prepares its own recommendation (normally in a memorandum of 10-20 pages) and makes appropriate provisions in the draft proceedings. This material is then reviewed in detail by the Chief Deputy Assistant Attorney General who in turn makes a recommendation to the Assistant Attorney General. Thus the decision to bring a criminal or civil case is based on an extensive analysis of the issues and the facts by both junior and senior officials in the Antitrust Division.

any rate, the area of overlap is small: most criminal antitrust cases involve hard-core price fixing and market allocations in which the defendants have clear notice and the Department has no responsible choice except to proceed by criminal indictment (or information in a misdemeanor case).[22] Those are the cases that Congress surely had in mind when it provided for expanded fines and jail sanctions for Sherman Act violations.

Several key points that emerged during the last twenty years accentuate the dual nature of the Sherman Act. First, the generality of the "civil" Sherman Act today raises serious questions concerning its constitutionality as a criminal statute.[23] Second, the Department of Justice has in recent years enforced the "criminal" Sherman Act so as to give defendants due notice of what it regards as within the Act's criminal prohibitions. And third, a criminal case against a clear civil violation (such as a noncoercive tie-in) would, in my opinion, be subject to criticism as an abuse of prosecutorial discretion.[24] All these facts point to the same conclusion: through the exercise of prosecutorial discretion and implicit judicial recognition of two different sets of rules, the single statute passed by Congress in 1890 has come to function as two statutes. Congress recently emphasized the Sherman Act's dual role by making "criminal" violations felonies and thereby introducing realistic deterrents to hard-core business restraints.[25]

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[22] The new felony standards (*see* note 4 *supra*) came into effect on December 21, 1974. The Antitrust Division's practice is to indict for felony any individual or corporation involved significantly in a conspiracy after that date. If the particular defendant's conspiratorial activities occurred entirely in the pre-December 21, 1974 period, the Antitrust Division will return a misdemeanor indictment or information. It is therefore plausible that a given investigation of multiple parties will result in both felony and misdemeanor prosecutions.

[23] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Palmer v. City of Euclid, 402 U.S. 544 (1971). In 1913, the Supreme Court upheld the constitutionality of the Sherman Act's misdemeanor provisions in the face of a "void for vagueness" challenge. Nash v. United States, 229 U.S. 373, 376-78 (1913). The same challenge has recently been renewed in the context of the offense being upgraded to a felony; again the vagueness argument was rejected. United States v. Jack Foley Realty, Inc., [1977-2] TRADE CAS. (CCH) ¶ 61,678 (D. Md. July 29, 1977). Both *Nash* and *Jack Foley* dealt with price-fixing situations where the Sherman Act prohibition is not realistically vulnerable to vagueness challenges.

[24] Public confidence is vital to the law enforcement process. Where prosecutorial decisions appear random and erratic, the public is more likely to regard prosecution as a game rather than a serious undertaking. Even if an Assistant Attorney General could obtain a felony indictment against a noncoercive tie-in, and this exercise of discretion could not be overturned as a matter of law, such a decision would surely deserve public criticism as a flagrant abuse of the responsibility entrusted to the Department of Justice.

[25] The prior $50,000 fine was increased to $1 million for corporations and $100,000 for other persons. The maximum jail sentence was increased from one year to three years.

I

PATTERNS OF PROSECUTORIAL PRACTICE

Over the years, the Sherman Act has been viewed alternatively as primarily a civil or criminal statute. This checkered history accounts in large part for the current prosecutorial practice of using section 1 in both criminal and civil actions.

Originally, the Department of Justice viewed the statute as essentially civil, and, except in a handful of labor cases involving violence, used section 1 to obtain equitable relief.[26] Thus, from 1890 to 1903 the Justice Department instituted sixteen civil cases and only seven criminal cases under section 1.[27]

Fifty years after its enactment, the Sherman Act assumed a new role. Under Thurman Arnold's leadership, the Antitrust Division used section 1 primarily to pursue criminal prosecutions. This shift in focus reflected Arnold's philosophy:

> As a deterrent, criminal prosecution is the only effective instrument under existing statutes. . . . [I]f there were teeth in the civil remedy, it might be a deterrent. But for this purpose the civil injunction is little more than a form of unemployment relief for lawyers since it carries no penalties.
>
> The civil suit has a useful place as a supplement to the criminal proceeding—not as a substitute.[28]

Thus, between 1938 and 1943 the Antitrust Division, under Arnold, brought approximately 340 section 1 cases, 231 of which were criminal prosecutions.[29] Although some of these cases involved simple, old-fashioned price-fixing conspiracies, others raised novel issues concerning industries generally thought exempt from the antitrust laws. *United States v. South-Eastern Underwriters Association*,[30] for example, was originally brought as a criminal case, despite considerable question as to whether the insurance transactions chal-

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Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (1974) (amending 15 U.S.C. § 1 (1970)).

[26] *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 596-97 (1955). *See generally* Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 YALE L.J. 464 (1959).

[27] Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 385 (1970).

[28] Arnold, *Antitrust Law Enforcement, Past and Future*, 7 LAW & CONTEMP. PROB. 5, 16 (1940).

[29] These figures were compiled from CCH, THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES 1890-1951, at 179-307 (1952). *See generally* Posner, *supra* note 27, at 385.

[30] 322 U.S. 533 (1944).

lenged were in interstate commerce or even subject to the antitrust laws.[31]

Thurman Arnold clearly went beyond present standards of due process. His actions invited criticism that businesses were branded as criminals on the basis of uncertain conduct and unpredictable rules. The Attorney General's National Committee to Study the Antitrust Laws addressed this very point in 1955, emphasizing the complexity of the modern economy:

> 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.[32]

Arnold's standard goes too far in one direction, but this statement goes too far in the other. Criminal prosecution should not be limited to "a flagrant offense" or require "plain intent."

In 1955, the Antitrust Division drew the line somewhere between the two views expressed above:

> 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 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 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.[33]

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[31] *Cf.* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1869) (issuing insurance policy not transaction in interstate commerce).

[32] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955).

[33] *Id.* at 350 (statement of Stanley N. Barnes, Ass't Att'y Gen. in Charge of Antitrust Div.).

Far less than a complete and detailed explanation, this statement provided little guidance in close cases. Fortunately, the criminal enforcement versus civil enforcement issue was of limited practical importance during the 1950's and 1960's when the Antitrust Division's criminal enforcement program was less extensive than it is now. The Antitrust Division, however, continued to ponder the dual nature of the Sherman Act and in 1967 once again summarized its position:

> The solution of the Antitrust Division to this problem of potential unfairness has been to lay down the firm rule that criminal prosecutions will be recommended to the Attorney General only against willful violations of the law, and that one of 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. The most common criminal violation of the antitrust laws is price fixing; upwards of 80 percent of the criminal cases filed charge conspiracies to fix prices. The Supreme Court held more than 30 years ago that price fixing was a *per se* violation of the law—one for which no justification or defense could be offered. . . . Second, if the acts of the defendants show intentional violations—if 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.[34]

I find that statement still fair and useful today.

II

WHERE WE STAND TODAY

The criminal-versus-civil issue has increased in importance in the last few years. The Antitrust Division now devotes a larger share of its resources to criminal enforcement than it has at any time since Thurman Arnold's administration.[35] It applies a more

[34] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 110 (1967) (footnote omitted).

[35] On May 5, 1977, while still Assistant Attorney General, I reported to Congress:

> [T]he Division has over 100 grand jury investigations in progress. This is an affirmative choice, designed to make maximum use of the increased deterrent impact of the Sherman Act felony sanctions enacted by Congress in December 1974. Consequently, there has been a 30 percent increase in the number of pending

liberal policy for initiating grand juries than it did a decade ago,[36] and now has well over one hundred grand jury investigations pending.

The decision to open a grand jury is not a determination that all cases recommended for prosecution by the grand jury will be treated as criminal cases. The Division initiates a grand jury investigation when there is *some* reason to believe that a criminal violation *may* have taken place. Such a standard inevitably results in authorization of grand jury investigations which in fact lead to civil suits rather than criminal prosecutions. The ultimate decision to proceed criminally, civilly, or not at all must await the conclusion of each investigation. The broad powers of civil discovery granted the Antitrust Division under the Antitrust Improvements Act of 1976,[37] remove any need or temptation to convene grand juries to promote civil investigations.[38] The decision to authorize a grand jury investigation is made primarily by the Office of Operations,[39] based upon what it already knows and what it expects to discover about a given case.

> antitrust grand juries over the pre-felony period. In fiscal year 1976, almost 2,000 attorney-days were spent in grand jury investigations.

Oversight of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 340 (1977) (statement of Donald I. Baker, Ass't Att'y Gen. in Charge of Antitrust Div.) [hereinafter cited as *Oversight Hearings*].

[36] The standard today is whether a potential investigation *might* result in a criminal indictment; if so, the grand jury investigation is usually used and the final decision whether to bring a criminal or civil case is left until the completion of the investigation. In the 1960's, the standard was whether the investigation *probably would* produce a criminal indictment.

[37] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 95-435, §§ 101-106, 90 Stat. 1383 (1976) (codified at 15 U.S.C.A. §§ 1311-1314 (West Supp. 1977)).

[38] *Cf.* United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) (grand jury not "short cut to goals otherwise barred or more difficult to reach").

[39] > *The Office of Operations* . . . is the focal point of review of all the Division's investigations and litigation. It consists of two senior people—the Director of Operations and his Deputy—supported by three assistants and a small support staff. This office supervises the assignment, opening and closing of investigations. It conducts [the Antitrust Division's] liaison activities with the FTC under the clearance procedure. It reviews every proposel [*sic*] civil and criminal case recommended by any section . . . . Operations is the key reviewer of immunity orders and CID's, both of which must be ultimately signed by the AAG [Assistant Attorney General].

Oversight Hearings, *supra* note 35, at 336. The Director of Operations is traditionally the highest career official in the Division and he directly supervises the operations of the five main litigating sections in Washington, the eight field offices spread around the country, and the various smaller litigation units.

The Assistant Attorney General must ultimately decide whether to bring a criminal prosecution. He bases that choice in part upon articulated principles, in part upon intuition gained from experience, and ultimately upon the facts of the particular case.

Let me tell you how I made that decision during my tenure as Assistant Attorney General. I believe, as Thurman Arnold believed, that criminal sanctions provide the best mechanism for dealing with price fixing, market allocation, and clearly predatory conduct. Criminal sanctions, particularly substantial individual jail sentences, best deter antitrust crimes.[40] Accordingly, I opted for criminal prosecutions in price-fixing and market-allocation cases, absent any of four special mitigating factors: (1) confusion of the law; (2) truly novel issues of law or fact; (3) confusion caused by past prosecutorial decisions; or (4) clear evidence that the defendants did not appreciate the consequences of their actions.

A. *Confusion of the Law*

In various areas of the economy, there is collusive conduct that would be clearly illegal—and indeed criminal—but for the presence of government regulation or some other arguable antitrust exemption. Where some form of regulatory umbrella exists, I generally believe we should test the scope of any exemption it may provide by civil rather than criminal enforcement. Such an approach is both fairer to the defendant and more conducive to reasoned analysis by the courts. In other words, I would not do what Thurman Arnold did in *South-Eastern Underwriters*—test a long-assumed Sherman Act exemption by bringing a criminal case.

The Antitrust Division has followed such a policy in recent years in "regulatory" and "state action" cases. For example, the New York Stock Exchange fixed commission system was an ancient and classic form of cartel rate making. When the Antitrust Division first focused on this practice in 1968, fixed rates had been in effect for more than 170 years, at least thirty of them under the benevolent eye of the Securities and Exchange Commission. We believed that the practice was illegal under the antitrust laws because it did not satisfy the standard for exemption announced in *Silver v. New York Stock Exchange*.[41] The Antitrust Division chose to proceed against

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[40] *See* Baker, To Make the Penalty Fit the Crime: How To Sentence Antitrust Felons (Nov. 20, 1976) (remarks before the Tenth New England Antitrust Conference, Boston, Mass.), *reprinted in* [1976] ANTITRUST & TRADE REG. REP. No. 790, at D-1 (Nov. 23, 1976).

[41] 373 U.S. 341 (1963).

the fixed rates by triggering SEC hearings[42] and by intervening in a private treble-damage case which was about to go to trial under a favorable Court of Appeals mandate.[43] We did not consider—and I would not consider—a criminal prosecution in that situation.

Of course, once the scope of the exemption is defined, a criminal case would be appropriate. Today brokerage rate fixing is clearly illegal under the Securities and Exchange Act Amendments of 1975;[44] it is therefore per se illegal under the antitrust laws. It would now be appropriate to proceed by grand jury investigation and to bring indictments against anybody engaged in such rate fixing.

B. *Truly Novel Issues of Law and Fact*

Criminal proceedings seem less appropriate where the Department's theory of antitrust liability is entirely new. Criminal indictments, particularly felony indictments, in such cases raise important issues of fairness which in turn may affect the likelihood of obtaining a conviction. The recently filed amendments to the *General Electric* and *Westinghouse* consent decrees[45] illustrate the considerations raised by cases posing new issues. The government alleged that GE and Westinghouse engaged in indirect price communication and signaling.[46] Information was communicated in public which established a body of data sufficient to enable each firm to identify the price that the other firm would quote on any given turbine generator. At the same time, the companies adopted policy

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[42] See Comments of the United States Department of Justice (Apr. 1, 1968), *reprinted in* 1 J. GROSSMAN & S. GLENDON, SECURITIES MARKET REGULATION: A CHRONOLOGY OF EVENTS AND SELECTED DOCUMENTS 105 (1975), which led to the Commission's opening of *In re* Commission Rate Structure of Registered Nat'l Sec. Exch., SEC File No. 44-144 (1968). The Department's position was amplified and its evidence summarized in the Memorandum of the United States Dep't of Justice on the Fixed Minimum Commission Rates Structure (Jan. 17, 1969), *reprinted in* J. GROSSMAN & S. GLENDON, *supra* at 222.

[43] Thill Sec. Corp. v. New York Stock Exch., 433 F.2d 264 (7th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

[44] Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 6(e)(1), 89 Stat. 97 (codified at 15 U.S.C. § 78(e) (Supp. V 1975)).

[45] United States v. General Elec. Co., [1977-2] TRADE CAS. (CCH) ¶ 61,660 (E.D. Pa. Sept. 19, 1977), *modifying* [1962] TRADE CAS. (CCH) ¶ 70,488 (E.D. Pa.); United States v. Westinghouse Elec. Corp., [1977-2] TRADE CAS. (CCH) ¶ 61,661 (E.D. Pa. Sept. 19, 1977), *modifying* [1962] TRADE CAS. (CCH) ¶ 70,503 (E.D. Pa.).

[46] Plaintiff's Memorandum in Support of a Proposed Modification of the Final Judgment Entered on October 1, 1962 Against Each Defendant, United States v. General Elec. Co., [1977-2] TRADE CAS. (CCH) ¶ 61,660 (Sept. 19, 1977); United States v. Westinghouse Elec. Corp., [1977-2] TRADE CAS. (CCH) ¶ 61,661 (Sept. 19, 1977), *reprinted in* 42 Fed. Reg. 17,004, 17,006-07 (1977).

positions that had the effect, and allegedly the purpose, of assuring each seller that the other would adhere to the formula price. The government viewed this as a case of "avoidable cooperation,"[47] rather than simply unavoidable "conscious parallelism."[48]

Given the unusual nature of that case, I did not and would not choose to proceed criminally. As far as I know, criminal prosecution was never considered in the course of this investigation—either during my tenure or during that of my predecessor. That the conduct involved might be labeled "price fixing" is not determinative of the mode of proceeding where the case involves novel conduct. In fact, the best remedy I saw for this particular phenomenon was an injunctive order preventing the firms from continuing their pattern of price signaling and response. The relief, originally included in a draft civil complaint, was ultimately implemented as a modification of outstanding consent decrees for reasons explained in the government's memorandum.[49]

C. *Confusion Caused by Prior Prosecutorial Action*

The third situation in which a civil action may provide the appropriate enforcement procedure for what might be regarded as criminal conduct occurs when a proposed case represents a departure from past practices of the Department of Justice. For example, I would not feel bound by a prior Business Review letter[50]—especially an old one—when the letter was based on what now would be regarded as incorrect analysis or policy. Yet such a changed position should not be unveiled in a criminal indictment. Rather a civil suit should be brought to "fire a shot across their bow." Having made its new position clear, the Department could proceed criminally in the future.

Years of prosecutorial acquiescence in longstanding open conduct may create a similar situation. For example, the Antitrust Division long tolerated "recommended" fee schedules by bar associations, although such schedules had the clear purpose and necessary effect of stabilizing prices for legal services. When the Division decided to prosecute such schedules as illegal, it initiated a

[47] *Id.* at 17,006-09.

[48] *Id.* at 17,007.

[49] *Id.* at 17,009.

[50] The Antitrust Division's Business Review Procedure is set forth in 28 C.F.R. § 50.6 (1976). Generally, it provides that an applicant can obtain a statement of the government's "present endorsement intention" with respect to a particular live transaction fully disclosed to the government. Normally, the request for such a ruling, the ruling itself, and the supporting documentation are made public. *See id.*

civil suit against the Oregon State Bar.[51] This suit was followed by the Supreme Court's decision holding such fee schedules illegal under the antitrust laws.[52] Having once given the professions full and adequate warning, the Justice Department may now take a more aggressive posture. In the future, it would be appropriate to proceed criminally against this type of scheme.

D. *Clear Evidence the Defendants Did Not Appreciate the Consequences of Their Actions*

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. An illustrative case arose a few years ago when a group of local gasoline dealers in a western state made public announcements calling for meetings to stabilize prices and eliminate price wars. I would normally regard such conduct as entirely indictable.[53] Yet the naive innocence of the exceptionally unsophisticated may deserve some weight in prosecutorial judgment. Although a showing of specific intent is not required to establish a price-fixing violation,[54] prosecutors recog-

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[51] United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974).

[52] Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[53] *See, e.g.*, United States v. Wholesale Tobacco Distribs., Inc., No. 77 Cr. 131 (S.D.N.Y., filed Feb. 17, 1977) (allegedly illegal conduct took place at publicly announced association meetings). I reject the suggestion that the Antitrust Division should proceed civilly in price-fixing conspiracies of limited economic impact, such as those involving a small industry or local market. Resources are limited, and the Department of Justice cannot discover, investigate, and prosecute every small, local price fixer. But once the decision to proceed against a local price-fixing conspiracy has been made, the same standards should apply as would be applicable to a larger conspiracy. I firmly believe that price fixing by a local service firm is as much a criminal violation as price fixing by a national manufacturer. *See* Baker, Antitrust Enforcement in the Service Sector (Sept. 15, 1976) (remarks to Wash. State Bar Ass'n, Antitrust Section) (on file at the *Cornell Law Review*). The service sector today accounts for one-third of the United States' GNP. The Antitrust Division is currently putting more resources into antitrust enforcement in the service sector to match changes in the economy, and criminal indictments should be used against price fixing and other hard-core restraints by local service firms. *See, e.g.*, United States v. Jack Foley Realty, Inc., [1977-2] TRADE CAS. (CCH) ¶ 61,678 (D. Md. July 29, 1977) (indictment of Montgomery County, Md. real estate brokers).

[54] Normally it is stated that "[u]nder 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*." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1943) (emphasis added). However, in fact, "[p]urpose and effect are disjunctively linked in antitrust analysis, both under the rule of reason and in the application of the *per se* doctrine. If the purpose or (assuming a very different and in-

nize that a judge or jury might be disinclined to convict under such circumstances. The violator's naiveté is, however, a much less compelling consideration than the other three I have mentioned.

Conclusion

The Antitrust Division's increased use of grand jury investigations makes its choice of whether to proceed against violators with civil or criminal actions a matter of growing practical importance to the business community and the bar. Close cases will remain close and they will not go away. It necessarily follows that with *very close* cases decisions could go either way. Articulation and consistent application of principles for deciding the form of proceeding give parties some notice of the standards to which their conduct will be held. Ultimately, however, these hard choices require judgment calls by the Assistant Attorney General. All we can ask is that in making such calls he be fair, candid, and dispassionate. Only then can he hope to maintain public confidence in the integrity of the antitrust enforcement process.

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nocent purpose) if the predictable effect of conduct is to fix prices (or achieve anything else held *per se* unlawful) the conduct runs afoul of the *per se* rule. Similarly, if either the purpose or effect of a practice evaluated under the rule of reason is sufficiently adverse to competition to outweigh any benefits, the conduct is deemed unreasonable." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 71, at 194 (1977).