Catholic University Law Review

Volume 29
Issue 2 *Winter 1980*

Article 5

1980

The Sherman Act and the Vicious Will: Developing Standards for Criminal Intent in Sherman Act Prosecutions

George E. Garvey

THE SHERMAN ACT AND THE VICIOUS WILL: DEVELOPING STANDARDS FOR CRIMINAL INTENT IN SHERMAN ACT PROSECUTIONS

[A]s a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will. *

*George E. Garvey***

I. INTRODUCTION

The Sherman Act,[1] which addresses the problems of economic power and its abuses,[2] is unique in several significant respects. First, the Act's proscriptions are unusually vague.[3] Congress specifically intended that the

---

* 4 W. BLACKSTONE'S COMMENTARIES 21 (referring to the mental element of a crime as a "vicious will").

** Assistant Professor, The Catholic University of America School of Law. B.A., University of Illinois at Chicago Circle, 1969; J.D., University of Wisconsin, 1972.

1. 15 U.S.C. §§ 1-7 (1976). The Sherman Act's criminal provisions provide, in pertinent part:

> Every person who shall make any contract or engage in any combination or conspiracy . . . [in restraint of trade or commerce] shall be deemed guilty of a felony. . . .

Id. § 1.

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a felony. . . .

Id. § 2.

2. For discussions of the conflicting goals of antitrust, see R. BORK, THE ANTITRUST PARADOX (1978); W. SHEPHERD, THE TREATMENT OF MARKET POWER (1975); Joffe, *Beyond Antitrust*, 28 CATH. U.L. REV. 1 (1978); *Symposium on Antitrust Law and Economics*, 127 U. PA. L. REV. 918 (1979); *Symposium — The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965).

3. Although the Supreme Court has determined that the Sherman Act is not unconstitutionally vague, *see* Nash v. United States, 229 U.S. 373, 376-78 (1913), its language does not proscribe specific conduct. Unlike traditional criminal statutes, the Sherman Act de-

substance of the Act be developed over time by the judiciary.[4] Second, the Act sets forth a multi-pronged enforcement procedure. Violations may give rise to criminal prosecutions,[5] to private civil actions for treble damages,[6] to private[7] and governmental actions in equity,[8] or to governmental damage suits.[9]

Pursuant to its legislative mandate, the courts have developed a "common law" of antitrust by constantly defining and refining the substance of the Sherman Act.[10] The substantive "refinement" producing the most dramatic reaction was the Supreme Court's pronouncement in *Standard Oil Co. v. United States*[11] that only unreasonable restraints of trade violate section 1 of the Act. The vagaries of this "rule of reason" have been partially resolved through judicial creation of the *per se* rule.[12] But these two rules have been in constant tension and the Supreme Court has never successfully articulated the scope of either rule nor defined their relationship to each other.[13] Antitrust courts have experienced similar difficulties attempting to establish a rational standard or standards to distinguish between legal "monopoly" and illegal "monopolization."[14]

---

scribes only the general harm to be prevented. *See generally* Kadish, *Some Observations On the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 427-28 (1963). The concept of criminal combination in restraint of trade was not well defined when the Sherman Act was passed. *See generally* H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 50-53 (1955).

4. *See* notes 181-82 and accompanying text *infra*.

5. The Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974) (amending 15 U.S.C. §§ 1-3 (1970)), elevated criminal liability for Sherman Act violations to felonies and increased the maximum prison sentence to three years. The Act also increased fines to a maximum of $1 million for corporations and $100,000 for individuals.

6. Clayton Act § 4, 15 U.S.C. § 15 (1976).

7. Clayton Act § 16, 15 U.S.C. § 26 (1976).

8. Clayton Act § 15, 15 U.S.C. § 25 (1976).

9. Clayton Act § 4A, 15 U.S.C. § 15a (1976).

10. The source of the "common law" of antitrust, however, has been statutory. There are no strictly common law crimes in the federal courts. *See* W. LA FAVE & A. SCOTT, CRIMINAL LAW 60-61 (1972).

11. 221 U.S. 1 (1911). For the classical formulation of the "rule of reason," see Justice Brandeis' opinion in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238-39 (1918).

12. *See, e.g.*, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 182-86 (1977).

13. *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975); White Motor Co. v. United States, 372 U.S. 253 (1963).

14. *Compare* Standard Oil Co. v. United States, 221 U.S. 1 (1911) *and* United States v. United States Steel Corp., 251 U.S. 417 (1920) *with* United States v. Griffith, 334 U.S. 100 (1948) *and* United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). Uniform standards are also difficult to establish because of the changing depth of judicial populism and diverse economic views. For a current discussion of the competing schools of

Despite active judicial development of substantive antitrust law, the courts have historically failed to distinguish between those activities that may result in civil liability and those that may lead to criminal conviction.[15] Until recently, a violation of the Sherman Act warranting the issuance of an injunction or an award of civil damages was, without more, a criminal violation.[16]

In *United States v. United States Gypsum Co.*,[17] however, the Supreme Court acknowledged that, even in the context of the Sherman Act, the appeal of a criminal conviction involves different considerations than an appeal of a civil judgment. The Court implicitly recognized that the substance of criminal antitrust violations must be developed under the principles of criminal law rather than civil antitrust precedent alone.[18] The Court held, therefore, that intent is an essential element of a criminal violation of the Sherman Act.[19]

The *Gypsum* decision, in a manner characteristic of the Burger Court's approach to antitrust,[20] is explicitly narrow. It addressed the specific facts before the Court with frequent disclaimers about legal implications beyond those facts.[21] The principles articulated in *Gypsum*, however, should impact on related, though factually different cases.

Since the Supreme Court decided *Gypsum*, several courts of appeals

---

antitrust economics, see Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 944 (1979).

15. Prior to United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Supreme Court found the Sherman Act to have the "same substantive reach in criminal and civil cases." *Id.* at 474 (Stevens, J., concurring in part and dissenting in part). This unitary treatment probably resulted more from inattention than deliberation. *See generally* 13 J. VON KALINOSKI, ANTITRUST LAWS AND TRADE REGULATION §§ 95A.01 to .02 (1979). *Compare* United States v. Griffith, 334 U.S. 100 (1948) (civil) *with* United States v. Patten, 226 U.S. 525 (1912) (criminal).

16. Even after the 1974 amendments making criminal violations felonies, the courts rejected arguments that the government must prove "specific intent." *See* United States v. Champion Int'l Corp., 557 F.2d 1270, 1274 (9th Cir. 1977); United States v. Noll Mfg. Co., 1977-2 Trad. Cas. ¶ 61,712 (N.D. Cal.). *But see* United States v. Nu-Phonics, Inc., 433 F. Supp. 1006, 1015 (E.D. Mich. 1977) (Sherman Act law of *mens rea* and overt acts should be reconsidered because of new felony provisions).

17. 438 U.S. 422 (1978).

18. *See id.* at 436-40.

19. *Id.* at 435. In a separate opinion, Justice Stevens argued that the unitary treatment of civil and criminal violations was so well established that it could only be changed by congressional amendment. *Id.* at 474 (Stevens, J., concurring in part and dissenting in part). Without the constraint of precedent, however, Justice Stevens would have adopted the more demanding specific purpose standard. *Id.* at 474-75.

20. *See* Posner, *The Antitrust Decisions of the Burger Court*, 47 A.B.A. ANTITRUST L.J. 819, 822 (1978).

21. *See, e.g.*, 438 U.S. at 436 n.13, 444 n.21.

have had an opportunity to apply its principles.[22] Their decisions raise significant issues about the standard adopted by the *Gypsum* Court. The claims of the various defendants and the judicial reactions to those claims have questioned the applicability of the single degree of culpability accepted by the Court in *Gypsum* — knowledge — without regard to the nature of the offense. In particular, defendants convicted under the new felony provisions have contended that a higher standard of culpability should be required because of the increased penalties.[23] Most significantly, however, subsequent decisions appear to be carving out an exception to the *Gypsum* rule that intent is an essential element of a criminal Sherman Act conviction when *per se* violations are involved. Such an exception is inconsistent with *Gypsum* as well as with the criminal jurisprudential traditions that *Gypsum* reaffirmed.

This article will evaluate the intent issue in several steps. First, *Gypsum* and its progeny will be examined to place the issue in context. Next, the article will consider the status of and reasons for a requisite mental element for criminal condemnation. Emphasis will be placed on the common law development of strict criminal liability. The focus will then shift to the evolution of strict liability in the Supreme Court. Against this background, the Sherman Act's criminal provisions will be analyzed to see if they may be appropriately considered strict liability offenses under common law or federal judicial precedent. Finally, the factors used by the appellate courts to distinguish their cases from *Gypsum* will be reviewed to determine whether they justify a different result.

II. *GYPSUM* AND ITS PROGENY

A. United States v. United States Gypsum Co.

Gypsum was the first case in which the Supreme Court found that the substance of a Sherman Act offense depends on the nature of the proceeding as well as the defendant's activities.[24] Because of the seminal nature of

22. *See* United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3310 (U.S. Oct. 26, 1979) (No. 79-679); United States v. Gillen, 599 F.2d 541 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3192 (Oct. 2, 1979); United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3776 (U.S. May 18, 1979) (No. 78-1737); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3191 (Oct. 2, 1979).

23. *See* note 5 *supra*.

24. In addition to the intent issue, the *Gypsum* decision addressed both the propriety of *ex parte* communications between a court and jurors and the relationship between the Robinson-Patman Act and the Sherman Act. *See generally* Handler, *Antitrust — 1978*, 78 COLUM L. REV. 1363, 1395-1411 (1978); *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 288 (1978). Professor Handler believes that *Gypsum* was a departure from United States v. Patten, 226 U.S. 525 (1912). Handler, *supra*, at 1399.

the opinion, its reasoning must be analyzed carefully to appreciate its implications.

The defendants were manufacturers of gypsum board, a product used in the construction of interior walls and ceilings. After a lengthy grand jury investigation, the defendants were indicted for allegedly conspiring to fix prices, terms and conditions of sales, and handling methods for gypsum board in violation of section 1 of the Sherman Act.[25] The government's case was based primarily upon evidence of widespread price verification between the defendants. The Supreme Court synopsized the prosecution as follows:

> The focus of the Government's price-fixing case at trial was interseller price verification — that is, the practice allegedly followed by the gypsum board manufacturers of telephoning a competing producer to determine the price currently being offered on gypsum board to a specific customer.[26]

In response, the defendants attempted to show that all price verification contacts "were for the purposes of complying with the Robinson-Patman Act and preventing customer fraud."[27] They argued that their motivation brought their behavior within a "controlling circumstances" exception to Sherman Act liability.[28] If the issue of liability was put to the jury, the defendants wanted the factual question about their purpose to be resolved. Nevertheless, the trial court's jury instructions, as interpreted by the Supreme Court, considered the defendants' purpose to be irrelevant if the effect of the pricing communications was to fix prices:

> [T]he law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the ex-

25. 438 U.S. at 427.

26. *Id.* at 429. *See generally* Senner, *Dissemination of Price Information*, 46 A.B.A. ANTITRUST L.J. 664 (1977).

27. 438 U.S. at 429.

28. The "controlling circumstances" exception to § 1 liability for exchanging price information comes from a statement made by Justice Douglas in United States v. Container Corp. of America, 393 U.S. 333 (1969). In *Container*, the Court found that the exchange of specific price information by competitors violates § 1. The defendants had claimed that their practices were lawful under Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925), but Justice Douglas explained that they were not protected by the "controlling circumstance" of preventing customer fraud. 393 U.S. at 335. *See generally* Kefauver, *The Legality of Dissemination of Market Data by Trade Associations: What Does Container Hold?*, 57 CORNELL L. REV. 77 (1972); Note, *Price Verification Under Robinson-Patman: The Creation of An Unnecessary "Controlling Circumstance,"* 58 B.U.L. REV. 127 (1978); Note, *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476 (1977); Note, *Antitrust Liability for An Exchange of Price Information — What Happened to Container Corporation?*, 63 VA. L. REV. 639 (1977).

> change of pricing information was to raise, fix, maintain and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.[29]

Upon this instruction, the jury found each defendant guilty.

The United States Court of Appeals for the Third Circuit reversed, holding that the purpose for price verification activities could create a "controlling circumstance" and provide an affirmative defense to a Sherman Act charge.[30] The court did not distinguish between civil and criminal antitrust litigation. It relied solely on civil precedent in ruling that a good faith attempt to avoid Robinson-Patman Act liability is a "controlling circumstance."[31]

Although the Supreme Court affirmed, its decision was not based on the purported conflict between the Robinson-Patman and Sherman Acts. The Court found instead that the criminal nature of the proceedings added an element to the offense that is not present in civil litigation:

> [W]e hold that defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inference drawn therefrom and cannot be taken from the trier of facts through reliance on a legal presumption of wrongful intent from proof of an effect on prices.[32]

Consistent with its growing interest in substantive criminal law,[33] the Court showed a marked aversion to strict criminal liability. Relying primarily on *Morissette v. United States*[34] and the Model Penal Code,[35] it determined that "intent generally remains an indispensible element of a criminal offense"[36] and that strict liability offenses enjoy a "generally dis-

---

29. 438 U.S. at 430 (quoting the district court's jury instructions).

30. United States v. United States Gypsum Co., 550 F.2d 115, 123 (3d Cir. 1977). For an analysis of the Third Circuit's opinion, see Kudon, *United States Gypsum: Price Verification: Controlling Circumstances or Controlling Prices*, 23 VILL. L. REV. 688 (1978).

31. 550 F.2d at 123-26. *See* note 27 *supra*.

32. 438 U.S. at 435. The strength of the Court's rejection of presumed intent in criminal cases was reaffirmed in Sandstrom v. Montana, 99 S. Ct. 2450 (1979). In *Sandstrom*, the defendant was convicted of "deliberate homicide." He argued at trial that he did not purposefully or knowingly kill the deceased, but the court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 2453. The Supreme Court reversed, holding that the instruction could have led the jury to believe there was either a legal presumption of intent or the evidentiary burden had shifted to the defendant to prove a lack of intent. The Court explained that the state must prove beyond a reasonable doubt the existence of every element of the offense. The Court stated that relieving the state of its obligation violates the constitutional rights of a defendant. *Id.* at 2458.

33. *See* Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978).

34. 342 U.S. 246 (1952).

35. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

36. 438 U.S. at 437.

favored status."[37]

Writing for the majority, Chief Justice Burger enumerated several reasons for the Court's refusal to apply strict liability to Sherman Act criminal offenses. First, in contrast with traditional criminal statutes, "[t]he Sherman Act . . . does not, in clear and categorical terms, precisely identify the conduct which it proscribes."[38] Although Congress intended the federal courts to give substance to the Act's prohibitions, judicial elaboration has provided only "open-ended and fact-specific standards like the 'rule of reason.'"[39] Moreover, the courts have traditionally interpreted the Act with a generality inappropriate for a criminal law.[40]

The Court was also persuaded by the announced policy of the Antitrust Division of the Department of Justice and of a special National Committee to Study the Antitrust Laws that criminal prosecution should be reserved for those who intentionally or willfully violate the law.[41] Finally, the Court feared the possibility of "overdeterrence." If businessmen are threatened with criminal conviction for seemingly legitimate conduct that is found, regardless of intent, to have an undesirable effect on competition, they may forego "salutary and procompetitive conduct."[42]

Having found intent an essential element of a criminal antitrust violation, the Court determined the nature of the requisite intent. Guided by the Model Penal Code's classifications for culpability[43] — purpose, knowledge, recklessness, and negligence — the Court determined that knowledge was sufficient for conviction: "[W]e conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal

37. *Id.* at 438.

38. *Id.*

39. *Id.*

40. The Court explained that "the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'" *Id.* at 439 (quoting Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933)).

41. 438 U.S. at 439-40. The Court reaffirmed the holding in Nash v. United States, 229 U.S. 373 (1913), that the Sherman Act's broad sweep alone does not render its criminal provisions unconstitutionally vague, but it implied that prosecutorial restraint by the Department of Justice may have forestalled renewed constitutional challenges. 438 U.S. at 439. The study referred to by the Court concluded 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*." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955), *quoted in* 438 U.S. at 439 (emphasis added).

42. 438 U.S. at 441. The Court also reasoned that strict criminal liability for antitrust violations would not "punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead . . . *regulate* business practices regardless of the intent with which they were undertaken." *Id.* at 442 (emphasis in original).

43. MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

liability under the antitrust laws."[44]

The scope of this holding was limited in three important respects. First, the Court followed the Model Penal Code and explained that the issue of culpability relates to each separate material element of the offense.[45] *Gypsum* determined that knowledge of anticompetitive effects is sufficient to convict for the "restraint of trade" element, but it did not decide what degree of culpability is necessary for finding agreement or conspiracy. It was concerned solely with "the more traditional intent to effectuate the objects of the conspiracy."[46]

Second, *Gypsum*'s "knowledge" criterion concerns only completed conduct. Knowledge is an adequate predicate for criminal conviction under section 1 only when anticompetitive effects are established. The Court suggested that a "purpose" to achieve the illegal result must be shown in order to convict when the proscribed result has not been realized.[47]

Finally, *Gypsum* does not eliminate the "controlling circumstances" defense. Fear of incurring Robinson-Patman liability, however, is not a "controlling circumstance" when the method used (price verification) will, to the defendant's knowledge, stabilize prices. Although stating it as a negative, the Court acknowledged the continued validity of the exception: "A defendant's purpose in engaging in the proscribed conduct will not insulate him from liability unless it is deemed of sufficient merit to justify a general exception to the Sherman Act's proscriptions."[48]

The holding of *Gypsum* concerning intent may be summarized as follows: intent is an essential element of a criminal Sherman Act violation and must be established by the government to obtain a conviction. If anticompetitive effects are shown, the intent element necessary to establish a restraint of trade is satisfied by proving that the defendants had knowledge of the probable anticompetitive consequences of the challenged conduct. Even if the requisite agreement, knowledge, and effect are established, a defendant may affirmatively defend by proving the existence of "controlling circumstances."

B. Recent Applications of Gypsum

Since *Gypsum*, three courts of appeals have addressed the intent issue in the context of criminal Sherman Act prosecutions. Two circuits have held or implied that the Court's opinion in *Gypsum* does not require proof of

44. 438 U.S. at 444.
45. MODEL PENAL CODE § 2.02(1)(4) (Proposed Official Draft 1962).
46. 438 U.S. at 443 n.20.
47. *Id.* at 444 n.21.
48. *Id.* at 448 n.23.

intent when the purported violation is *per se* illegal under established case law.

In *United States v. Foley*,[49] the United States Court of Appeals for the Fourth Circuit upheld the convictions of several Maryland real estate brokerage firms and their executives for conspiring to fix commission rates on sales of residential property. The jury had been instructed that "defendants must have known their agreement, if effectuated, would have an effect on prices; that they knowingly joined a conspiracy whose purpose was to fix prices; and that in joining they intended to further that purpose."[50] The defendants claimed they were entitled to an instruction requiring the jury to find that they had "specifically intended" to restrain trade. In their view, the necessary degree of culpability had to be greater than that adopted in *Gypsum* because they were charged under the new felony provisions.[51] The court held, however, that such specificity is not required on either statutory or constitutional grounds, even with the more serious penalties.[52]

In *United States v. Brighton Building & Maintenance Co.*,[53] the United States Court of Appeals for the Seventh Circuit reached a similar conclusion. The defendants were convicted of rigging bids for highway construction projects in Illinois. As in *Foley*, the defendants claimed it was error not to instruct the jury that a conviction could result only if the defendants specifically intended to restrain trade.[54] The court disagreed and found sufficient an instruction that required a knowing agreement to rig bids and intentional assistance in achieving that goal.[55]

The court bolstered its opinion by noting that bid rigging is a *per se* violation of the Sherman Act, while the price verifications in *Gypsum* were not. It did "not read *Gypsum* as indicating that once defendants are

49. 598 F.2d 1323 (4th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3776 (May 18, 1979) (No. 78-1737).

50. *Id.* at 1336.

51. *Id.* at 1335.

52. *Id.*

53. 598 F.2d 1101 (7th Cir. 1979), *cert. denied*, 480 U.S.L.W. 3191 (Oct. 2, 1979).

54. The defendants' arguments in *Brighton Building* illustrate the inherent difficulties in applying the concept of "specific intent." They contended that the jury must find that the defendants had a specific intent to unreasonably restrain trade and that the defendants knew their conduct violated the law. Lack of such knowledge, however, is similiar to the seldom recognized defense of mistake of law. The Seventh Circuit, therefore, held it sufficient to prove "that defendants knowingly agreed or formed a combination or conspiracy for the purpose of rigging the bids, and intentionally assisted in its furtherance." *Id.* at 1106.

In the context of *Brighton Building*, there were three possible variants of "specific intent": (1) the intent to commit an act that violates the law (bid rigging); (2) the intent to achieve the result proscribed by the statute (unreasonable restraint of trade); and (3) the intent to violate the law (act purposely done with knowledge that it violated the Sherman Act).

55. *Id.*

proved to have intentionally made an agreement which is unlawful *per se*, there must be an instruction that the defendants cannot be convicted unless they are found to have intended to restrain trade or commerce."[56] This dictum raises an issue distinct from that present in *Gypsum*. The Court in *Gypsum* held that a presumption of intent could not be predicated on an anticompetitive effect. There is, however, a subtle distinction between a presumption that the accused knew or intended the result and a presumption that conduct identified as *per se* illegal is unreasonable. The latter relates to the conduct itself; the former relates to the actor's state of mind. These issues are not the same, and to the extent that *Brighton Building* infers that intent may be presumed because the activity is *per se* unreasonable, it is inconsistent with *Gypsum*.

United States v. Gillen, [57] however, is the most disturbing of the post-*Gypsum* decisions. In sustaining a conviction for price-fixing, the United States Court of Appeals for the Third Circuit concluded that the intent element required in *Gypsum* applied only to borderline violations:[58]

> The conduct at issue in *Gypsum* concededly was of such a nature as to warrant a further inquiry into intent. The Supreme Court's concern with those who unwittingly violate antitrust laws has no place here . . . . The act of agreeing to fix prices is in itself illegal; the criminal act is the agreement.[59]

Although the court postulated that proof of intent was not required in a price-fixing case, it explained that if intent must be shown, it could be presumed from the agreement:

> [T]he intent requirement[s] will always be met in a case involving a price-fixing conspiracy . . . . Here, where [defendants'] actions were nothing less than price-fixing, the violators cannot be heard to argue that they did not know that their meetings and discussions of price would result in an unreasonable restraint of trade.[60]

The Third Circuit developed this limitation on the *Gypsum* knowledge standard more fully in *United States v. Continental Group, Inc.*[61] After reaffirming that knowledge of anticompetitive effects does not have to be

---

56. *Id.*

57. 599 F.2d 541 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3192 (Oct. 2, 1979). The Third Circuit reaffirmed its limited view of *Gypsum* in United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3447 (U.S. Jan. 15, 1980) (No. 79-679).

58. 599 F.2d at 544. Judge Adams, in a concurring opinion, argued that the majority's treatment of the intent issue was inconsistent with *Gypsum*. *Id.* at 548 (Adams, J., concurring).

59. *Id.* at 545.

60. *Id.*

61. 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3447 (U.S. Jan. 15, 1980) (No. 79-679).

proven in *per se* cases, the court held that knowingly entering into an agreement to engage in conduct that is *per se* illegal is sufficient to support a criminal conviction.[62] The *Gypsum* Court, however, did not address the standard of intent required to satisfy the combination element of a Sherman Act violation. Its decision concerned only the intent to achieve the proscribed restraint of trade.[63]

The post-*Gypsum* opinions raise several common issues. For example, the defendants reintroduced the nebulous principle of "specific intent." This concept was avoided in *Gypsum* because the Court adopted the more comprehensible definitions in the Model Penal Code.[64] Regardless of the appropriate standard of culpability, the law would be less perplexing if courts consistently applied the Code's terminology. Concepts such as "criminal intent," "specific intent," "*mens rea*," or "scienter" may be significant on a philosophical level because they all indicate that an evil state of mind is an essential aspect of criminality. Applying such general notions to fact-specific cases, however, often tends to confuse rather than clarify the inquiry into intent because "[t]he *mens rea* differs from crime to crime."[65]

Another issue in the post-*Gypsum* cases was whether conviction under the 1974 felony statute required a heightened degree of intent or culpability because of the greater potential penalty and stigma.[66] *Gypsum* involved misdemeanor convictions, and the defendants argued that something more than "knowledge" should be required under the new law. This argument has sound support in criminal jurisprudence but was summarily rejected by each court.

Finally, and most importantly, *Gillen*, *Brighton Building*, and *Continental Group* intimated that even proof of knowledge was not required if the alleged conduct is *per se* illegal under the Sherman Act.[67] The requisite intent may be presumed to exist when the defendant's conduct amounted

62. *Id.* at 461-66.

63. 438 U.S. at 435, *quoted in* text accompanying note 32 *supra*.

64. The Model Penal Code adopted its measures of "culpability" largely to avoid the confusing common law concepts of "general intent" and "specific intent." *See* MODEL PENAL CODE § 2.02, Comment (Tent. Draft No. 4, 1955); § 5.01(1)(b), Comment (Tent. Draft No. 10, 1960).

65. R. PERKINS, CRIMINAL LAW 739 (3d ed. 1969).

66. *See* note 5 *supra*. The defendants in *Foley* and *Brighton Building* were convicted for acts that occurred after the new felony provisions became effective. *Gillen*, however, involved misdemeanor convictions. Nevertheless, in *Continental Group*, the court concluded that the increased penalties did not alter the result in *Gillen*. 603 F.2d at 461.

67. *See* United States v. Gillen, 599 F.2d 541, 545 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3192 (Oct. 2, 1979); United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3191 (Oct. 2, 1979); note 61 and accompanying text *supra*.

to a *per se* violation. The Third Circuit in particular appears to opt for strict criminal liability. Its opinions suggest two reasons supporting this variance from the holding in *Gypsum*. First, since the law regarding *per se* offenses is well established, the defendants were not acting in the unclear realm of the rule of reason.[68] Second, *per se* offenses involve egregious behavior.[69] The first justification is suspect because it overstates the clarity of *per se* rules.[70] The latter reason — that the seriousness of the offense justifies a lowered standard of culpability — is contrary to basic principles of criminal law.[71]

III. The Role of Intent in Criminal Law

A. The General Rule

The generally accepted rule for the mental element of criminality is readily stated: "[A] crime is committed only if the evil doer harbored an evil mind."[72] Nevertheless, the devotion to *mens rea* is not as timeless as is usually suggested. The ancient common law required men to answer for obvious trespasses without regard to intent.[73] As the law developed, however, exceptions to this harsh rule began to multiply.[74] In the case of a requisite mental element for criminal liability, the exception eventually devoured the rule. When the Sherman Act was passed, therefore, courts generally required proof of a mental element to sustain criminal convictions.

Professor Sayre has explained the underlying rationale for the *mens rea* requirement as follows:

> In general, the *mens rea* is as vitally necessary for true crime as understanding is necessary for goodness. To inflict substantial punishment on one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement.[75]

---

68. United States v. Gillen, 599 F.2d at 549.

69. *Id.*

70. *See* notes 192-200 and accompanying text *infra*.

71. *See* notes 72-102 and accompanying text *infra*.

72. C. Torcia, Wharton's Criminal Law § 27 (14th ed. 1978). Dean Roscoe Pound believed that a criminal enactment not requiring some form of *mens rea* was "counter to the very common-law conception of a crime." Pound, *The Law of the Land*, 62 Am. L. Rev. 174, 182 (1928).

73. *See* R. Perkins, *supra* note 65, at 739.

74. *Id.* at 740-41.

75. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 56 (1933). Another commentator has stated:

> Without moral culpability there is in a democratic community an explicable and justifiable reluctance to affix the stigma of blame. This perhaps is the basic explanation, rather than the selfish mediation of business interests, for the reluctance of

B. Strict Criminal Liability

Although insistence on *mens rea* is the general rule, there is a contrary tradition in criminal law: strict liability. In order to evaluate the decisions limiting *Gypsum*, it is necessary to examine this doctrine's development, ascertain it scope, and delineate the factors justifying its application. The underlying question is whether it is justifiable to apply strict liability to Sherman Act prosecutions.

In the mid-nineteenth century, legal devotion to the scienter requirement waned.[76] Courts began to recognize the validity of criminal offenses that required no proof of mental culpability. This development was part of the criminal law's continuing response to society's changing estimation of the individual and his or her responsibility to public well-being. In the early nineteenth century, the individual was preeminent, but that supremacy began to fade as the century progressed. One commentator explained: "[A]s a direct result of [a] new emphasis on public and social, as contrasted with individual interest, courts have naturally tended to concentrate more upon the injurious conduct of the defendant than upon the problem of his individual guilt."[77] This shift in emphasis was the result of a recognition that a technological, interdependent society needs to protect itself against conduct injurious to the common welfare.[78]

Since strict liability runs counter to a fundamental concept of the common law, courts and scholars have attempted to discover some rational basis for distinguishing between those offenses requiring intent and those that do not. Early courts found that *mens rea* was required for offenses that are *mala in se*, although not essential for those acts that are *mala prohibita*.[79] It has also been suggested that common law crimes always require *mens rea* but statutory crimes do not if the appropriate legislative

---

> administrators and prosecutors to invoke the criminal sanction; the reluctance of jurors to find guilt and the reluctance of judges to impose strong penalties.

Kadish, *supra* note 3, at 437 (footnotes omitted).

76. Sayre attributes the conscious beginning of strict criminal liability to Regina v. Stephens, [1866] 1 Q.B. 702. Sayre, *supra* note 75, at 59. Stephens had been indicted because his employee dumped slate into a navigable river. The court emphasized that if abatement of a public nuisance was left to the public, no individual would have standing to sue. Judge Mellor explained: "Inasmuch as the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment." 1 Q.B. at 710 (Mellor, J.). For examples of earlier strict liability decisions, see Sayre, *supra* note 75, at 56-58; 1 J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 327-28 (2d ed. 1960).

77. Sayre, *supra* note 75, at 68. *See generally* Remington & Helstad, *The Mental Element in Crime — A Legislative Problem*, 1952 WIS. L. REV. 644, 670.

78. *See* Morissette v. United States, 342 U.S. 246, 256 (1952); Remington & Helstad, *supra* note 77, at 670; Sayre, *supra* note 75, at 68. *See also* M.C. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 186-88 (1978).

79. *See* J. HALL, *supra* note 76, at 337-42; Sayre, *supra* note 75, at 70.

intent can be shown.[80] Sayre, on the other hand, considers strict liability to be traditionally reserved for "public welfare offenses."[81]

While each formulation is partially accurate, none embraces the complete spectrum of strict liability offenses. More significantly, none justifies departing from a fundamental rule of substantive criminal law. The applications of strict liability, therefore, must be further examined in an effort to locate common, unifying factors.

Professor Packer has identified four categories of strict liability offenses.[82] The first and most difficult to rationalize includes "basic offenses" for which proof of moral culpability has been eliminated for at least one material element of the offense. These crimes include statutory rape, felony-murder, misdemeanor-manslaughter, bigamy, and adultery.[83] For example, in the case of statutory rape, the reason generally proferred for ignoring an individual's good faith belief about the victim's age is that, even if the victim was of age, it would not make the conduct legal; the crime would then be adultery or fornication. Likewise, in felony-murder and misdemeanor-manslaughter cases, some *mens rea* is present: the intent to commit the felony or misdemeanor. A common element, therefore, is the presence of some form of *mens rea* for some element of the offense.[84]

Packer's second category of strict liability offenses also departs from the common law *mens rea* requirement by using a negligence criteria.[85] Although the Model Penal Code includes it as a valid form of criminal culpability,[86] negligence is disfavored and will not be deemed sufficient when a statute is silent about the required degree of culpability.[87] In any case, the application of a negligence standard is not pertinent to a discussion relating to Sherman Act liability, because the Supreme Court in *Gypsum* adopted knowledge as the appropriate standard. Moreover, those courts finding an exception in the case of *per se* offenses suggest that mental culpability in any form is not an element of the offense.

---

80. *See* Sayre, *supra* note 75, at 70.

81. *Id.* at 56. Most public welfare offenses involve: alleged sales of intoxicating liquor; sales of impure or adulterated food or drugs; sales of misbranded articles; violations of antinarcotic acts; criminal nuisances; violations of traffic regulations; violations of motor vehicle laws; or violations of general police regulations passed for the safety, health, or well-being of the community. Remington & Helstad, *supra* note 77, at 670.

82. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 140.

83. *Id.* at 141-42.

84. *Id.* The imposition of strict liability for bigamy and adultery is harder to rationalize. The English courts have abandoned this approach and now require proof of *mens rea*. *See* Sayre, *supra* note 75, at 75.

85. Packer, *supra* note 82, at 143-45. *See generally* M.C. BASSIOUNI, *supra* note 78, at 182-83.

86. MODEL PENAL CODE § 2.02(2)(d) (Proposed Official Draft 1962).

87. *Id.* § 2.02(3).

The third category specified by Packer concerns judicial rejection of the *ignorantia legis* defense.[88] Except in very limited circumstances, the courts have refused to recognize "mistake of law" as a legitimate defense to criminal liability.[89] Some defendants in post-*Gypsum* cases have implicitly raised this defense. In *Brighton Building*, for example, the court rejected summarily the claim that the defendants could be convicted only if they actually knew their conduct violated the Sherman Act.[90] The court's view was consistent with the traditional lack of judicial sympathy for the mistake of law defense, and there is no reason to believe that the defense will be treated differently in the context of the Sherman Act.

Most strict liability offenses fall within Packer's fourth category: public welfare offenses. A classic application of strict liability under this category involves the regulation of food and drug manufacturing and distribution.[91] Such laws generally represent part of a much larger governmental regulatory scheme and are intended not so much to punish as to induce acceptable behavior.[92] Strict liability offenses of this type share several common characteristics: (a) their goals are regulatory, not punitive;[93] (b) the punishment is not severe;[94] and (c) there is no moral stigma attached to conviction.[95]

Although strict liability is now well established, it is not generally well received.[96] The Model Penal Code, for example, completely rejects strict liability when the offense is punishable by imprisonment.[97] There is also factual evidence that criminal liability without a guilty mind is so alien to a public sense of morality that those responsible for enforcing such laws

88. Packer, *supra* note 82, at 145-46.

89. *See* J. HALL, *supra* note 76, at 343-76. *Compare* United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) *with* Lambert v. California, 355 U.S. 225 (1957). *See generally* M.C. BASSIOUNI, *supra* note 78, at 449-52. The Model Penal Code provides a limited defense based on ignorance or mistake. MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962).

90. *See* notes 53-71 and accompanying text *supra*.

91. *See* note 81 *supra*.

92. *See* Kadish, *supra* note 3, at 425-26. *See also* Paulus, *Strict Liability: Its Place In Public Welfare Offenses*, 20 CRIM. L.Q. 445 (1978).

93. *See* Morissette v. United States, 342 U.S. 246, 258-59 (1952); Sayre, *supra* note 75, at 72.

94. One commentator has stated: "If [the penalty] be serious, particularly if the offense be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind." Sayre, *supra* note 75, at 72.

95. Kadish, *supra* note 3, at 425-26. *But see* text accompanying notes 83-84 *supra*.

96. For example, the Canadian Law Reform Commission concluded: "We arrive then, it is submitted, at an impasse. On grounds of morality and justice strict liability is intolerable. On grounds of practicality it is essential." LAW REFORM COMM'N OF CANADA, STUDIES IN STRICT LIABILITY (1974), *quoted in* Paulus, *supra* note 92, at 445. The Commission suggested a balance that prohibited imprisonment for strict liability offenses. *Id.* at 447.

97. In limiting the use of strict liability under the Model Penal Code, the drafters stated:

will do so only when personally convinced that the accused intended the result. For example, Professor Carson studied the reports of the inspectors charged with enforcing the British Factories Act of 1961,[98] which relates to factory safety conditions. The law does not require any form of intent for criminal conviction. Based upon his extensive review of the reports, Carson concluded that enforcement officials had built into their program an informal mental culpability requirement.[99]

The aversion to strict liability, however, is not universal. Some commentators view the law as a utilitarian, rather than a moral instrument: "[T]here is no necessary connection between the label 'crime' and public morality . . . . Criminal law, particularly as it relates to economic crime, is a set of techniques to be manipulated for social ends."[100] It is questionable whether criminal law can or should be divorced from public morality, but assuming that a utilitarian rationale does represent a legitimate view of criminal law, it does not support the application of strict liability to the Sherman Act. The legitimacy of a strict liability offense when judged by this pragmatic standard depends solely on the law's efficacy. Those who advocate this approach agree that any law that is to be employed as a technique for modifying social behavior should be clear, unambiguous, and strictly enforced.[101] The Sherman Act fails on all three counts.[102]

C. Constitutional Considerations

Since the *mens rea* requirement for criminality is premised on concepts

---

> This section makes a frontal attack on absolute or strict liability in penal law, whenever the offense carries a possibility of sentence of imprisonment. . . .
>
> This position is affirmed not only with respect to offenses defined by the Penal Code; it is superimposed on the entire corpus of the law, so far as penal sanctions are involved. . . . The liabilities involved are indefensible in principle, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of imprisonment may be imposed. In the absence of minimal culpability, the law has neither a deterrent nor corrective nor an incapacitative function to perform. . . .
>
> Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. That is too fundamental to be compromised.

MODEL PENAL CODE § 2.05, Comment (Tent. Draft No. 4, 1955).

98. Carson, *Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation*, 33 MOD. L. REV. 396 (1970).

99. *Id.* at 403-04, 410-12. Paulus reached a similar conclusion after studying the British food and drug laws. Paulus, *supra* note 92, at 457-60. *See also* note 75 *supra*.

100. Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 211 (1965).

101. *See id.* at 220.

102. *See* note 3 *supra*.

of fundamental fairness, its abrogation raises constitutional questions.[103] The Supreme Court, however, has at times casually rejected the notion that the Constitution imposes limitations on strict criminal liability.[104]

The Supreme Court's earliest pronouncements about *mens rea* as a constitutional requirement were unfortunate in result and the products of unusual proceedings.[105] In *Shevlin-Carpenter Co. v. Minnesota*,[106] the appellant was found by the trial court to have committed a civil trespass. Challenging the validity of the statute on appeal, Shevlin-Carpenter argued that because the law contained a criminal provision not requiring intent, both the civil and criminal aspects were unconstitutional.[107] The Court saw no problem with the statute and ruled that its criminal provision was severable.[108] In so holding, the Court disposed of the only claim properly before it. Unfortunately, it went on to assert in broad language that criminal sanctions could be imposed on persons unaware that their conduct was unlawful.[109]

Twelve years after *Shevlin-Carpenter*, the Court unambiguously rejected scienter as a constitutional requirement in criminal proceedings. In *United States v. Balint*,[110] the Court was confronted with the validity of an indictment charging a violation of section 2 of the Narcotics Act.[111] This statute made it illegal to sell narcotics without using a form provided by the Internal Revenue Service. The district court had dismissed the indictment because it failed to allege that the defendant knew the substance was a narcotic.[112] The defendant did not participate in the appeal, and the case was decided on the *ex parte* arguments of the government's counsel.[113]

In reversing the district court's dismissal, the Court disposed of the argument that scienter was constitutionally required with a reference to *Shev-*

---

103. *See generally* Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039 (1973).

104. Justice Rehnquist, in his separate opinion in *Gypsum*, was concerned that the majority may have implied a "special constitutional difficulty if criminal liability is imposed without fault." 438 U.S. at 473 (Rehnquist, J., concurring in part and dissenting in part).

105. *See* Packer, *supra* note 82, at 110-16.

106. 218 U.S. 57 (1910).

107. *Id.* at 65-67.

108. *Id.* at 66-67.

109. *See id.* at 68-70. The Court stated that "public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." *Id.* at 70.

110. 258 U.S. 250 (1922).

111. Ch. 223, 38 Stat. 785 (1914) (repealed 1939).

112. 258 U.S. at 251.

113. Packer has contended the government deliberately worded the indictment to bring the strict liability issue before the Supreme Court. Packer, *supra* note 82, at 113.

lin-Carpenter[114] and went on to state:

> Many instances of [strict liability] are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently on the achievement of some social betterment rather than the punishment of the crimes as in the cases of *mala in se*.[115]

The Court viewed the law primarily as a taxing provision "with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs,"[116] and it considered the sole issue to be whether the legislature had intended scienter as an element of the offense.[117] The Court did not mention that conviction could result in a five-year prison sentence.

Balint represented a watershed in the development of strict criminal liability. It expressly established that there is no constitutional barrier to strict criminal liability; therefore, legislative intent is controlling.[118] *Balint* also implicitly found the gravity of the offense and the penalty to be irrelevant. The Court's failure to address the penalty issue has been severely criticized.[119]

The next significant case raising the intent issue was *United States v. Dotterweich*.[120] It involved the application of strict liability under a statute prohibiting the shipment of misbranded or adulterated products in violation of the Federal Food, Drug, and Cosmetic Act.[121] In this context, the use of strict liability was not surprising. The Court, again emphasizing the regulatory nature of the statute, summarily dismissed the argument that *mens rea* was required.[122]

---

114. 258 U.S. at 252.

115. *Id. See also* United States v. Behrman, 258 U.S. 280 (1922). In *Berhman*, decided the same day as *Balint*, the Court found it irrelevant that a doctor believed he was following professional medical standards in dispensing certain drugs. *Id.* at 288.

116. 258 U.S. at 253.

117. *Id.* at 253-54.

118. *See* Saltzman, *supra* note 33, at 1595. The Court inferred from the statute's silence a congressional purpose to exclude *mens rea* as an element of the offense. *See* 258 U.S. at 254.

119. *See, e.g.*, Packer, *supra* note 82, at 113, 146-50; Saltzman, *supra* note 33, at 1595; Sayre, *supra* note 75, at 81. Perkins has suggested that the Court could have advanced strict liability law by addressing the penalty issue: "Had the Court added that the penalty must be limited to a fine if the sale resulted from an innocent and nonnegligent mistake of fact, we would be many years ahead in the development of this part of the law." R. PERKINS, *supra* note 65, at 796.

120. 320 U.S. 277 (1943).

121. Ch. 675, 52 Stat. 1040 (1938) (current version at 21 U.S.C. §§ 301-392 (1976)).

122. The Court explained:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct —

These early cases were marked by a lack of concern for the principles underlying the common law's requirement that mental culpability must exist before an individual may be branded a criminal. Gradually, however, the Court began to appreciate, and consequently limit, the scope of these sweeping opinions.

The Court's changing attitude regarding intent first surfaced in *Dennis v. United States*.[123] In *Dennis*, the Court determined that a provision of the Smith Act,[124] although not specifically incorporating a mental element, must be construed to require some form of intent. It explained that "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."[125] *Dennis* stands in marked contrast to *Balint*, in which the Court was willing to infer from the legislation's silence a congressional desire to exclude intent.

A year after *Dennis*, the Court confronted the question squarely and acknowledged for the first time the gravity of the strict liability issue. In *Morissette v. United States*,[126] the appellant had been convicted of stealing or knowingly converting government property. Morissette had removed spent bomb casings from a government practice range where they had been thrown in piles and were rusting. Although Morissette testified at trial that he reasonably believed that the casings were abandoned, the trial court held such belief to be irrelevant.[127] In its view, the law was violated by knowingly taking government property without permission. The court of appeals affirmed the conviction, holding that intent was not an element of the offense.[128]

Justice Jackson, writing for the majority, discussed in some detail the development of strict liability, the types of cases to which it generally applied, and "the [aroused] concern of responsible and disinterested students of penology"[129] about its growth. In reversing the conviction, he stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of

---

awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in a responsible relation to a public danger.

320 U.S. at 280-81. The Court was unnecessarily expansive because the real issue in *Dotterweich* was one of vicarious rather than strict liability. *See* Packer, *supra* note 82, at 118.

123. 341 U.S. 494 (1951).

124. 18 U.S.C. § 2385 (1976).

125. 341 U.S. at 500.

126. 342 U.S. 246 (1952).

127. *Id.* at 249.

128. *Id.* at 249-50.

129. *Id.* at 254 n.14.

the normal individual to choose between good and evil.[130]

The *Morissette* decision, however, was not premised on constitutional considerations. The issue was treated as one of statutory interpretation. The Court refused to infer congressional intent to establish a strict liability crime from the statute's silence, particularly because of the infamy attached to a felony conviction and because stealing is a common law offense with severe penalties.[131]

While the Court has consistently refused to find a general constitutional prohibition against criminal conviction without *mens rea*, it has found this element constitutionally required in some circumstances. For example, the Court has refused to permit the application of strict liability to crimes impinging upon freedom of expression.[132] The emphasis, however, has been on the first amendment and the possible "chilling" effect of the challenged statutes.

The *mens rea* requirement has also been imposed to save otherwise unconstitutionally vague criminal laws.[133] By interpreting a vague statute to require some form of intent, the Court supplies the missing "notice" that must be present to support a criminal prosecution. A person acting with the requisite intent cannot be heard to claim lack of notice of the offense.

Although the Court has required proof of intent to save a vague statute, it will not do so if the nature of the matter regulated should put reasonable persons on notice of the legal strictures. In *United States v. Freed*,[134] for example, a statute forbidding the possession of hand grenades was upheld. Likewise, in *United States v. International Minerals & Chemicals Corp.*,[135] the Court noted that a person dealing in dangerous acids "must be presumed to be aware of the regulation."[136]

There are, therefore, two distinct lines of cases concerning the constitutionality of criminal offenses not requiring scienter. The first, exemplified

---

130. *Id.* at 250. Justice Jackson also stated:

> A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Id. at 250-51.

131. *Id.* at 260-62.

132. *See, e.g.*, Smith v. California, 361 U.S. 147 (1959); Winters v. New York, 333 U.S. 507 (1948).

133. *See, e.g.*, Lambert v. California, 355 U.S. 225 (1957); Screws v. United States, 325 U.S. 91 (1945). *See generally* Colautti v. Franklin, 99 S. Ct. 675, 685-86 (1979); Kadish, *supra* note 3, at 428; Packer, *supra* note 82, at 125.

134. 401 U.S. 601 (1971).

135. 402 U.S. 558 (1971).

136. *Id.* at 564-65.

by *Balint*, does not see any constitutional issue at all. The second, represented by *Morissette*, perceives a fundamental issue concerning the fairness and morality of strict liability. The Supreme Court, however, has not yet found criminal liability without any required mental element to be, by itself, unconstitutional.[137] It has imposed constitutional limitations only when freedom of expression is at stake or when a statute fails to give adequate notice of its proscriptions. According to Packer, the Court has found *mens rea* to be "an important requirement, but it is not a Constitutional requirement, except sometimes."[138]

IV. Application to the Sherman Act

As we have seen, *Gypsum* held that the framers of the Sherman Act did not intend to create a strict liability criminal offense.[139] The Court relied on the disfavored status of strict criminal liability, the indefiniteness of the Sherman Act, and the differences between the Act and traditional criminal offenses requiring no proof of mental culpability. Since lower courts have suggested limitations on the scope of *Gypsum*, the factors relied upon by the Supreme Court should be scrutinized in greater depth to determine whether they are actually less compelling than the Court found them at the time of its decision.

In construing the Sherman Act, the controlling factor is, of course, legislative intent. Inquiry into the intent of Congress regarding the mental element of any criminal statute should follow the rule established in *Morissette* that strict liability is not favored, particularly when the offense existed at common law.[140] There is "an interpretive presumption that *mens rea* is required";[141] therefore, a congressional desire to create a criminal offense dispensing with *mens rea* should not be inferred from legislative silence. Two areas of inquiry can be pursued further than the Court did in *Gypsum* to determine congressional motivations. First, and most significant, is legislative history. Second, the Act can be more closely scrutinized

137. Saltzman has argued that analogous constitutional criminal law developments require a bar to strict liability. Saltzman, *supra* note 33, at 1574.

138. Packer, *supra* note 82, at 107.

139. *See* notes 32-42 and accompanying text *supra*.

140. *See* 342 U.S. at 263; text accompanying notes 34-37 *supra*. Certain restraints of trade and monopolistic practices were indictable at common law. Many of the legislators who enacted the Sherman Act believed they were providing federal enforcement of the common law prohibitions. Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955). *See also* M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION 35-91 (1975); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

141. United States v. United States Gypsum Co., 438 U.S. 422, 437 (1978).

to see if it has any of the traditional characteristics of a strict liability statute.

A construction of the Sherman Act should also attempt to maintain its constitutionality. The *Gypsum* Court indicated that an intent requirement minimizes the unfairness of convicting the unwary for violating a vague statute.[142] An examination of the Court's treatment of analogous trade regulations will reveal how close the Sherman Act's vagueness is to constitutional impropriety in its criminal applications. If permitted by the legislative history, strict adherence to an intent requirement will lessen the Act's uncertainty and reinforce its constitutionality.

A. Legislative History

The legislative history of the Sherman Act is sparse. Nevertheless, it does contain sufficient evidence to show that Congress did not intend to create a criminal provision with less than the full panoply of rights attaching to criminal prosecution. Much of the congressional debate about the constitutionality and efficacy of the Act concerned the effect that the criminal provision would have on its interpretation and enforcement.

The antitrust bill that the Fifty-first Congress began to consider contained three sections.[143] The first section declared certain anticompetitive

142. *Id.*

143. As introduced, the bill provided:

> [SEC. 1.] That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.
>
> SEC. 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination may sue for and recover, in any court of the United States of competent jurisdiction of any person or corporation a party to a combination described in the first section of this act, the full consideration or sum paid by him for any goods, wares, and merchandise included in or advanced in price by said combination.
>
> SEC. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section one of this act, either on his own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor, and on conviction thereof in any district or circuit court of the United States shall be subject to a fine of not more than ten thousand dollars, or to imprisonment in the penitentiary for a term of not more than five years, or to both such fine and imprisonment, in the discretion of the court. And it shall be the duty of the district attorney of the United States of the district in which

activities to be illegal and against public policy. The second section provided a civil remedy for any person injured by a violation of the first. Finally, the third section made a violation a "high misdemeanor" that was punishable by a fine not to exceed $10,000 and a prison term of not more than five years. Senator Sherman envisioned a necessary distinction between remedial civil enforcement and the use of the criminal provisions:

> The first section, being a remedial statute, would be construed liberally, with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally; . . . .
>
> In providing a remedy the intention of the combination is immaterial. . . . It is the tendency of a corporation, and not its intention, that the courts can deal with.
>
> The third section is a criminal statute, which would be construed strictly and is difficult to be enforced.[144]

Senator Sherman also presumed that the traditional element of intent would be present in criminal prosecutions. He explained that "individuals can only be punished for criminal intentions."[145]

Senator George of Mississippi also believed that the creation of a criminal sanction would require strict construction and proof of intent. In his opinion, the entire bill was a vague penal statute requiring careful drafting because the courts would construe it "strictly in favor of alleged violators."[146]

In January 1890, the Senate Committee on Finance reported a modified version of the bill that proscribed intentional behavior only.[147] Senator

---

such persons reside to institute the proper proceedings to enforce the provisions of this act.

S. 1, 51st Cong., 1st Sess., 21 CONG. REC. 89 (1889), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 89 (E. Kintner ed. 1978) [hereinafter cited as 1 LEGISLATIVE HISTORY].

144. 21 CONG. REC. 2546 (1890).

145. *Id.* at 2457.

146. *Id.* at 1765.

147. As reported by the Senate Committee on Finance, § 1 of the bill provided:

> That all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with ~~a view, or which tend~~ *the intention* to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material, that competes with any similar article upon which a duty is levied by the United States, or *intended for and* which shall be transported from one State or Territory to another *for sale*, and all *such* arrangements, contracts, agreements, trusts, or combinations between persons or corporations ~~designed, or which tend~~, *intended* to advance the cost to the consumer of any such articles, a [*sic*] hereby declared to be against public policy, unlawful, and void.

S. 1, 51st Cong., 1st Sess., 21 CONG. REC. 541 (1890), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 143, at 93 (emphasis in original).

George again argued that the proposed law was essentially a penal statute and would have to be strictly construed. Sherman continued to stress his opinion that the proposed law would establish dual enforcement procedures: the civil provisions would be liberally construed to arrest conduct having a tendency to prevent competition without regard to intent, while the criminal provision would penalize only intentional offenders. He explained that "[T]he tendency is the test of legality. *The intention is the test of a crime.*"[148] When Senator George continued to object to the proposed legislation, Senator Sherman, apparently in exasperation, conceded that George's comments about the criminal section were valid, and he agreed to join George in striking it out.[149]

Although statements made during congressional debates have limited value when construing statutes, this record shows that those legislators most prominently involved in the passage of the Sherman Act did not consider it a penal statute that dispensed with the traditional protections afforded criminal defendants. No one disagreed about the implications of the criminal provision. It would have to be strictly construed, and intent would have to be proven. The Senators simply could not agree about which portions of the proposed law would be treated as criminal.[150]

Several significant changes were proposed during the congressional debates, but the bill, as finally enacted, incorporated a criminal sanction.[151] Neither the proposed amendments nor the final form, however, raise any doubt that key members of the legislature believed that criminal conviction would require a criminal intent.

B. Comparison with the Characteristics of Traditional Strict Liability Offenses

Although the legislative history is apparently dispositive, congressional purpose is also evidenced by the nature of the statute. It can be assumed that Congress did not intend to create a strict liability offense with none of the traditional characteristics of such offenses. These include: an essen-

148. 21 CONG. REC. 2461 (1890) (emphasis added).

149. Senator Sherman stated:

> [A]ll through [Senator George's] speech he quotes the phrases of a "certain specified intent," "specific intent," "penal legislation," "reasonable doubt" "indicted must be acquitted." . . . He no doubt is partly justified in this . . . by the third section, which would be subject to his criticism, and which I will join him in striking out.

21 CONG. REC. 2461 (1890).

150. *See* 1 J. VON KALINOWSKI, *supra* note 15, § 3.01[3] (1979).

151. *See* 21 CONG. REC. 2901, 3152-53 (1890). As finally signed into law, the Sherman Act contained the criminal provisions. Ch. 647, §§ 1-3, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-3 (1976)).

tially regulatory scheme; a light penalty; and no moral stigma attaching to conviction. As will be seen, the Sherman Act does not possess such characteristics.

While the criminal sanctions of the Sherman Act are obviously intended to control business behavior, they are not regulatory in the manner of traditional strict liability offenses. Strict criminal liability is generally the ultimate weapon in the arsenal of a regulatory agency that directly oversees the subject matter of the law.[152] Such agencies may regulate behavior in numerous ways, including persuasion, formal and informal administrative proceedings, civil judicial actions, and ultimately criminal prosecution. The availability of a criminal sanction facilitates the agency's regulatory activities.[153] The Department of Justice, which enforces the Sherman Act, is not such a regulatory agency. Thus, the Sherman Act is not primarily a "regulatory" scheme. At a minimum, it does not fit the usual model in which a regulatory agency utilizes a limited criminal sanction.[154]

Moreover, the Sherman Act does not possess the characteristic light penalty of strict criminal liability statutes. When first enacted, the law provided for a maximum $5,000 fine and one-year prison term, but a violation was a misdemeanor.[155] In 1974, however, the Act was amended, and a violation became a felony punishable by a maximum $100,000 fine ($1 million for corporations) and imprisonment for three years.[156] The Antitrust Division of the Department of Justice has taken the position that persons convicted of a felony should generally be sentenced to eighteen months in prison.[157] The Model Penal Code and many scholars argue, however, that strict liability offenses should never result in imprisonment.[158] The original one-year prison term, even though for a misde-

152. Paulus, *supra* note 93, at 459.

153. *Id.*

154. If the criminal sanctions of the Sherman Act had been embodied in the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976), and entrusted to the Commission, it could be argued that the provision was in the nature of a strict liability offense.

The Sherman Act also does not fit the mold of the "public nuisance" law. The decisions allowing strict liability for those creating public nuisances were justified by the inability of any single individual to seek relief. *See* notes 74-75 and accompanying text *supra*. The Clayton Act, however, permits private civil actions in response to violations of the Sherman Act. *See* 15 U.S.C. § 15 (1976).

155. Ch. 647, §§ 1-3, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1-3 (1976)).

156. The Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974) (amending 29 U.S.C. §§ 1-3 (1970)).

157. Memorandum from Assistant Attorney General, Antitrust Division, Department of Justice (Feb. 24, 1977).

158. *See* note 97 and accompanying text *supra*; R. PERKINS, *supra* note 65, at 796; Sayre, *supra* note 75, at 78.

meanor, was sufficient to create a presumption that the element of criminal intent was required. With the recently increased penalties, the government should not be freed from proving the existence of moral culpability.[159]

The final characteristic of strict liability crimes is the societal decision not to attach moral stigma to conviction. The conduct proscribed by the Sherman Act, however, has been uniformly and consistently condemned by all branches of government. In 1888, both the Democratic and Republican parties adopted planks in their party platforms condemning the trusts.[160] In that same year, President Cleveland excoriated the "trusts, combinations and monopolies" in his state of the union message.[161] Senator Jones of Arkansas, addressing a pre-Sherman Act bill in 1889,[162] used the "sugar trust" to show his contempt for the anticompetitive activities sought to be prohibited: "The sugar trust has its 'long, felonious fingers' at this very moment in every man's pocket in the United States, deftly extracting with the same audacity the pennies from the pockets of the poor and dollars from the pockets of the rich."[163]

The condemnatory language has always been somewhat mitigated by a perceived lax enforcement of the antitrust laws and the historical use of mild penalties.[164] Nevertheless, the government continues to expressly condemn as reprehensible the conduct forbidden by the antitrust laws. In an address to a joint session of Congress, for example, President Ford identified antitrust violations as a serious contributing cause of inflation.[165] This speech ultimately led to the 1974 amendment increasing the penalties for violations of the Act.

The condemnation of those who unduly restrict trade has been severe as well as persistent. The legislators who enacted the Sherman Act considered any deliberate distortion of the competitive marketplace as a threat to

---

159. *Cf.* United States v. Nu-Phonics, Inc., 433 F. Supp. 1006, 1015 (E.D. Mich. 1977) (felony provisions may require a reconsideration of the *mens rea* requirement). *See also Panel Discussion — The Differences Between Trying a Criminal Antitrust Case and a Civil Antitrust Case*, 46 A.B.A. ANTITRUST L.J. 703, 707 (1978).

160. Antitrust Plank of the Democratic Party Platform (June 5, 1888), Antitrust Plank of the Republican Party Platform (June 19, 1888), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 143, at 93.

161. Fourth Annual Message of President Grover Cleveland (Dec. 3, 1888), *reprinted in* 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, 1599 (F. Israel ed. 1966).

162. S. 3445, 50th Cong., 2d Sess., 19 CONG. REC. 7512 (1889). This bill was the first antitrust legislation introduced by Senator Sherman. *See* 1 J. VON KALINOWSKI, *supra* note 15, § 3.01[2], at 3-5 to 3-6 (1979).

163. 20 CONG. REC. 1457 (1889).

164. *See generally* Note, *Sentencing Antitrust Felons*, 34 WASH. & LEE L. REV. 1097 (1977).

165. President Ford's Address to a Joint Session of Congress (Oct. 8, 1974), *reprinted in* 30 CONG. Q. ALMANAC 43-A (1974).

a free society. That fear continues today. Attorney General Robert Kennedy, for example, saw the defendant's conduct in the celebrated electrical equipment price-fixing cases[166] as "a serious threat to democracy."[167] Given the history of condemnation and the fact that violation is now a felony,[168] conviction certainly carries the stigma of moral blameworthiness.

The Sherman Act, therefore, does not exhibit any of the usual characteristics of a strict criminal liability offense. It is not regulatory; its sanctions are severe; and conviction can result in serious personal stigma for the violator. Under these circumstances, Congress could not have desired to eliminate the presumptively present element of intent. The courts, to the extent that they have discretion, should not interpret away the intent requirement.

C. *Effect of the Vague Statutory Prohibitions*

The vagueness of the Sherman Act must also be addressed in determining the appropriateness of strict liability. Reading intent out of a vague criminal statute may render the law unconstitutional.[169] The Court in *Gypsum* recognized that the problem of applying strict liability to Sherman Act offenses is aggravated because the law does not clearly define the offense.[170] Despite the current sensitivity to the statute's vagueness, when originally faced with a challenge to the constitutionality of the Sherman Act, the Supreme Court dismissed the challenge without serious consideration. The Court's subsequent treatment of similar trade regulations, however, suggests there was more to the issue than originally perceived.

In *Nash v. United States*,[171] the defendants, who were convicted of conspiring to affect the price of turpentine, challenged the constitutionality of the Sherman Act. They alleged that the law, as interpreted by the Court in *Standard Oil Co. v. United States*,[172] was unconstitutional. Justice Holmes, writing for the Court, held the Act to be valid and explained that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as a jury subsequently estimates it, some matter of de-

166. *See, e.g.*, United States v. Westinghouse Elec. Corp., 1960 Trade Cas. ¶ 69,699 (E.D. Pa.).

167. Television interview with Attorney General Robert Kennedy, *quoted in* Ball & Friedman, *supra* note 100, at 198.

168. Maitland considered felony "as bad a word as you can give to man or thing." 2 F. POLLOCK & W. MAITLAND, HISTORY OF ENGLISH LAW 463 (1895), *quoted in* Morissette v. United States, 342 U.S. 246, 260 (1952).

169. *See* notes 133-36 and accompanying text *supra*.

170. 438 U.S. at 438-41.

171. 229 U.S. 373 (1913).

172. 221 U.S. 1 (1911).

gree."[173]

The year after *Nash*, however, in *International Harvester Co. v. Kentucky*,[174] the Court invalidated a Kentucky statute proscribing combinations to depreciate or increase the price of articles above or below their "real value." The Court found the concept of "real value" to be impossibly vague. It distinguished *Nash* as follows:

> [Men must] rightly estimat[e] a matter of degree — what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. . . . The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.[175]

This reassuring statement was made while the antitrust world was still reeling from the confusion of *Standard Oil*'s "rule of reason."[176]

The Supreme Court reached a similar result in *United States v. L. Cohen Grocery Co.*[177] In *Cohen Grocery*, the appellee was indicated for selling sugar at an excessive price in violation of section 4 of the Lever Act.[178] The Act proscribed the exacting of an "excessive price" for any "necessaries" and made it illegal to set an "unjust or unreasonable rate or charge" when dealing in such goods. A violation could result in a fine not to exceed $5,000 and a maximum prison term of two years. The Court had to determine whether the statute put persons subject to these sanctions on adequate notice of the activities that violated the Act. It concluded that the law was clearly insufficient in this regard and explained that enforcement of "the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interests when unjust and unreasonable in the estimation

173. 229 U.S. at 377.

174. 234 U.S. 216 (1914).

175. *Id.* at 223-24. The Court was concerned about the way the Kentucky statute had been applied. Farmers' cooperatives, formed to obtain higher prices, were permissible since they tended to stabilize prices, while manufacturing combinations were always found to have violated the law. *Id.* at 221.

176. *See* E. GELLHORN, ANTITRUST LAW AND ECONOMICS 24-28 (1976).

177. 255 U.S. 81 (1921).

178. Ch. 53, § 4, 40 Stat. 276 (1917), *as amended by* Act of Oct. 22, 1919, ch. 80, § 2, 41 Stat. 298 (1919).

of the court and jury."[179] The Court noted further that *Nash* and similar cases dealt with laws that "either from the text of the statute involved or the subjects with which they dealt, [afforded] a standard of some sort. . . ."[180]

Despite the Court's attempts to distinguish the Sherman Act from the statutes involved in *Cohen Grocery* and *International Harvester*, the Act suffers from a similar lack of standards. The legislative history shows that the Sherman Act was deliberately intended to be indefinite with specificity to be provided by the judiciary. Senator Sherman indicated that any line between legal and illegal conduct would have to be provided by the courts.[181] Other members of Congress were more expressive. Congressman Bland, for example, introduced an amendment to specifically prohibit monopolies in the transportation and cattle industries. Addressing the amendment, he noted that "[t]his amendment will cover these two things, but God knows, for no man in this House knows, what else the bill will cover."[182] Bland's observations were not atypical.

Judicial attempts to add certainty to the Sherman Act have been disappointing because there are inherent aspects of the Act that will render it perpetually vague. Development of case law under the Act has involved highly factual evaluations in the light of competing economic theories. Dean Kadish has stated that the Sherman Act is necessarily vague for three reasons:

> First, the economic policy is itself unclear. . . . Second, illegality must turn on judgments that are essentially evaluative in character, rather than on purely factual determinations. . . . Third, the inevitable development of novel circumstances and arrangements in the dynamic areas under regulation would soon make precise formulations obsolete, even to the limited extent they prove feasible.[183]

The uncertainty in antitrust is fostered not only by the dynamics of economics and the market place, it is exaggerated by competing noneconomic goals. The tension between the political and economic ends of the antitrust laws, for example, increases the unpredictability of the outcome in any particular case.[184] In this context, strict criminal liability is difficult to justify.

---

179. 255 U.S. at 89.

180. *Id.* at 92.

181. 21 CONG. REC. 2460 (1890).

182. *Id.* at 4099. Congressman Culberson also stated that he did "not know, nor can any man know, just what contracts will be embraced by this section of the bill until the courts determine." *Id.* at 4089.

183. Kadish, *supra* note 3, at 427-28.

184. Ball & Friedman, *supra* note 100, at 202.

The purpose of this discussion is not to suggest that *Nash*, at this late date, should be reversed. It is simply to show that the Sherman Act was intentionally unspecific; that the courts, though upholding the Sherman Act, have found very similar trade regulations to be unconstitutionally vague; and that the statute by its nature will remain indefinite. These factors require a cautious interpretation of the Act's criminal provisions that gives great deference to the traditional precepts of criminal law.

In sum, all of the considerations possibly justifying the elimination of *mens rea* as an element of a Sherman Act violation weigh against that result. To the extent that its purpose is discernible, Congress did not wish to dispense with the intent requirement. Moreover, the Sherman Act does not have the characteristics of a traditional strict liability offense. Finally, the Act is, and will continue to be, vague. Under these circumstances, the Court in *Gypsum* correctly held that intent is an element of a criminal Sherman Act offense.

V. POST-*GYPSUM* DEVELOPMENTS

The most encompassing issue raised by the post-*Gypsum* decisions focuses on the propriety of applying a "knowledge" standard in all section 1 prosecutions in which anticompetitive effects have been established. This issue is too broad for comprehensive treatment here, but it is possible that *Gypsum*'s knowledge rule might not fare well with a more traditional "rule of reason" offense. In a price verification case such as *Gypsum*, the actual restraint is price-fixing which is, of course, *per se* illegal. The analysis conducted in such cases determines whether the price exchanges had the proscribed effect.[185] It may, therefore, be appropriate to hold that those who engage in conduct knowing that the effect is to stabilize prices have acted with the requisite mental state to justify criminal conviction.

"Knowledge" may be a less palatable standard for "rule of reason" cases in which the issue is the reasonableness of an acknowledged restraint and not its existence. For example, a distributor and a manufacturer entering into a distribution contract with an exclusive territory both know that the agreement restrains trade, but the contract is illegal only if the restriction is found to be unreasonable.[186] If mere knowledge of the "restrictive" effect on competition is sufficient to convict the contracting parties of a felony, the distinction between civil and criminal enforcement has been lost. *Gypsum*'s factual context made a "knowledge" criterion reasonable and consistent with the concepts of criminal jurisprudence being applied by the

185. *See* United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118-20 (1975); United States v. Container Corp. of America, 393 U.S. 333, 339 (1969) (Fortas, J., concurring).

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

Court. Given a case in which the rule of reason is applied in its broadest sense — "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"[187] — the Court will have a difficult time reconciling a "knowledge of the restraint" standard with the jurisprudential principle that only the mentally culpable may be convicted of a crime.[188]

A second issue raised by the post-*Gypsum* decisions concerns the effect that the increased penalty provisions should have on the standard of mental culpability. There is support for the position that increasing the gravity of the offense should result in an elevated standard of intent.[189] The Court in *Gypsum* noted that while the penalties had been increased at the time of the decision, the defendants had been convicted under the misdemeanor provisions.[190] The courts of appeals, when confronted with this

187. *Id.* at 49.

188. Two additional factors make the uniform application of a "knowledge" standard questionable. First, though the appellate decisions since *Gypsum* have questioned even the need to prove knowledge, the actual instructions given by the trial courts infer a "purposeful" standard. For example, in United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3191 (Oct. 2, 1979), the court synopsized the jury instructions as follows: "[I]n order to convict it must be proved that defendants *knowingly* agreed or formed a combination or conspiracy for the *purpose* of rigging bids, and *intentionally* assisted in its furtherance." *Id.* at 1107 (emphasis added). Similarly, in United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), *petition for cert. filed*, 47 U.S.L.W. 3776 (U.S. May 18, 1979) (No. 78-1737), the court paraphrased the jury instruction in this way:

> [H]e told the jury in substance that it 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 a conspiracy whose purpose was to fix prices; and that in joining they *intended* to further that purpose.

Id. at 1336 (emphasis added). *See also* United States v. Continental Group, Inc. 603 F.2d 444, 462-64 (3d Cir. 1979), *cert. denied*, 48 U.S.L.W. 3447 (Jan. 15, 1980) (No. 79-679).

A second factor supporting a higher standard of culpability than knowledge is the nature of the conspiratorial crime. Conspiracies have traditionally required an elevated degree of criminal intent. MODEL PENAL CODE § 2.02(3), Comment (Tent. Draft No. 4, 1955); Packer *supra* note 80, at 145 n.141. The drafters of the Model Penal Code also considered purposeful conduct to be necessary in a conspiracy case, especially when the combination has both legal and illegal goals. A comment states: "Knowledge of that [illegal] objective and conscious assistance may justify an inference of such purpose, but would not be independently sufficient to establish liability." MODEL PENAL CODE § 5.03, Comment (Tent. Draft No. 10, 1960). Moreover, a Sherman Act conspiracy is somewhat unique because the conduct proscribed is not illegal if engaged in unilaterally. Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 744-45 (1950). The Model Penal Code refuses to accept that form of conspiracy as criminal. MODEL PENAL CODE § 5.03, Comment (Tent. Draft No. 10, 1960).

189. *See* note 97 and accompanying text *supra*; R. PERKINS, *supra* note 65, at 796; Sayre, *supra* note 75, at 78.

190. 438 U.S. at 442 n.18.

issue, determined that the new penalty provisions did not make any difference. Nevertheless, the heightened penalties are one more factor militating against strict criminal liability for Sherman Act violations.

The most significant development directly impacting upon the scope of *Gypsum*, however, was the lower courts' use of strict criminal liability for practices that are *per se* illegal under civil precedent. The Court in *Gypsum* refused to find that the Sherman Act was intended to create a strict liability offense.[191] The question, therefore, is whether the limitation expressly created in the subsequent decisions is an accurate interpretation of *Gypsum* or general criminal law.

Gillen, Foley, and *Continental Group* suggested that *Gypsum* required intent because the offense involved was not *per se* illegal;[192] therefore, the certainty necessary for strict liability was lacking. This reasoning ignored the tenor and breadth of the Supreme Court's decision. The primary emphasis in *Gypsum* was on principles of criminal jurisprudence that are fundamentally hostile to strict criminal liability. The presumption is that *mens rea* is required.[193] Having stated this general rule, the Court noted that the traditional "inhospitable attitude to non-*mens rea* offenses"[194] is reinforced with respect to the Sherman Act by several factors, including the statute's indefiniteness and the possibility of overdeterrence. The Court used the activity at issue (price verification) to illustrate the difficulty of applying strict liability in a "rule of reason" case, but it did not indicate that the non-*per se* nature of the offense was determinative.

In limiting the scope of *Gypsum*, the appellate courts should have appreciated that the Supreme Court was not stating judicial preference but was attempting to fathom congressional intent. The *mens rea* requirement can be eliminated only if Congress intended strict liability. It is inconceivable that the 1890 Congress foresaw the creation of the *per se*/rule of reason dichotomy; it is even more inconceivable that Congress desired to make intent an element of one type of offense and not the other.

Even if the issue was left to judicial policy making, different treatment for *per se* offenses is unsound. The rationale offered by the *Gillen* court was that the proscribed conduct was both clear and egregious. These justifications pale upon close examination.

The *Gillen* approach to *per se* rules exaggerates the clarity they add to the law. In *McLain v. Real Estate Board of New Orleans, Inc.*,[195] for exam-

191. *Id.* at 443.

192. *See* notes 49-71 and accompanying text *supra*.

193. 438 U.S. at 437. *See* text accompanying notes 34-36 *supra*.

194. *Id.* at 438.

195. 583 F.2d 1315 (5th Cir. 1978), *vacated and remanded*, 48 U.S.L.W. 4063 (Jan. 8, 1980) (plaintiffs had shown a sufficient jurisdictional basis to go forward with the action).

ple, the district court dismissed the action for lack of subject matter jurisdiction because the alleged activity, conspiracy to fix commission rates for real estate sales, did not have the requisite impact on interstate commerce. On appeal, plaintiffs argued that jurisdiction should have been presumed because the alleged conduct was *per se* illegal. The court of appeals affirmed, however, finding that the Supreme Court has never differentiated between *per se* and "rule of reason" allegations to determine if jurisdiction exists. The court also addressed the problem of relying on *per se* rules for certainty in the following manner:

> To say the least, it can be difficult to ascertain whether particular allegations are classified under *per se* or rule of reason restraint. *See White Motor Co. v. United States*, 372 U.S. 253, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963) (vertical restrictions not *per se*); *but see United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967) (vertical restraints are *per se*). *But see again Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L.Ed. 2d 568 (1977) (vertical restraints are not *per se*). The often elusive boundary separating the substantive analyses of *per se* and rule of reason restraints does not command a drastic jurisdictional differentiation.[196]

The diverse positions in *White Motor, Schwinn*, and *GTE Sylvania* regarding vertical restraints are not extraordinary. The *Fortner I*[197]-*Fortner II*[198] developments concerning tying arrangements also show the uncertainty of deeming a particular activity a *per se* violation. Even the "abso-

196. *Id.* at 1321 n.5. *See generally* Redlick, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979).

197. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969). United States Steel provided extremely attractive credit terms (100% financing, low credit, and no personal guarantees). Fortner sued alleging the transaction was an illegal tying arrangement with the credit being the tying product and the homes the tied product. The trial court granted summary judgment finding that U.S. Steel lacked sufficient power over the tying product (credit). The Supreme Court reversed and explained that "uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors." 394 U.S. at 505. *See generally* Dam, *Fortner Enterprises v. United States Steel: "Neither a Borrower, Nor a Lender Be"* 1969 S. CT. REV. 1.

198. United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977). On remand of the first *Fortner* case, the district court found as a matter of law that U.S. Steel was liable and submitted only the issue of damages to the jury. The court of appeals reversed and remanded for a trial on all issues. At the second trial, U.S. Steel was again found to be in violation, and the court of appeals affirmed. Both courts found that U.S. Steel had sufficient power in the credit market. The Supreme Court reversed finding that the uniqueness of the product is relevant only when competitors are barred in some way from offering the distinctive product: "The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." *Id.* at 622. *See generally* Jones, *The Two Faces of Fortner: Comment On A Recent Antitrust Opinion*, 78 COLUM. L. REV. 39 (1978).

lute" rule against price-fixing is not as unqualified as *Socony-Vacuum*[199] implied. The restraint in *Chicago Board of Trade*,[200] for example, involved price-fixing but was found to be reasonable. Thus, *per se* rules have sometimes added more confusion than clarity to the antitrust laws. The "bright line" between legal and illegal conduct under the Sherman Act is simply not bright enough to justify deviation from the traditional presumption that criminal conviction requires proof of intent.

The dominant motive for imposing strict liability when an offense is illegal *per se* is probably the egregious nature of the conduct. This is also the most dangerous reason to relieve the prosecution of its burden. *Per se* offenses, having been judicially identified as pernicious, are most likely to involve stiff penalties and to result in social stigma. Instead of a relaxation of procedural and substantive rights, they require strict adherence to all of the safeguards that our criminal justice system provides to one accused of a serious felony.[201]

A related concern is the prosecutorial difficulty engendered by requiring proof of intent. If the government must prove knowledge, or perhaps even purpose, a defendant may simply deny such knowledge or purpose, and the government's task will be nearly impossible.[202] The response to this argument is obvious: factfinders may and do infer subjective intent from objective facts and behavior.[203] Despite their denials, men and women have been executed because juries have found that they committed homicide with "malice aforethought."

The *Gillen* and *Brighton Building* cases amply demonstrate how unnecessary it is for courts to eliminate the intent element to obtain convictions. In each case, the evidence showed an overt agreement to fix prices or rig bids. Clearly, any reasonable factfinder would have found that the defendants knew and intended such obvious restraints of trade. As Professor Handler has stated:

> In the *per se* area — such as cases involving price-fixing, division of markets or other similar conduct — *Gypsum* might appear to place an added burden on the prosecution. This burden can, however, readily be met, for 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. Thus, in *per se* cases the new test may be verbally differ-

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

200. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). *See also* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

201. *See* Saltzman, *supra* note 33, at 1638-40; Sayre, *supra* note 75, at 79-80.

202. *See* Handler, *supra* note 124, at 1398.

203. W. LAFAVE & A. SCOTT, *supra* note 10, at 203.

ent from the old one, but the result is the same.[204]

If Professor Handler is suggesting a conclusive presumption of law, the suggestion is not consistent with *Gypsum* but he appears to be merely stating the obvious. It is not an onerous task to prove intent when the alleged conduct is a *per se* violation.

Even if proof of subjective intent does complicate the prosecutor's task, such difficulty is not a sound reason to eliminate intent as an element of a serious crime. Justice Jackson addressed this serious issue in *Morissette*:

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefits as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.[205]

In summary, neither the explicit nor implicit reasons that have caused some courts to except *per se* violations from the scope of *Gypsum* justify the exception. The *per se* rules are not clear enough to remedy the vagueness of the Sherman Act. Even when the violations are obvious, the serious consequences of conviction demand that traditional safeguards be afforded defendants.

VI. Conclusion

Gypsum was a sound and reasoned statement of law. While the Court's knowledge standard may be subject to criticism, the real wisdom of its opinion lies in its ordering of priorities. The Court implicitly established that when there is a conflict between antitrust precedents and significant principles of criminal law, the latter will prevail.

Criminal law, substantive as well as procedural, defines a fundamental aspect of the relationship between citizen and state in a democratic society. It determines when the state may deprive an individual of freedom or property, not for resolving a private dispute between citizens, but for punishing and ultimately shaping individual behavior. The serious implications to an accused of conviction plus the obvious danger of governmental abuse make it essential that fundamental principles of substantive criminal law be preserved. The requirement that only the morally culpable be punished as criminal is a persistent principle that the Court honored in *Gypsum*.

The antitrust laws, however, are also significant to a society that orders its economy through the discipline of a competitive market. Fortunately,

204. Handler, *supra* note 24, at 1399-1400.
205. 342 U.S. at 263.

there is no real conflict between the antitrust goals and the criminal law's principle that only the morally culpable be punished. Requiring criminal intent does not threaten the efficacy of the Sherman Act. Violators may be enjoined and compelled to pay civil damages regardless of their intent. *Gypsum* merely holds, consistent with criminal law tradition, that the most drastic sanction is available only for those who have a criminal intent.

The post-*Gypsum* cases have relied only on antitrust precedents and have ignored the required synthesis of antitrust and criminal law. The courts should have determined if the existence of a *per se* violation justifies the elimination of the fundamental precept of criminal intent. When viewed from the perspective of criminal jurisprudence, *per se* civil violations of the Sherman Act are not properly subject to strict criminal liability.

The post-*Gypsum* decisions also suggest difficulties in the uniform application of the Supreme Court's standard of culpability. This problem is a manifestation of a persistent antitrust dilemma. Antitrust cases are extraordinarily fact oriented and nuanced, and judicial attempts to make application of the Sherman Act more certain have never succeeded.[206] Thus, while the courts were in error when they completely dispensed with the intent requirement, their implicit finding that a uniform standard is inappropriate may be sound.

If the Supreme Court wishes to apply a single standard regardless of the circumstances of a specific case or the type of violation, it should reconsider the knowledge standard adopted in *Gypsum*. Business activities run the gamut from clearly illegal conduct to conduct which enjoys a strong presumption of legality (*per se* legal).[207] Strong arguments can be made that violations in the latter category should be the basis for a criminal conviction only upon a showing of specific intent in its broadest sense, that is, an intent to violate the law. Additionally, borderline restraints judged by a classic rule of reason analysis should require a "purposeful" standard, especially if the activity has clearly legal as well as possibly illegal aspects. If a variable standard is unacceptable, the purposeful criterion would be less likely to do an injustice to alleged antitrust violators than the knowledge standard applied in *Gypsum*.

The Supreme Court decided in *Gypsum* that intent is a necessary element of a criminal Sherman Act prosecution. The decision was a significant departure from the prior judicial approach to criminal antitrust suits

206. For a discussion of the legislative attempts to provide clarity, see E. GELLHORN, *supra* note 176, at 28-30. For a discussion of the failure of the courts to provide clarity, see text accompanying notes 195-200 *supra*.

207. *See* Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957).

because the propriety of the lower courts' rulings was judged by the standards of criminal law. Future courts should continue to develop the substantive and procedural content of the criminal applications of the Sherman Act so that it is consistent with the principles of criminal jurisprudence. Under these principles, the clarity and gravity of *per se* offenses do not justify an exception to the general rule that intent is an essential element of a crime.

ADDENDUM

In *United States v. Society of Independent Gasoline Marketers of America*[208] (*SIGMA*), the United States Court of Appeals for the Fourth Circuit added the weight of its authority to the position that *Gypsum*'s intent requirement applies only to non-*per se* offenses. A brief review of the facts in *SIGMA*, and the manner in which the court distinguished *Gypsum*, demonstrates how seriously the federal appellate courts are eroding the principles announced in *Gypsum*.

In *SIGMA*, a number of "private brand" gasoline companies, several individual officers, and a trade association (SIGMA) were convicted of price-fixing. The evidence established that private brand companies must compete by charging lower prices than the major producers and that competition occurs at the local market level. Industry publications provided information regarding the current and prospective national pricing activities of major oil companies. To establish competitive prices, however, a private brand producer requires information about the local prices of both its major and private brand competitors. The trial court found that SIGMA was created in part to gather and disseminate such information.[209]

On appeal, the Fourth Circuit held that intent did not have to be proven to support the criminal convictions. It distinguished *Gypsum* as follows:

> *Gypsum* involved the practice of inter-seller price verification, a practice which is not in itself, unlawful *per se*.
>
> . . . .
>
> . . . Here the indictment charged the defendants with a conspiracy to fix prices, and the "exchange of information" was merely one of the activities by which the alleged agreement was effectuated.[210]

This distinction cannot withstand scrutiny. The defendants in *Gypsum* were charged with price-fixing,and price communications were identified in the indictments as one of thirteen different types of activities used to

208. 1980-81 Trade Cas. ¶ 63,097 (4th Cir. Dec. 26, 1979).
209. *Id.* at 77,453-54.
210. *Id.* at 77,454.

effectuate the conspiracy.[211] Furthermore, the accumulation and dissemination of pricing information by a trade association is, like price verification, not *per se* illegal.[212] Therefore, neither the differences between the offenses charged in *SIGMA* and *Gypsum*, nor the methods alleged to have facilitated the offenses justify the different legal standard adopted by the Fourth Circuit.

The implications of *SIGMA*'s restrictive view of *Gypsum* becomes readily apparent when the conduct generally giving rise to criminal antitrust prosecutions is considered. For example, in each of the fifty-four criminal antitrust actions initiated by the Department of Justice between July 1, 1976 and September 30, 1978, defendants were charged with price-fixing, bid-rigging, and/or territorial or customer allocations.[213] The possibility of a criminal prosecution for conduct which is judged by the rule of reason is remote at best. Thus, since criminal antitrust prosecutions are essentially reserved for those engaged in activities which are *per se* illegal, the *SIGMA* court's limitation on the legal standard regarding criminal intent adopted in *Gypsum* renders the *Gypsum* decision an insignificant development in criminal antitrust law.

Gypsum, however, represented a sound and novel application of an important principle of criminal law in an antitrust context.[214] Yet, without seriously addressing the principle of criminal jurisprudence motivating the Supreme Court in *Gypsum*, three courts of appeals have now seriously limited its application. If the distinction stated in *SIGMA* can justify the different result, *Gypsum* has effectively been rendered *sui generis*. An artfully drafted indictment, alleging only *per se* offenses, can avoid the requirement that intent be proven in a criminal antitrust prosecution. The legal precept that moral culpability is an essential element of criminality, however, is fundamental. *Gypsum* is too principled a decision to be avoided so readily; certainly, it should not be discussed without a more reasoned analysis than provided by the court in *SIGMA*.

---

211. 438 U.S. at 427-28. *See* notes 25-26 and accompanying text *supra*.

212. *See, e.g.*, Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925); note 28 *supra*.

213. Antitrust Division, Department of Justice, Antitrust Cases Initiated and Terminated: July 1, 1976 - September 30, 1978, Rep. No. 9-4.

214. *See* notes 32-44 and accompanying text *supra*.