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Richard A. Wirtz

PURPOSE AND EFFECT IN SHERMAN ACT CONSPIRACIES

Richard S. Wirtz*

[A] conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

—Chief Justice Shaw in *Commonwealth v. Hunt*[1]

Every corporation engaged in business must be responsible for the tendency of its business, whether lawful or unlawful. . . . To require the intentions of a corporation to be proven . . . would defeat the object of the law.

—Senator John Sherman on the Senate Floor, March 21, 1890[2]

The offense of conspiracy, it is said, is predominantly mental.[3] Two "intents" are required for its commission—the intent to agree, and the intent to achieve an unlawful objective.[4] An agreement among two or more persons to achieve an unlawful objective is a crime though it is never implemented[5] and though the parties, had they tried to implement it, would have failed.[6] What makes it unlawful as a conspiracy is not its actual or probable effects, but the "common purpose to attain an objective covered by the law."[7]

These doctrines have substantially influenced the construction by lower federal courts of the proscription in section 1 of the Sherman Act of 1890[8] against "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." Justice Holmes' characterization of conspiracy as a "partnership in criminal purposes"[9] has found its way into pattern jury instructions frequently given in section 1 cases:

* Associate Professor of Law, University of Tennessee; A.B., 1961, Amherst College; M.P.A., 1963, Princeton University; J.D., 1970, Stanford University. Thanks to Neil Cohen, James Gobert, Jerry Phillips, and James Rahl for encouragement and criticism, and to Sandra McCrea and Deborah Smith for help in research.

1. 45 Mass. (4 Met.) 111, 123 (1842).
2. 21 CONG. REC. 2457 (1890).
3. *E.g.*, Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 632 (1941).
4. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 61, at 464 (1972).
5. *Id.* § 62, at 476.
6. *Id.* § 62, at 474.
7. *Id.* § 61, at 464.
8. Ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1976)).
9. United States v. Kissel, 218 U.S. 601, 608 (1910).

> A conspiracy is a combination of two or more persons, by concerted action, to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of "partnership in criminal purposes," in which every member becomes the agent of every other member.[10]

Juries have been routinely instructed that, to form a section 1 combination or conspiracy, two or more persons must have an agreement or understanding that they will act together for an "unlawful purpose."[11] They may be told that the defendants have violated the law only if "the purpose of the contract, or of the conspiracy was to achieve an objective that

10. 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 27.04 (3d ed. 1977). *See generally* ABA ANTITRUST SECTION, JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 1964–1976 (1979) [hereinafter cited as CRIMINAL JURY INSTRUCTIONS] (compilation of jury instructions given in criminal cases under the antitrust laws). The quoted instruction was given, for example, in the following cases: United States v. General Motors Corp., 352 F. Supp. 1071 (E.D. Mich. 1973); United States v. Colley Enterprises, Inc., Crim. No. W–72–CR–34 (W.D. Tex. 1973); United States v. Oregon Restaurant & Beverage Ass'n, Crim. No. 68–162 (D. Or. 1968), *aff'd*, 429 F.2d 516 (9th Cir. 1970); United States v. Rubino Builders, Inc., 1967 Trade Cas. (CCH) ¶ 72,076 (D. Md. Apr. 12, 1967). *See* CRIMINAL JURY INSTRUCTIONS, *supra*, ch. 10. Note also the instruction given by the trial court and approved by the Fifth Circuit in Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978), a civil case, as reported in ABA ANTITRUST SECTION, ANTITRUST CIVIL JURY INSTRUCTIONS 74 (1980) [hereinafter cited as 1980 CIVIL JURY INSTRUCTIONS] (an antitrust conspiracy is "a kind of partnership of unlawful purposes").

11. *See, e.g.*, 1980 CIVIL JURY INSTRUCTIONS, *supra* note 10, at 79 (reporting the instruction given in Harlem River Consumers Coop. v. Associated Grocers, Inc., 408 F. Supp. 1251 (S.D.N.Y. 1976)) ("In determining whether each defendant became a member of the conspiracy you must determine not only whether the defendant you are considering participated in it, but also whether that defendant did so with knowledge of its unlawful purposes"); CRIMINAL JURY INSTRUCTIONS, *supra* note 10, at 68 (instruction given in United States v. Chas. Pfizer & Co., 281 F. Supp. 837 (S.D.N.Y. 1968), *rev'd on other grounds*, 426 F.2d 32 (2d Cir. 1970), *aff'd by an equally divided court*, 404 U.S. 548 (1972) (To be guilty of a § 1 conspiracy, "two or more persons must enter into a mutual agreement or understanding that they will act together for an unlawful purpose. . . . It is the agreement to act together for an unlawful objective that constitutes the gist of this crime"); *id.* at 55 (instruction given in United States v. Interborough Delicatessen Dealers Ass'n, 23 F. Supp. 230 (S.D.N.Y. 1964)) (To constitute a Sherman Act conspiracy, it "is essential . . . that some character of manner or communication take place between [two or more persons] sufficient to enable them to reach a definite mutual understanding of [a] common unlawful objective or purpose to be thereafter accomplished").

Similar instructions were given in the following cases, among others: Wood v. Gulf Oil Corp., No. Mo–77–CA–90 (W.D. Tex. 1978), *see* 1980 CIVIL JURY INSTRUCTIONS, *supra* note 10, at 81; United States v. Bridge Constr. Corp., Crim. No. 64–28 (S.D. Me. 1965), United States v. H. P. Hood & Sons, Inc., Crim. No. 63–110–c (D. Mass. 1965), and United States v. Johns-Manville Corp., 231 F. Supp. 690 (E.D. Pa. 1964), *see* CRIMINAL JURY INSTRUCTIONS, *supra* note 10, at 44, 53, 58; Crown Packers v. Peelers Co., Civ. No. 2797 (W.D. Wash. 1966), and Adams Dairy Co. v. Saint Louis Dairy Co. (E.D. Mo.), *aff'd*, 260 F.2d 46 (8th Cir. 1958), *see* ABA ANTITRUST SECTION, ANTITRUST CIVIL JURY INSTRUCTIONS 28, 31 (1972) [hereinafter cited as 1972 CIVIL JURY INSTRUCTIONS].

would create an unreasonable restraint on interstate . . . commerce."[12] Sometimes the forbidden objective is defined in specific terms;[13] often it is cast more generally as a purpose to "stifle or exclude competition"[14] or to "restrain trade."[15]

However well these statements comport with traditional conspiracy doctrine, as instructions on the law of Sherman Act conspiracies they are anomalous. For more than eighty years the Supreme Court has consistently held that wrongful or unlawful purpose is not an indispensable element of the offense defined by section 1 of the Sherman Act. In 1897, in *United States v. Trans-Missouri Freight Association,*[16] the Court struck down the defendants' rate-fixing scheme on the ground that an agreement whose "direct, immediate, and necessary effect" is to restrain trade or commerce is unlawful "without proof . . . that [it] was entered into for the purpose of restraining trade."[17] The principle applied was well established in the common law on which the drafters of the Sherman Act drew for guidance in 1890.[18] Spokesmen for both parties endorsed it on the floor of the Senate during the 1890 debates.[19] In subsequent decisions the

12. SEVENTH CIRCUIT JUDICIAL CONFERENCE COMMITTEE ON JURY INSTRUCTIONS, MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES § 801–1; *cf.* 1980 CIVIL JURY INSTRUCTIONS, *supra* note 10, at 79 (reporting the instruction given by the trial court in Hanson v. Shell Oil Co. (D. Ariz.), *aff'd,* 541 F.2d 1352 (9th Cir. 1976)) ("It is enough that Defendant . . . be shown to have knowledge that the party whom he was assisting was engaged in a common and unlawful plan").

13. *See, e.g.,* CRIMINAL JURY INSTRUCTIONS, *supra* note 10, at 50 (reporting the instruction given in United States v. Federación de Transporte, Crim. No. 870 (D.P.R. 1971)) ("In this case, conspiracy means an agreement, arrived at by two or more persons, . . . for the purpose of raising truck rates . . . .").

14. *See, e.g.,* 1972 CIVIL JURY INSTRUCTIONS, *supra* note 11, at 25 (reporting the instruction given in Paramount Loew's (Syndicate Theatres, Inc.) v. Warner Bros. (D. Ind. 1963)) ("A combination is a joining or uniting together between two or more persons having for its object to stifle or exclude competition, or otherwise to interfere with the normal course of trade under conditions of free competition").

15. *See, e.g., id.* at 39 (reporting the instruction given in Westcoast Broadcasting Co. v. Jerrold Electronics Corp. [*sic*] (W.D. Wash.), *aff'd,* 341 F.2d 653 (9th Cir.), *cert. denied,* 382 U.S. 817 (1965)):

> A combination or conspiracy, as used in the antitrust laws . . . means an agreement . . . directed toward unreasonable restraint . . . of interstate trade and commerce. . . . In other words, if restraint . . . of interstate trade or commerce is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in furtherance thereof, every one of such persons becomes a member of the combination or conspiracy.

16. 166 U.S. 290 (1897).

17. *Id.* at 342.

18. *See* text accompanying notes 90–92 *infra.*

19. In the debate on the bill, there was considerable discussion of the matter of "intent." Senator George of Alabama, a leader of the Democratic opposition to the bill, argued that to require proof as to the defendants' state of mind would render the new legislation almost wholly ineffective:

> [I]t must be noted that the bill deals only with agreements, arrangements, and combinations. It denounces and punishes these when made with a certain intent, but it neither punishes nor af-

Court has repeatedly confirmed it.[20] In section 1 cases, proof of a purpose to injure competition is relevant, but it is not essential: the Act condemns agreements that are unreasonably anticompetitive in *purpose or effect*.[21]

At the heart of the problem is the fact that the antitrust laws do not proscribe "restraint of trade" as such.[22] Since there is no substantive offense corresponding to the offense of "contract, combination . . . or conspiracy" defined by section 1, if anticompetitive purpose were required for a violation, concerted action resulting in severe and unjustified injury

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fects in the least any act done in pursuance of these combinations. It . . . treats these things when done as perfectly lawful, as harmless, even meritorious.

. . . .

[This requirement of specific intent] is . . . a very serious obstacle . . . in enforcing the bill as a law.

21 CONG. REC. 1765, 1766 (1890). Senator Sherman, once he got the floor, set the record straight. Senator George had the wrong text before him: "The word 'intention' is not in the bill. . . . It was a proposed amendment . . . and was never adopted." *Id.* at 2461. In principle, Senator George and the other opponents of an "intent" requirement were absolutely right:

In providing a remedy the intention of the combination is immaterial. . . . If the natural effects of [the acts of a corporation] are injurious, if they tend to produce evil results, if their policy is denounced by the law as against the common good, it may be restrained, be punished with a penalty or with damages, and in a proper case it may be deprived of its corporate powers and franchises. . . .

. . . .

. . . Every corporation engaged in business must be responsible for the tendency of its business, whether lawful or unlawful. . . . To require the intentions of a corporation to be proven . . . would defeat the object of the law.

Id. at 2456–57 (remarks of Sen. Sherman). *See generally* H. THORELLI, THE FEDERAL ANTITRUST POLICY 174–79 (1955).

20. *See* text accompanying notes 108–127 *infra*.

21. McLain v. Real Estate Bd., 444 U.S. 232, 243 (1980) (stating the principle for civil cases); United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978)(same); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953); United States v. Griffith, 334 U.S. 100, 105 (1948); Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 577 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377, 400 (1921); United States v. American Tobacco Co., 221 U.S. 106, 179 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911); Joe Reguiera, Inc. v. American Distilling Co., 642 F.2d 826, 831–32 (5th Cir. 1981); Program Eng'r. Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1195 (9th Cir. 1980); Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1115–16 (5th Cir. 1979); Foster v. Maryland State Sav. & Loan Ass'n, 590 F.2d 928, 933 n.20 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1300 (9th Cir. 1978); Oreck Corp. v. Whirlpool Corp., 563 F.2d 54, 58 (2d Cir. 1977), *cert. denied*, 439 U.S. 946 (1978); Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466, 470 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); Joseph E. Seagram & Sons., Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); Bank of Utah v. Commercial Sec. Bank, 369 F.2d 19, 24 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 71 (1977).

22. [T]o the common law lawyers of 1890, a direct prohibition of restraint of trade would have seemed meaningless. The phrase was the creature of the English courts in private suits for the enforcement of an agreement by the defendant to refrain from competing with the plaintiff . . . . Restraint of trade could not come into being without the exchange of promises of two persons.

Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743, 745 (1950).

to competition would frequently escape the condemnation of the law. Repeatedly, in order to reach such conduct, the Supreme Court has held that anticompetitive purpose is not essential to a section 1 violation.[23] In jury instructions in both civil and criminal cases, these holdings are occasionally acknowledged.[24] To make the instructions intelligible to jurors in particular cases, however, judges have had to grapple with difficult questions that the Court has not fully answered: (1) What exactly is a "contract, combination . . . or conspiracy" under section 1, if not a "partnership in criminal purposes"? (2) How, except by reference to the parties' purposes, is a court to decide whether a given restraint on competition rises to the level of "restraint of trade"? (3) What, if anything, justifies the application of the severe sanctions prescribed by Congress for violations of the Sherman Act[25] to persons entirely innocent of any conscious wrongdoing? Judges facing these questions have frequently fallen back on safe, traditional formulations of conspiracy under which such questions do not arise.

Contributing to the courts' difficulties in this area is a factor that may at first appear ironic: great importance *is* assigned, in the law of section 1, to the actor's purpose. While a section 1 "contract, combination . . . or conspiracy" may be formed without the connivance of the parties in a deliberate scheme to subvert competition, proof of such a scheme clearly suffices.[26] Though proof that the parties acted with a purpose to injure competition is not essential to a finding that their agreement was in restraint of trade, proof that this was their sole or primary purpose is held to be conclusive against them on that issue.[27]

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23. The cases are discussed in the text accompanying notes 93–127 *infra*.

24. *See, e.g.*, 1972 CIVIL JURY INSTRUCTIONS, *supra* note 11, at 3 (reporting the instruction given in Kenmore-Louis Theatre, Inc. v. Loew's Boston Theatres, Inc., Civ. No. 59–184–J (D. Mass. 1963))("[I]n order to constitute a violation of Section 1 . . . a conspiracy must be for the purpose of or have the effect of unreasonably restraining . . . trade . . . .").

25. Section 1 of the Sherman Act as enacted provided that "[e]very person who shall make any such contract or engage in any such combination or conspiracy, shall be guilty of a misdemeanor . . . ." Ch. 647, § 1, 26 Stat. 209 (1890). In 1974 Congress raised the offense to a felony. Antitrust Procedures & Penalties Act, Pub. L. No. 93–528, § 3, 88 Stat. 1708 (1974) (codified at 15 U.S.C. § 1 (1976)). Criminal violations are punishable by imprisonment for up to three years or by fines up to $100,000 for an individual and up to $1,000,000 for corporations, or by both fine and imprisonment.

Section 4 of the Clayton Act, enacted in 1914 to replace a similar provision of the original Sherman Act, provides "[t]hat any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Ch. 323, § 4, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 15 (1976)).

26. *See, e.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

27. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *see* text accompanying notes 51–70 *infra*.

Recently the Supreme Court, in *United States v. United States Gypsum Co.*,[28] has for the first time in the history of the Sherman Act squarely addressed the issue of the relevance of purpose in connection with *criminal* violations of section 1. In its carefully worded opinion the Court, after considering at length whether a purpose to restrain trade is an indispensable element of a section 1 violation, concluded that it is not.[29] It held, however, that to sustain a criminal conviction it must be shown that the defendants acted with *knowledge* that their conduct would have anticompetitive effects.[30] Thus *Gypsum*, while it reinforces prior holdings establishing that bad purpose is inessential in section 1 cases, inserts a new and, inevitably, troublesome variable into the calculus with which lawyers, entrepreneurs, and lower courts must deal.

The *Gypsum* decision supplies the proper occasion for a renewed effort to sort out and line up the Court's pronouncements since *Trans-Missouri* concerning the respective functions in cases arising under section 1 of proof of anticompetitive purpose and effect. Once this is done, a reasonably coherent body of doctrine emerges and the unresolved issues come more clearly into focus. The first two sections of this article deal with purpose and effect as determinants, respectively, of "restraint of trade" and of "contract, combination . . . and conspiracy."[31] The third section takes up the problems that arise when the doctrine that bad purpose need not be shown in section 1 cases—a doctrine developed primarily in suits in equity—is applied to criminal cases and civil actions for treble damages.[32]

I. RESTRAINT OF TRADE

In the analysis of restraint of trade under section 1, the proper starting points are the Rule of Reason decisions of 1911. In *Standard Oil Co. v. United States*[33] and *United States v. American Tobacco Co.*,[34] the Supreme Court declared that section 1 prohibits only those "contracts or

28. 438 U.S. 422 (1978).

29. *Id.* at 443.

30. *Id.*

31. Because the criteria for contract, combination, and conspiracy have been shaped to fit the criteria for restraint of trade, it is useful to take up the latter first.

32. Throughout this article, the term "agreement" will serve as shorthand for the Sherman Act's expression "contract, combination in the form of trust or otherwise, or conspiracy." In generalizing about the conditions under which agreements violate § 1, I mean to refer only to agreements that satisfy the § 1 requirement of trade or commerce "among the several states, or with foreign nations." 15 U.S.C. § 1 (1976).

33. 221 U.S. 1 (1911).

34. 221 U.S. 106 (1911).

acts which [are] *unreasonably* restrictive of competitive conditions,"[35] and fixed the basic terms of the inquiry into reasonableness. Under the Court's formulation in *Standard Oil*, a restraint may be determined to be unreasonable "*either* from the nature or character of the contract or act *or* where the [facts] give rise to the inference . . . that [it was] entered into or done with the intent to do wrong to the general public."[36] In *American Tobacco* the Court restated the categories more succinctly: acts and agreements might be held to violate section 1 "either because of their inherent nature or effect or because of [their] evident purpose."[37]

From these decisions springs the doctrine that contracts, combinations and conspiracies violate section 1 when they are unreasonably anticompetitive in either purpose *or* effect.[38] Agreements that "eliminate," "hamper," "injure," "restrict," "restrain," "limit," "harm," "diminish," "chill," or "clog" competition may be unlawful under section 1 even though the parties' purposes are wholly neutral or benign.[39] Conversely, "even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends";[40] agreements entered into for the purpose of injuring or of restraining competition may violate section 1, though they have had no demonstrable impact.

In principle, then, there are two branches to the Rule of Reason—two tests for reasonableness, two ways an agreement may fail. That much is clear. What is less clear is the nature and relationship of those two tests. The problem is complicated by the fact that, in the course of construing section 1, the Supreme Court has laid down "per se rules" defining classes of agreements "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable."[41] These rules have taken on lives of their own and, in any treatment of purpose and effect under section 1, they require separate consideration.

From an analysis of the major decisions under the Rule of Reason, two substantially independent tests for "restraint of trade" emerge—one for agreements entered into for anticompetitive purposes, the other for agreements with demonstrable anticompetitive effects. Each test has its peculiar strengths and weaknesses and its peculiar function. Each contributes something to the per se rules.

35. *Standard Oil*, 221 U.S. at 58 (emphasis added); *see American Tobacco*, 221 U.S. at 179.

36. 221 U.S. at 58 (emphasis added).

37. 221 U.S. at 179.

38. *See* note 21 *supra*; *see also* R. BORK, THE ANTITRUST PARADOX 36–37 (1978) (discussion of Justice White's opinion in *American Tobacco*).

39. *See* text accompanying notes 93–175 & 196–209 *infra*.

40. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622 (1953).

41. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

A. *Rule of Reason: Purpose*

In the context of conspiracy, "purpose" refers to the object or objects consciously sought by the parties to the agreement.[42] In section 1 cases the focus is on anticompetitive purpose—the purpose to cause anticompetitive effects.

Agreements entered into for anticompetitive purposes resemble traditional conspiracies, and in section 1 cases involving such agreements many traditional conspiracy doctrines are held to apply. Thus, an agreement may violate section 1 though no overt act has been committed in furtherance of it,[43] though it has failed of its anticompetitive purpose,[44] and though in retrospect it is clear that the parties never had the power to achieve that purpose.[45] "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other."[46]

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42. In § 1 cases the courts generally use the terms "intent" and "intention" to mean "purpose" as here defined. As the Supreme Court noted recently, "intent" has a broader significance in the criminal law, encompassing "knowledge" as well as "purpose." United States v. United States Gypsum Co., 438 U.S. 422, 443–46 (1978). Since, after *Gypsum*, the distinction between knowledge and purpose is material in criminal cases under § 1, the ambiguity in the term "intent" is likely to prove troublesome in these cases.

Another term often used in the cases interchangeably with "purpose" is "motive." Some writers on the mental aspects of the § 1 offense have defined "purpose" and "motive" to mean different things. *See, e.g.*, Bishop, *Criminal Intent as Applied to Conspiracy Under the Sherman Act*, 11 VA. L. REV. 417, 420–21 (1925); Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 709–12 (1962). That seems to me a confusing departure from conventional usage in the § 1 cases. What the cases call a "good motive" usually corresponds, under the definitions used here, to a purpose to do something either neutral in the calculus of reasonable restraints on competition, or positive on the side of saving the agreement from condemnation. Note, for example, the Supreme Court's classic dictum in Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912), to the effect that the policies underlying § 1 cannot "be evaded by good motives." Usually, by asserting a "good motive," the defendant is claiming either that it was not his purpose to injure competition in any respect, or that he had at least one other relevant purpose as well.

43. The seminal decision is Nash v. United States, 229 U.S. 373, 378 (1913). *See* Fiswick v. United States, 329 U.S. 211, 216 n.4 (1946); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977); United States v. Johns-Manville Corp., 213 F. Supp. 65, 68 (E.D. Pa. 1962); United States v. Sherwin-Williams Co., 9 F.R.D. 69, 70 (W.D. Pa. 1949).

44. *See* United States v. Griffith, 334 U.S. 100, 105 (1948). Another good example is United States v. Trenton Potteries Co., 273 U.S. 392, 402–03 (1927), in which the Court approved an instruction to the jury in substance that:

> [I]f . . . the respondents did conspire to restrain trade as charged in the indictment, then it was immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part, or whether an effort was made to carry the object of the conspiracy into effect.

45. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. Central States Theatre Corp., 187 F. Supp. 114, 147 (D. Neb. 1960).

46. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) (quoting Sherman Act, § 1, 15 U.S.C. § 1 (1976)) (ellipsis in original).

Under the law as it stood before 1911, a good case could be made that section 1 condemned every agreement entered into for the purpose of restraining competition in any way.[47] The 1911 Rule of Reason decisions changed all that. After *Standard Oil* and *American Tobacco,* an agreement with "direct and necessary" anticompetitive effects can be defended under section 1 on the ground that it is not *unreasonably* restrictive of competitive conditions—that on balance it does not suppress competition, but instead regulates and promotes it. Quite clearly, the dispensation under the Rule of Reason is not confined to agreements from which the anticompetitive effects result by accident. The Court has extended it to a rule promulgated by a commodities exchange which had as its clear purpose the elimination of bargaining over price in the sale of grain during certain hours of the day[48] and to resale restrictions imposed by a manufacturer on its agents or consignees for the purpose of reducing rivalry among its retailers.[49] Within limits—and at the risk of later being found to have violated those limits by "a jury of less competent men"[50]—firms may lawfully seek to reduce competition by agreement.

The question, then, is under what conditions anticompetitive purpose is conclusive against the defendants on the issue of "restraint of trade." For the answer, one must look first to the seminal Rule of Reason cases, *Standard Oil* and *American Tobacco,* in which the Court's decisions condemning the two great trusts turned on its findings concerning the purposes for which they were formed.

From the evidence in the Rule of Reason cases it was apparently quite plain that the defendants had monopolized their respective industries by design. That in itself might have seemed to be enough to remove their agreements from the class of contracts "entered into . . . with [a] legitimate purpose,"[51] and place them squarely in the class of those "entered into . . . with the intent to do wrong to the general public."[52] The Court, however, did not view the question of "reasonableness" in that way. In each case, rather than rest the decision on the ground of deliberate mono-

47. In the early cases the Court struck down agreements on the simple stated ground that their "direct and necessary effect" was to restrain trade. *See* text accompanying notes 103–107 *infra.* If, as these decisions strongly implied, nothing could save an agreement with "direct and necessary" anticompetitive effects, then, unless the Court was prepared (as it was not) to accept ineffectuality as a defense, agreements whereby the parties sought to *cause* anticompetitive effects would have been equally indefensible. *Cf.* United States v. Jellico Mountain Coal & Coke Co., 46 F. 432, 436 (C.C.M.D. Tenn. 1891)(defendants liable under § 1 on the strength of anticompetitive "purposes and intentions," without more).

48. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

49. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 381 (1967).

50. Nash v. United States, 229 U.S. 373, 376 (1913).

51. *Standard Oil,* 221 U.S. at 58.

52. *Id.*

polization, the Chief Justice (writing for himself and seven other Justices) pursued at great length a further, more elusive fact concerning the defendants' state of mind. The facts in the oil case gave rise, the Court said, to the "presumption of [an] intent and purpose to maintain the dominancy over the oil industry . . . with the purpose of excluding others from the trade."[53] The defendants were unable to rebut that presumption; indeed, it was "made conclusive" by a careful consideration of the tactics by which the defendants had secured their control.[54] The function of the presumption, it appears, was to shift to the defendants the burden of clarifying for the Court their *ultimate* purposes. Proof merely that they sought monopoly, though it raised a presumption of illegality, did not foreclose the possibility of a defense; the defendants were entitled to show, if they could, that they had sought it for good reasons. From the opinions no criteria for "good reasons" really emerge. In neither case were the proprietors of the great trusts able to persuade the Court that they had had any end in view more noble than to "drive others from the field and to exclude them from their right to trade."[55] What clearly emerges from the opinions is the Court's sense of its duty, before striking down agreements monopolistic in both purpose and effect, to try to determine what the monopolists were *really* trying to do.[56]

This proposition—that the true test of legality in a section 1 case is what the parties were *really* trying to do—emerges only by painful implication from the long and difficult opinions of the Court in *American Tobacco* and *Standard Oil*. The case most often cited for this proposition is *United States v. Addyston Pipe & Steel Co.*,[57] decided in 1898 by the Sixth Circuit in an opinion written by Judge (later Chief Justice) William Howard Taft. The record in *Addyston Pipe* disclosed an elaborate scheme for raising prices by rigged bids, defended by the parties on the ground that the only competition they sought to prevent was "ruinous competition."[58] The trial judge dismissed the bill and the Government appealed. After a lengthy review of the authorities, the Sixth Circuit reversed. Recognizing that not all restraints were prohibited either at common law or by the Sherman Act,[59] Judge Taft observed that one line of authority was clear: "[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful

53. *Id.* at 75.
54. *Id.*
55. *Id.* at 76; *see American Tobacco*, 221 U.S. at 181–83.
56. *See* R. BORK, *supra* note 38, at 37–38.
57. 85 F. 271 (6th Cir 1898), *aff'd*, 175 U.S. 211 (1899).
58. *Id.* at 279.
59. *Id.* at 282.

contract, and necessary to protect the covenantee . . . ."[60] If the contract had a lawful main purpose, its anticompetitive provisions were void if they "exceed[ed] the necessity presented" by that purpose;[61] if the contract had no purpose other than to restrain competition, it was void altogether. And since any contract or covenant void at common law as a restraint of trade fell, after 1890, within the prohibition of section 1 of the Sherman Act if the trade it restrained was interstate, the agreement before the court—a concerted attempt to suppress competition in sales to several states with no lawful purpose whatsoever to redeem it—was in clear violation of the federal law.[62]

Judge Taft's opinion in *Addyston Pipe* has had a distinguished career. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[63] decided in the same term as *Standard Oil* and *American Tobacco,* the Supreme Court reversed its earlier position[64] and expressly endorsed Judge Taft's reasoning. It has renewed that endorsement repeatedly since.[65] Commentators have praised the opinion;[66] lower courts rely on it.[67] On the whole, its doctrines have proven far more serviceable than any others in defining the

60. *Id.*

61. *Id.*

62. *Id.* at 278–79.

63. 220 U.S. 373 (1911).

64. The privilege of writing the Court's opinion affirming the Sixth Circuit's decision in *Addyston Pipe* fell to Justice Peckham. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). In his earlier opinion for the Court in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 329 (1897), Justice Peckham had dismissed the "lawful main purpose" doctrine as irrelevant to the Sherman Act. In his opinion in *Addyston Pipe,* he omitted any reference to Taft's main-purpose rationale, resting the Court's affirmance instead on "the necessary effect of the combination." 175 U.S. at 235–38, 245.

65. *E.g.,* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689, 696 (1978); Apex Hosiery Co. v. Leader, 310 U.S. 469, 497–98 (1940); Cline v. Frink Dairy Co., 274 U.S. 445, 462 (1927); *cf.* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 622 (1953) (sustaining vertically imposed restraint on the ground that it was "predominantly motivated" by "legitimate business aims"); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951) (affirming judgment for Government on findings that trademark licensing restrictions, reasonable on their face, were "subsidiary and secondary to the central purpose of allocating trade territory").

66. One prominent enthusiast is Professor Robert Bork of Yale, former Solicitor General of the United States and Assistant Attorney General for Antitrust: "[G]iven the time at which it was written, *Addyston* must rank as one of the greatest, if not the greatest, antitrust opinions in the history of the law. . . . [It] may well have been the high-water mark of rational antitrust doctrine." R. BORK, *supra* note 38, at 26, 30.

67. Among the more recent decisions are: Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978); Edwin K. Williams & Co. v. Edwin K. Williams & Co.—East, 542 F.2d 1053, 1061 (9th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); Golden v. Kentile Floors, Inc., 512 F.2d 838, 844 (5th Cir. 1975); Tripoli Co. v. Wella Corp., 425 F.2d 932, 936 (3d Cir.), *cert. denied,* 400 U.S. 831 (1970); Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252, 255–56 (D.N.J. 1975), *aff'd,* 533 F.2d 96 (3d Cir.), *cert. denied,* 429 U.S. 860 (1976).

class of those agreements unlawful under section 1 because (in the terminology of *Standard Oil*) they have been "entered into . . . with the intent to do wrong to the general public."[68]

The "lawful main purpose" doctrine reflects the common law's abiding mistrust of agreements entered into for the purpose of stifling competition. When competition is stifled, the public is injured and, therefore, unless the parties have misjudged their power in the market, their agreement will surely do harm. The question is whether in a given case there is a reasonable likelihood that it will do equivalent good. In the usual case there is no such likelihood, as the parties are pursuing purely private gain at the public's expense. In those few cases, however, in which the parties to the agreement are pursuing a larger end—increased efficiency, or the enhanced ability to compete—and are suppressing competition to that end in a limited way, their interest in suppressing competition may coincide with the public interest. To decide such cases, the doctrine shifts the burden of evaluation from the court to the parties themselves. The controlling question is whether the parties' lawful purpose was their main one. No judge or juror deciding a case on main-purpose grounds need worry that he or she has assumed "the power to say . . . how much restraint of competition is in the public interest, and how much is not":[69] the balance is struck in the minds and hearts of the defendants.[70]

Clearly this approach has much to be said for it. There is a healthy simplicity to a rule that condemns, in every context under the Act and without reservation, every agreement entered into primarily for anticompetitive purposes. Where there is no lawful main purpose—where the restraint has been imposed solely or primarily for anticompetitive purposes, with "lawful" objectives secondary at best—the desirability of deterrence is very great and the equities favoring the parties generally very slight. If in a given case benefits flow to the public from such an agreement, it is highly unlikely that the restraint chosen by the parties was really necessary to their attainment. In the specific context of suits in equity, the rule enables the court to frame a decree that will promote competition in

68. 221 U.S. at 58.

69. United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

70. Sixteen years after his decision in *Addyston Pipe*—three years after *Standard Oil* and *American Tobacco*—Taft wrote:

> No man who reads [the opinions in the decided cases under §1] need be doubtful whether, when he is making a business arrangement, he is violating the law or not. He can search his own heart. . . . [I]f what he is going to do is to reduce competition and gain control of the business in any particular branch, if that is his main purpose and reduction of competition is not a mere incidental result, if except for that purpose he would not go into the arrangement, then he must know he is violating the law, and no sophistry, no pretense . . . need mislead him.

W. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 96 (1914).

furtherance of the objectives of the Act without the expense, frustration, and delay attendant on trial of the full range of the agreement's actual and probable effects.[71]

Appealing and functional though this doctrine is, problems arise in its application which the opinions tend to gloss over. Several of these are worth attention. None, I believe, represents a fundamental flaw.

First, there is the question of whose purposes control. The opinions often refer to the purpose of the contract or the agreement. This usage is appropriate for agreements like the one in *Addyston Pipe,* in which the relevant purposes of all parties are the same. It is inappropriate in many other kinds of cases that frequently arise, including, for example, the case in which a manufacturer extracts an agreement from a distributor not to resell the manufacturer's product below a certain price. The distributor may or may not welcome the restriction. Though the distributor knows what the effect of adherence will be, and may in fact intend to adhere, unless termination of price competition is the conscious object of the distributor as well as the manufacturer, only the manufacturer can be said to have entered into the agreement with that *purpose*. In such cases, both at common law and under the Sherman Act, the courts have generally ignored the dissenter, and concentrated on the purposes of the party who insisted that the agreement include the anticompetitive term.[72] In general that seems entirely right.[73]

Second, once it is established that an agreement was entered into by parties seeking to restrain or injure competition, that agreement must be held unlawful unless, at a minimum, those parties sought lawful objectives as well. The criteria for "lawful objectives" or "legitimate purposes" have never been entirely clear. At common law the permissible restraints generally involved the transfer of information or ownership, or the integration of productive facilities, activities from which not only the parties

71. It might be argued that in fairness, and to prevent the court from interfering in conduct that harms nobody, the defendants should be permitted to attempt to prove that their agreement cannot possibly have the anticompetitive effects they hoped it would. In cases where the parties' purposes are clear, this inquiry will greatly prolong the trial for the sake of a very doubtful improvement in the soundness of the ultimate judgment. Moreover, there is something highly obnoxious—something cynical—about a defense on the ground that the anticompetitive effects the defendants sought to cause will never in fact materialize.

72. *E.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964); Northern Pac. Ry. v. United States, 356 U.S. 1, 8 (1958); Schine Chain Theaters, Inc. v. United States, 334 U.S. 110, 119 (1948); Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 18 P. 391 (1888); Arnot v. Pittston & Elmira Coal Co., 68 N.Y. 558 (1877).

73. The fact that some parties acted with anticompetitive purposes and others did not may be important on the issue of liability to sanctions for the violation. *See* text accompanying notes 260–287 *infra*.

but the public might expect to gain.[74] It is unsettled how far beyond these traditional categories the privilege to restrict competition by agreement extends. From the premises of the doctrine it seems clear that the privilege is confined to purposes the pursuit of which is likely to benefit the public. The question is whether any and all claims of public benefit will qualify—whether, for example, restraints are defensible on the ground that their primary purpose was to promote public health,[75] safety,[76] or morals,[77] deter and punish tortious conduct,[78] or promote affirmative action against racial segregation.[79] The same questions arise under the other branch of the Rule of Reason in connection with proof of beneficial effects.[80] One would hope and expect to find, as these questions are pressed toward solution, that the classes of legitimating purposes and legitimating effects coincide. But at this point even that much is conjecture.

If the defense of an agreement survives this step, the court must next inquire into the "main purpose" of the agreement. On top of the usual difficulties of assigning purposes to the acts of business entities, the "lawful main purpose" doctrine adds another: the pursuit of anticompetitive and lawful purposes in the same agreement is permissible under section 1 only if the lawful purpose is the main one. Where good purposes are pleaded in expiation of bad ones, it does seem important to ask what the

74. *See generally* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 400–02 (1911); United States v. Addyston Pipe & Steel Co., 85 F. 271, 280–83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

75. *See, e.g.*, American Brands, Inc. v. National Ass'n of Broadcasters, 308 F. Supp. 1166 (D.D.C. 1969) (preliminary injunction denied in suit attacking concerted refusal by broadcasters to accept commercials for cigarettes high in tar and nicotine).

76. *See, e.g.*, Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970) (upheld a manufacturer's termination of sales to an established dealer for the dealer's breach of a convenant to confine resale of beauty products to professional beauticians, where the products posed risks of skin irritation or blindness to consumers who used them improperly).

77. *See, e.g.*, America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972) (newspapers' joint refusal to print X-rated movie advertisements sustained).

78. *Cf.* Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) (group boycott for the purpose of policing an industry against tortious copying of defendants' designs held to violate § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976)).

79. In 1977 the Baltimore Association of Minority Contractors sought a statement of the Justice Department's enforcement intentions regarding proposed agreements with general contractors to give minority-owned enterprises 10% of the subcontracting work on certain publicly financed projects. Noting the conflict between two worthy objectives, the encouragement of participation by minority contractors in the construction industry and open competition, the Department declined to state its intentions. *Justice Takes No Antitrust Position on Pact Awarding Subcontracts to Minority Firms*, 832 ANTITRUST & TRADE REG. REP. (BNA) A–6 (1977).

80. *See* text accompanying notes 142–157 *infra*. Professor John Coons has argued persuasively that a conspiracy to promote wholly social objectives, without profit to the parties in any commercial sense, would be beyond the prohibition of § 1. Coons, *Noncommercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962). *See also* Bird, *Sherman Act Limitations on Noncommercial Refusals to Deal*, 1970 DUKE L.J. 247.

parties were *really* trying to do. The question is how far it is wise and just to entrust that question to the intuitions of the trier of fact. Perhaps it is generally true, as the doctrine seems to assume, that, when a firm enters into an agreement hoping to accomplish several objectives, one of them is more important to it than the rest. Unfortunately, there is no well established technique in antitrust doctrine for sorting out this "main" or "primary" purpose from the others.[81]

Finally, to complete the defense of an agreement entered into for anticompetitive purposes, the parties must show not only that they acted with a lawful main purpose, but also that the restraint they sought to impose did not exceed "the necessity presented" by that purpose.[82] In *Addyston Pipe,* Judge Taft wrote confidently that "[t]he main purpose of the contract . . . furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."[83] He was spared the necessity, however, of demonstrating his point, as the agreement before him lacked any lawful main purpose at all. The determination is more difficult than he implied. A restraint that inhibits competition in ways from which even the parties themselves derive no benefit is, of course, unlawful,[84] but that is the only easy case. The test is not simply whether the restraint benefits at least one of the parties, but whether it is "reasonable both with respect to the public and to the parties"[85]—whether it is "no greater than necessary to afford fair protection to the parties and not so extensive as to interfere with the interests of the public."[86] The restraint is unlawful unless it offers the party seeking it "fair" or "necessary" protection and no more, bearing in mind the countervailing interest of the public in competition.[87] It is far from obvious how one draws that line, and courts that have purported to draw it in applying the test of *Addyston Pipe* to sustain

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81. Some cases are easier than others. Where it appears, for example, that the lawful purpose claimed by the defendants as their main one could have been achieved by other means at less cost to competition and no extra cost to the defendants, and that the defendants must have known of this, the defense fails. *See, e.g.,* Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940), *discussed in* text accompanying note 173 *infra.*

82. United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899).

83. *Id.*

84. *Cf.* Mitchel v. Reynolds, 24 Eng. Rep. 347, 350 (Ch. 1711) ("[W]hat does it signify to a tradesman in *London,* what another does at *Newcastle?*").

85. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911).

86. Sound Ship Bldg. Corp. v. Bethlehem Steel Corp., 387 F. Supp. 252, 255 (D.N.J. 1975), *aff'd,* 533 F.2d 96 (3d Cir.), *cert. denied,* 429 U.S. 860 (1976).

87. *See* Horner v. Graves, 131 Eng. Rep. 284, 287 (C.P. 1831), *quoted with approval in* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898) (Taft, J.), *aff'd,* 175 U.S. 211 (1899):

> [W]e do not see how a better test can be applied to the question whether [this is a reasonable restraint of trade] than by considering whether the restraint is such only as to afford a fair protec-

agreements challenged under section 1 have seldom even tried to explain what they have done.[88]

Until the Supreme Court speaks to these questions, lower courts evaluating agreements under the "purpose" branch of the Rule of Reason will have to continue to experiment with answers of their own. It is settled that schemes to undermine competition may violate section 1 even when they fail. It is equally settled that the Act must not be read to condemn every agreement made for any anticompetitive purpose. The doctrine that reconciles these principles, in cases not covered by a per se rule, is that an agreement entered into for anticompetitive purposes violates section 1 unless the parties had a lawful main purpose as well and unless the restraint imposed by their agreement was necessary to the accomplishment of that lawful main purpose. Like most antitrust rules, the "lawful main purpose" doctrine has the potential for good and for bad results, depending on how it is applied. If administered carefully, it frees the courts to promote the objectives of the Sherman Act in those cases where the Act's objectives would be seriously frustrated if proof of anticompetitive effects were invariably required.[89]

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tion to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party . . . is . . . unreasonable.

88. *See, e.g.*, Edwin K. Williams & Co. v. Edwin K. Williams & Co.—East, 542 F.2d 1053, 1061 (9th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); Winn Ave. Warehouse, Inc. v. Winchester Tobacco Warehouse Co., 341 F.2d 287, 288 (6th Cir. 1965). The modern decisions applying the common-law tests of "fairness" and "necessity" to employee covenants not to compete are discussed and analyzed in Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960); Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193 (1973); and Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L.F. 621.

89. A body of doctrine is evolving in the lower courts to the effect that a private plaintiff cannot prevail in a Rule of Reason case without proof that the defendant's agreement actually injured competition. *See, e.g.*, Lektro-Vend Corp. v. Vendo Co., 1981-2 Trade Cas. (CCH) ¶ 64,258, at 74,084-86 (7th Cir. Aug. 27, 1981); Kaplan v. Burroughs Corp., 611 F.2d 286, 290-93 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 570-71 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). Some of the opinions state flatly that no showing of anticompetitive purpose will compensate in a Rule-of-Reason case for failure to prove substantial anticompetitive impact. *E.g.*, Northwest Power Prods. Inc. v. Omark Indus., 576 F.2d 83, 90-91 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). The opinions seldom reflect a strong showing of anticompetitive purpose; sometimes the courts note expressly that the record discloses a lawful primary purpose for the restraint. *E.g.*, Lektro-Vend Corp. v. Vendo Co., 1981-2 Trade Cas. (CCH) ¶ 64,258, at 74,083 (7th Cir. Aug. 27, 1981); Golden Gate Acceptance Corp. v. General Motors Corp., 597 F.2d 676, 678 n.4 (9th Cir. 1979). In a few cases, however, the doctrine has been seriously applied. *E.g.*, Borger v. Yamaha Int'l Corp., 625 F.2d 390, 396-97 (2d Cir. 1980) (reversing a judgment for the plaintiff on the ground that it was error to instruct the jury that the plaintiff could recover without proof of actual public injury, if he could show that he was damaged by an agreement entered into for the sole purpose of protecting distributors from competition).

Doubtless, to make out a restraint of trade under § 1, a private plaintiff must show more than unfair conduct and injury to himself; the antitrust laws protect "*competition*, not *competitors*." Brown Shoe

B. Rule of Reason: Effects

At common law, anticompetitive purpose was only one ground on which agreements were denied enforcement as restraints of trade. Prior to the enactment of the Sherman Act, contracts and covenants were frequently held void as against public policy on the strength of their actual and probable anticompetitive effects alone. Writing in 1880, in condemning an agreement among salt manufacturers which delegated the setting of prices to a central committee, the Supreme Court of Ohio observed:

> The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. . . . Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.[90]

Co. v. United States, 370 U.S. 294, 320 (1962). From the fact that § 1 does not make every business tort a federal offense, it does not follow, however, that only those conspiracies that result in actual injury to competition violate the law. Sound policy reasons exist for condemning at least some agreements entered into solely or primarily for anticompetitive purposes whether or not they have done quantifiable harm. *See* text accompanying note 71 *supra*. In civil and criminal cases alike, "[i]t is the . . . conspiracy . . . which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). *See also* McLain v. Real Estate Bd., 444 U.S. 232, 243 (1980).

From the language in these recent opinions it seems clear that the courts mean to distinguish Rule of Reason cases from cases in which the plaintiff invokes a per se rule. The reason for the distinction is never explained. Given the logic of dispensing in particular cases with proof of anticompetitive effects, the distinction is unsound. Compare, for example, two kindred practices—resale price maintenance and the imposition of territorial restrictions on resale. The former practice is still unlawful per se, *see* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); but after Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the latter is not. A regime of territorial restrictions imposed for the primary purpose of suppressing competition is hardly less likely to do unjustifiable harm than a pattern of resale price maintenance agreements. If the seller imposing either restraint has a small share of the market, the harm may well be insubstantial; if its share is large, and it has the power often associated with large market share, the potential for unjustified harm in both cases is great. There is a strong public interest in deterring and enjoining both schemes. In neither case is there good reason to put the party seeking relief to the difficult and cumbersome proof of actual market power and effect.

Significantly, perhaps, the cases in which the courts have imposed a requirement of actual market power and effect tend almost without exception to be private treble-damage cases. To recover treble damages, the plaintiff must prove "injury of the type the antitrust laws were intended to prevent." Brunswick Corp. v. Pueblo Bowl-O-Mat., Inc., 429 U.S. 477, 489 (1977). Such injury, the Court has said, "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.* This is dictum, and may require qualification even in treble-damage cases. It does suggest that what some courts have characterized as a substantive requirement in Rule of Reason cases under § 1 may be, in fact, a general remedial requirement under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), applicable in private damage actions, but not in cases of other kinds.

90. Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 672 (1880).

Courts confronting agreements with clear and potent anticompetitive tendencies often struck them down in terms that implied complete indifference to the defendants' state of mind.[91] As a leading legal encyclopedia of 1891 summarized the prevailing doctrine at common law: "Modern adjudications have declared that all agreements tending to monopoly, or restraint of trade, *or* that have for their primary intent the destruction of competitive business and a consequent increase of price . . . are injurious to the commercial interests of the country, are contrary to public policy, and, therefore void."[92]

Consistently since 1897,[93] the Supreme Court in construing section 1 of the Sherman Act has adhered to that common-law tradition. Whatever the proof may show concerning the parties' intentions, in a section 1 case "[i]t is only if the conduct is not unlawful in its *impact* . . . that protection is achieved."[94] Given proof of unreasonably anticompetitive effects, proof of anticompetitive purpose is superfluous. Thus, an agreement may be held to be in restraint of trade though it is impossible to determine from the evidence what the parties were really trying to do. In section 1 cases "it is sufficient that a restraint of trade . . . results as the consequence of a defendant's conduct or business arrangements"; to require a showing of specific intent would "cripple the Act."[95]

In view of the novelty of the notion of "conspiracy" without "unlawful purpose," some documentation is warranted to show that these propositions as they appear in the cases are not sports. Six of the Court's opinions on restraint of trade establish the doctrine's good credentials. In 1897, in *United States v. Trans-Missouri Freight Association,*[96] the Supreme Court held that anticompetitive purpose is not an essential element of restraint of trade under section 1. It has never retreated from that holding. In the 1911 Rule of Reason opinions—*Standard Oil*[97] and *American To-*

91. *E.g.*, People v. North River Sugar Ref. Co., 121 N.Y. 582, 24 N.E. 834, 3 N.Y.S. 401 (1890); Atcheson v. Mallon, 43 N.Y. 147 (1870); Lawrence v. Kidder, 10 Barb. 641 (N.Y. App. Div. 1851); Crawford & Murray v. Wick, 18 Ohio St. 190 (1868); Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173 (1871); Keeler v. Taylor, 53 Pa. 467, 469–70 (1866).

92. Annot., 13 L.R.A. 770, 770 (1891) (emphasis added).

93. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

94. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967); *cf.* Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912):

> [The policy of the Sherman Act cannot] be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intentions of the parties . . . .

95. United States v. Griffith, 334 U.S. 100, 105 (1948).

96. 166 U.S. 290 (1897).

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

bacco[98]—the Court carefully assimilated the *Trans-Missouri* holding into the new doctrine.[99] In the *Chicago Board of Trade v. United States* opinion of 1918[100] the Court reformulated the Rule of Reason in terms that almost wholly subordinated proof of purpose to proof of effects. The Court's 1953 opinion in *Times-Picayune Publishing Co. v. United States*[101] restored the original balance between purpose and effect as alternative and independent grounds of liability. Most recently, in *United States v. Container Corp.*,[102] the Court held an agreement in violation of section 1 on a record barren of any findings concerning anticompetitive purpose; all nine Justices concurred in the proposition that an agreement may properly be held to violate section 1 on the strength of its anticompetitive effects alone.

In the germinal case, *Trans-Missouri,* the Government appealed from the dismissal of its bill charging eighteen railroad companies with "contriving and intending" to raise freight rates "and to counteract the effect of free competition" by means of an agreement establishing a committee to fix rates and make regulations that would bind them all.[103] The defendants in their answer denied that in forming their association they had acted with any of the purposes alleged in the bill. Because the Government chose to bring the case before the Supreme Court "on bill and answer," the Court was required to assume the truth of those denials.[104] Thus, if the allegations in the bill concerning intent were essential to the Government's claim, the Court had no choice but to affirm the dismissal of the suit. Given the peculiar procedural posture of the case, the Court could rule for the Government only if it was prepared to hold that the circumstances made it unnecessary to reach the question of purpose at all.[105] The Court so held. In light of the terms of the agreement the defendants admitted having made, proof as to their intent was not required: since restraint of trade was the "direct, immediate, and necessary effect" of the agreement, the agreement was unlawful under section 1 "without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce."[106]

The sweeping condemnation in *Trans-Missouri* of all agreements with

98. United States v. American Tobacco Co., 221 U.S. 106 (1911).
99. *See* text accompanying notes 108 & 109 *infra.*
100. 246 U.S. 231 (1918).
101. 345 U.S. 594 (1953).
102. 393 U.S. 333 (1969).
103. 166 U.S. at 299.
104. *Id.* at 341.
105. *Id.*
106. *Id.* at 342.

"direct, immediate, and necessary" ill effects on competition in interstate commerce proved unsatisfactory as a general standard for liability under section 1. In a subsequent opinion applying the *Trans-Missouri* doctrine, the Court noted that in order to avoid stifling ordinary trade the Act would have to be given a "reasonable construction."[107] Finally, in *Standard Oil* and *American Tobacco* a majority of the Court led by Chief Justice White succeeded in establishing the Rule of Reason as the dominant test under section 1 for restraint of trade.

If the Court in these cases had formulated the Rule of Reason in terms that made anticompetitive purpose an indispensable element, *Trans-Missouri* would have been effectively overruled. Instead, the Court chose a disjunctive formulation: arrangements might be "unreasonably restrictive of competitive conditions, *either* from the nature or character of the contract or act *or* [where the facts] give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public."[108] In the *Standard Oil* opinion, the Chief Justice took some care to accommodate the Court's holdings to the holdings of the earlier decisions. While perhaps a few things in *Trans-Missouri* had been carelessly stated, the decision was right: the agreement in that case was illegal under section 1 by virtue of its "necessary effect and the character of the parties by whom [it was] made."[109] Thus, under the Rule of Reason, an agreement might stand condemned without findings of anticompetitive purpose, on a proper showing of anticompetitive effect. Beyond endorsing the result in *Trans-Missouri,* the Court did not indicate what showing of anticompetitive effect would suffice. Rather, it rested its condemnation of the agreements in the cases before it on proof in the record of malevolent intent.[110]

Seven years after *Standard Oil* and *American Tobacco,* the Court decided *Chicago Board.*[111] The formulation of the Rule of Reason most widely quoted today is Justice Brandeis' formulation for the Court in that case. "The true test of legality," Brandeis wrote, "is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition."[112] In making this determination, a court must consider not only the

107. United States v. Joint Traffic Ass'n, 171 U.S. 505, 568 (1898). *Cf.* Cincinnati, Portsmouth, Big Sandy, & Pomeroy Packet Co. v. Bay, 200 U.S. 179, 185 (1906). Four Justices had dissented from the Court's decision in *Trans-Missouri* on that same ground. 166 U.S. at 344.

108. *Standard Oil,* 221 U.S. at 58 (emphasis added); *see American Tobacco,* 221 U.S. at 179.

109. *Standard Oil,* 221 U.S. at 65.

110. *See* text accompanying notes 51–56 *supra.*

111. 246 U.S. 231 (1918).

112. *Id.* at 238.

"nature of the restraint, and its effect, actual or probable," but also "[t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained."[113] As to this last group of considerations, the Justice added a clarification: "This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."[114] Applying this analysis to the after-hours trading rule before the Court, the Court held unanimously for the defendants.

On the point important here—the controlling significance of *effects* in a section 1 case—*Chicago Board* and the 1911 decisions are in full accord.[115] An agreement may violate section 1 if, as a result of it, competition is suppressed or destroyed, regardless of the purposes for which it was made. Proof of good and bad intentions is relevant insofar as it helps the court determine what effects the agreement has had or will have. At this point, however, its significance ends; once an agreement is found to be objectionable in its consequences, the best of intentions will not save it.

The Supreme Court's Rule of Reason opinions after 1917 elaborate on the basic themes of *Standard Oil, American Tobacco,* and *Chicago Board.* One in particular—Justice Clark's opinion for the Court in *Times-Picayune Publishing Co. v. United States*[116]—is important here for its explicit recognition that the seminal cases require not one evaluation of a restraint for "reasonableness," but two.

At issue in *Times-Picayune* was the defendant publishing company's so-called "unit plan"—its practice of requiring merchants who wished to advertise in its morning paper to buy an ad in its afternoon paper as well. The Government sued to enjoin the practice as a tying arrangement unlawful per se under section 1. The Court stated that, while the unit plan was not unlawful per se, this did not end the inquiry: the publisher's contracts must also "be tested under the Sherman Act's general prohibition on unreasonable restraints of trade."[117] Since the defendant's unit-plan

113. *Id.*

114. *Id.*

115. Without citing or quoting directly from *Standard Oil* or *American Tobacco,* Brandeis took the elements of Chief Justice White's formulations ("nature," "effect," "intent") and recombined them in a way that undermined White's rationale for the actual decisions in the earlier cases. For White, the key to *Standard Oil* and *American Tobacco* had been the nefarious intent of the defendants. Under Brandeis' formulation, the sole office of evidence as to intent is to help a court predict the consequences of an agreement or regulation; in the final evaluation of the agreement as to its reasonableness, intent plays no part.

116. 345 U.S. 594 (1953).

117. *Id.* at 614.

contracts were "banned by § 1 if unreasonable restraint was *either* their object or effect,"[118] the test would have to be conducted under two separate heads. The Court examined the record, first, for indications of unreasonably anticompetitive effects, and then, because "even otherwise reasonable trade arrangements must fall if conceived to achieve forbidden ends," for indications that the agreements had been "predominantly motivated" by other than "legitimate business aims."[119] Concluding that the Government had failed to prove either case, the Court upheld the unit plan. The significance of the opinion lies in its structure, which exemplifies perfectly the teaching of *Standard Oil* and *American Tobacco:* agreements may violate section 1 "either because of their . . . effect or because of [their] evident purpose."[120]

The last case in the series shows that all this is more than mere talk. In 1969, in *United States v. Container Corp. of America,*[121] the Court struck down an agreement among competitors on the strength of its adverse effects on price competition, without suggesting in any way that the court below had erred in finding the parties innocent of any purpose to cause those effects.

The heart of the Government's section 1 case against the corporate defendants in *Container Corp.* was their practice of informing one another, on request, of prices most recently quoted and charged for standardized corrugated containers. After trial without a jury, the district judge found that the Government had failed to prove that the defendants had entered into an agreement for any purpose, that their purpose in exchanging price information had been to injure competition, or that their exchange had had that effect. Accordingly, he dismissed the complaint.[122] The Supreme Court reversed. The defendants' tacit understanding that any one of them would supply the others on request with information as to the prices he was currently charging and quoting to specific customers was held sufficient to establish a combination or conspiracy under section 1.[123] From the record, "[t]he inferences [were] irresistible that the exchange of price information . . . had an anticompetitive effect in the industry, chilling the vigor of price competition."[124] That was sufficient to establish restraint of trade.[125] Without the benefit of any finding that the

118. *Id.* (emphasis added).
119. *Id.* at 622.
120. *American Tobacco,* 221 U.S. at 179.
121. 393 U.S. 333 (1969).
122. 273 F. Supp. 18 (M.D.N.C. 1967), *rev'd,* 393 U.S. 333 (1969).
123. 393 U.S. at 335.
124. *Id.* at 337.
125. *Id.* at 338.

parties had acted with a purpose to inhibit price competition—without disturbing the lower court's finding that they had not—the Court held that the defendants had combined and conspired in violation of section 1.[126]

The Court's decision in *Container Corp.* stands squarely in the tradition established in 1897 by *Trans-Missouri,* perpetuated in *Standard Oil, American Tobacco, Chicago Board,* and *Times-Picayune.* The defendants were held to have violated section 1 "without proof . . . that [their] agreement was entered into for the purpose of restraining trade or commerce"[127] because of the agreement's demonstrable anticompetitive effects.[128] Their agreement suppressed competition and did not promote it. Under the "effects" branch of the Rule of Reason, the proof was complete.

Looking behind and beyond this line of Supreme Court decisions, it is appropriate to ask whether the doctrine that proof of anticompetitive purpose is dispensable in a section 1 case serves the purposes of the Sherman Act. I think that it does, and does so particularly well in the kinds of cases that have produced the Rule—that is, in civil suits under section 1 for injunctive relief.

The aim of the Sherman Act is to preserve for the public the benefits of competition. Many agreements that on the whole are injurious to competition are entered into under circumstances that make anticompetitive purpose difficult or impossible to prove. To require that a bad purpose be proven in every suit for an injunction under section 1 would place beyond the reach of the law agreements that as a matter of reason and policy fall squarely within it, and ought to be enjoined.

This argument seems to me quite persuasive. It must be defended against attack on four main grounds: (1) evidence of anticompetitive effect is unreliable unless supported by proof of anticompetitive purpose; (2) reasonably and unreasonably anticompetitive agreements cannot be distinguished on the basis of effects alone; (3) condemnation of wholly well-motivated agreements will deter businessmen from launching projects from which the public would benefit; and (4) condemnation of such agreements will work undue hardship.

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126. Justice Fortas, concurring, stressed that he did not understand the Court to hold that exchanges of price information among competitors were illegal per se; the defendants' agreement violated § 1 only because it "did in fact substantially limit the amount of price competition in the industry." 393 U.S. at 340. Justice Marshall, joined by two others, dissented. He would not, he wrote, condemn such an agreement under § 1 without more proof "that it was entered into for the purpose of restraining price competition *or* that it actually had that effect." *Id.* at 341 (emphasis added).

127. *Trans-Missouri,* 166 U.S. at 342.

128. McLain v. Real Estate Bd., 444 U.S. 232, 243 (1980); United States v. United States Gypsum Co., 438 U.S. 422, 446 n.22 (1978) ("[O]ur decision in . . . *Container Corp.* . . . is fairly read as indicating that proof of an anticompetitive effect is a sufficient predicate for liability").

Determining how an agreement will affect competition is a difficult business, and the judge who welcomes the task is rare. Justice Frankfurter, for one, made it clear that he wanted no part of it:

> [T]o demand . . . evidence as to what would have happened but for the adoption of the practice that was in fact adopted or to require firm prediction of an increase of competition as a probable result of ordering the abandonment of the practice, would be a standard of proof, if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.[129]

Unless the parties agree to do something sufficiently pernicious to qualify for per se treatment, their purpose is arguably the only reliable guide to the agreement's effects. When the record shows that the parties sought to injure competition in a certain way and that they had the power to do it, a court is justified in ascribing those results to the agreement. Absent such proof, the courts are so unlikely to estimate the good and bad economic effects of agreements correctly that it must be assumed that Congress did not intend for them to try.

Such reasoning might fairly persuade a judge in honest doubt in a particular case to stay his or her hand. It will not support a fixed and uniform policy of requiring proof of bad purpose in every section 1 suit. Common experience and basic propositions of economics teach that certain kinds of agreements normally have certain kinds of anticompetitive effects. In any given case involving such an agreement it is right to shift the burden of proof to the party who denies that such effects will follow, and if that party fails to produce persuasive evidence that they will not, to find that they will. In evaluating such evidence, and in making more complex judgments, expert assistance is available to the court. Sometimes conflicts in the expert testimony will sorely trouble the trier of fact, but that problem is scarcely peculiar to antitrust. It surely does not justify quitting the field.

One might concede that it is possible in many cases to identify anticompetitive consequences by proof of something other than the parties' purposes, and still deny that an agreement can be evaluated in any principled way by reference to effects alone. "[E]conomics," Professors Dirlam and Kahn have written persuasively,

> offers no objective measure of the vitality of competition, in all its aspects, or any way of balancing its possible attenuation in certain respects or in certain markets—where the advantages, tactics, or consequences of market power may have taken the toll of existing firms, discouraged the entry of

129. Standard Oil Co. and Standard Stations, Inc. v. United States, 337 U.S. 293, 309–10 (1949) (footnote omitted).

> others, or softened the price rivalry among those that remain—against its intensification, by the same firms and similar market practices, in other markets or in other respects.[130]

From this one might, perhaps, conclude that there is no way in most cases to differentiate reasonable from unreasonable restraints of trade except by reference to the parties' purposes:

> How does one decide when to exonerate, when to condemn . . . ?
> The inescapable conclusion is that, from a practical standpoint, the criterion of intent alone "fills the bill" for a sensible antitrust policy in [most] cases. . . . What was the purpose of the list which may have made it black? Was the lower price offered in good faith to meet competition? Why did one firm buy out another? . . .
> The point is . . . simply to find out what they were *doing*.[131]

This carries a valuable insight to an extreme conclusion. Of the three ways in which agreements have been held to fail the "effects" test under section 1, two do not depend at all on the kind of judgment that economics is powerless to make. First, agreements with anticompetitive effects are held to violate section 1 when there are no offsetting procompetitive effects whatsoever.[132] While that determination is sometimes hard to make on a sketchy factual record, there is nothing logically peculiar about it. Second, when an agreement has anticompetitive and procompetitive effects, the doctrine has it that the agreement is unreasonably anticompetitive if a means exists by which the bad effects can be mitigated without substantially jeopardizing the good ones.[133] Again, the problems of judgment stem from limits on the court's resources for factfinding and prediction rather than from anything unusual about the criterion for judgment. Courts of equity are frequently called on to make that kind of assessment, tailoring their decrees to the circumstances of the case so as to sacrifice only so much of one party's interests as is necessary to protect the other party and the public.[134]

Surely there is, however, something troublesome about the third kind of judgment courts are called on to make under the effects branch of the analysis. An agreement with procompetitive effects that cannot be achieved by less anticompetitive means is lawful, under the decisions of the Supreme Court, *only* if its "net effect is to preserve and not to damage

130. J. DIRLAM & A. KAHN, FAIR COMPETITION 48 (1954).
131. *Id.* at 51–52 (emphasis added).
132. *See* text accompanying notes 143–152 *infra*.
133. *See* text accompanying notes 169–175 *infra*.
134. *See generally* W. DEFUNIAK, HANDBOOK OF MODERN EQUITY § 25 (2d ed. 1956).

competition."[135] On the present state of the theory, something must be conceded to those who question the ability of courts in section 1 cases to make this determination in a lawlike way. Economics furnishes no technique for balancing the anticompetitive against the procompetitive effects of an agreement; the Supreme Court has yet to identify the discipline that will.

If courts are permitted in section 1 cases to enjoin the implementation of agreements without proof that the parties consciously sought to injure competition, clearly some agreements will be enjoined that should be, and could not be otherwise. Perhaps some agreements will be enjoined that should not be. The question is whether, in view of the alternatives, that risk is worth bearing. A rule that required proof of anticompetitive purpose in every section 1 case would confine the Act's operation to those agreements where the parties foresaw that competition would be injured and consciously desired to injure it, and where their bad purposes are provable at trial. Excluded from the operation of the Act would be all agreements with anticompetitive effects overlooked by the parties in their planning; all with anticompetitive effects the parties foresaw, but did not desire to cause; and all with anticompetitive effects carefully planned for by parties who had the wit and skill to disguise their objectives. Given the fact that anticompetitive effects are often reasonably ascertainable without proof of anticompetitive purpose, the ease with which evidence of good purposes can be fabricated, and the caution with which courts customarily proceed in enjoining projects that appear to have been undertaken in good faith, a rule dispensing with a requirement of proof of anticompetitive purpose in section 1 suits seems likely to condemn a great many bad agreements, and very few good ones.

From the standpoint of a case-by-case evaluation of agreements on the merits in suits in equity under section 1, it seems fairly clear that a requirement of proof of anticompetitive purpose would significantly obstruct the purposes of the law. Eliminating such a requirement may deter the formation of some socially desirable agreements. Surely, it has a constructive deterrent effect as well. Entrepreneurs who know that lack of an improper purpose is not a complete defense will be more likely to look for ways to reduce or eliminate the anticompetitive effects of their projects. At least in the context of suits in equity under section 1, there is no good reason to suppose that dispensing with a fixed requirement of anticompetitive purpose will discourage more good projects than bad ones.[136]

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135. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967); *see* text accompanying notes 158–168 *infra*.

136. The risk of over-deterrence increases when the more awesome Sherman Act sanctions—treble damages and criminal penalties—are imposed without proof of anticompetitive purpose. *See*

That leaves the equities. Agreements often do involve changes of position—commitments costly to abandon, good opportunities passed up. Injunctions issued on proof of anticompetitive effects alone may impose real hardship on well-motivated people who could not reasonably have foreseen those effects or who honestly overlooked the less restrictive alternatives available.

This concern can be and is accommodated in suits in equity under section 1, not by requiring anticompetitive purpose as an indispensable element of every violation, but by adhering to the general principles which govern courts in granting equitable relief.[137] Traditionally in equity, the defendant's innocent state of mind, even when it is immaterial on the issue of whether or not a legal duty was breached, may properly be considered in the determination of the appropriate remedy.[138] In general, in suits in equity under section 1, acts done in deliberate disregard of the law are held to "call for repression by sterner measures" than acts undertaken in the reasonable belief that no substantial harm would result.[139] In determining the appropriate equitable remedy for a section 1 violation, the judge must look primarily to the interest of the public. The decree must be framed so as "to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance."[140] But there will always be choices to be made concerning degrees of severity, based on the apparent extent of the parties' culpability.

Whatever its costs, the doctrine that under section 1 "[i]t is sufficient [for liability] that a restraint of trade . . . results as the consequence of a defendant's conduct or business arrangements"[141] is indispensable to the fulfillment of the basic purposes of the law. Under the "effects" branch of the Rule of Reason, unfortunately, there is no single opinion comparable to Judge Taft's in *Addyston Pipe*—no authoritative statement of all of the

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United States v. United States Gypsum Co., 438 U.S. 422, 440–42 (1978). The Court has held, nevertheless, that even in criminal cases under § 1 an anticompetitive purpose requirement would be "unduly burdensome." *Id.* at 446; *see* text accompanying notes 260–277 *infra*.

137. *See* De Beers Consol. Mines v. United States, 325 U.S. 212, 218–19 (1945).

138. *See generally* Keeton & Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1940).

139. United States v. United States Gypsum Co., 340 U.S. 76, 89–90 (1940). *Compare* United States v. Crescent Amusement Co., 323 U.S. 173, 183, 186 (1944) (harsh decree entered against defendants who sought to "crush" competition and succeeded—"[t]he pattern of past conduct is not easily forsaken") *with* United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (defendant held entitled to consideration, in framing decree, of the fact that its officers had acted in reliance on reasonable interpretations of decisions of the Supreme Court).

140. United States v. United States Gypsum Co., 340 U.S. 76, 88 (1940).

141. United States v. Griffith, 334 U.S. 100, 105 (1948).

steps in the analysis. From the cases decided under this branch of the rule, however, a procedure for decision does emerge. First, it seems reasonably clear that any agreement with actual or probable anticompetitive effects violates section 1 unless it has actual or probable procompetitive effects as well. Second, when effects of both kinds are found to be present, the agreement is unlawful under section 1 if on balance its net effect on competition is adverse. Finally, if an agreement passes this test it is lawful, unless its beneficial effects on competition could reasonably have been achieved at less cost to competition—unless, in other words, the defendants had reasonably available to them a less restrictive alternative.

While it has been well understood that good effects may properly be urged on a court in a Rule of Reason case, there has been no clear understanding as to the *kinds* of effects that make out a section 1 defense. Some lower courts have seemed to believe that if a restraint could be shown to have had any effects that were useful to the parties and not wholly pernicious, the anticompetitive effects of the restraint were automatically excused.[142] For a long time, no Supreme Court decision clearly held to the contrary.

The question of redeeming virtues in section 1 cases has now been significantly clarified by the Supreme Court's decision in *National Society of Professional Engineers v. United States*.[143] In that case the National Society appeared before the Court to defend a bylaw provision forbidding any member to quote a firm price to a client until the client had selected him for the project, subject to the negotiation of a satisfactory contract. It contended that price competition among consulting engineers jeopardizes the safety of the public by promoting slipshod engineering, and appealed to the Court to reverse the decree rendered below for the Government without findings as to primary purpose or probable beneficial effect. The Court affirmed on the merits. "Contrary to its name," Justice Stevens wrote for the majority, the Rule of Reason "does not open the field of antitrust inquiry to *any* argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the

142. *E.g.*, American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975). A franchisee sued the nation's largest hotel chain over certain restrictive clauses in the franchise contract, including a clause that forbade franchisees to operate motels other than Holiday Inns anywhere in the country without prior approval by the franchisor. Defendant contended that its "Holidex System"—a computerized reservation referral network connecting the 1380 Holiday Inns—had been "very important" to its "growth and success," *id.* at 1237, and that the contract clause in question was necessary to ensure that a guest at one Holiday Inn would be booked into another Holiday Inn the following night. *Held*, judgment for plaintiff reversed and case remanded for further consideration of whether the clause was "fairly necessary" to "preserve the viability" of the Holidex system. *Id.* at 1238, 1248.

143. 435 U.S. 679 (1978).

challenged restraint's impact on *competitive conditions*."[144] The sole test under the Rule of Reason is "whether the challenged agreement is one that promotes competition or one that suppresses competition."[145] The defendant's bylaw did suppress competition: It "operate[d] as an absolute ban on competitive bidding" and "impede[d] the ordinary give and take of the market place."[146] Whether it had the virtues claimed for it or not was immaterial, because those virtues were not the kind that could properly be urged on a court under section 1. The defendant had chosen to rest its case, not on the proposition that preservation of the public safety promotes competition in some way, but on "the potential threat that competition poses to the public safety."[147] Its argument, reduced to its essentials, was that "competition itself is unreasonable."[148] That, however sensible it might sound to the defendant, was contrary to the basic policy of the Sherman Act.[149] Since that was all the engineers had to say for their anticompetitive bylaw, there was no issue to try.

In *Professional Engineers* the Supreme Court confirmed what it had implied in a number of Rule of Reason cases[150] after *Chicago Board,* but never squarely held: Absent proof of "procompetitive" effects, an agreement with demonstrable anticompetitive effects violates section 1.[151] To hold otherwise, Justice Stevens observed, would commit the courts to sail endlessly on the "'sea of doubt'" Judge Taft warned of long ago, "which this Court has firmly avoided ever since."[152]

The opinion in *Professional Engineers* defines the terms in which the defense of an agreement with anticompetitive effects must be conducted in a section 1 case. There have been and will continue to be arguments over the kinds of effects that can fairly be called "procompetitive," stem-

144. *Id.* at 688 (emphasis added).

145. *Id.* at 691.

146. *Id.* at 692.

147. *Id.* at 695.

148. *Id.* at 696.

149. Indeed, it was a "frontal assault" on that policy. *Id.* at 695.

150. *E.g.*, United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 118 (1975); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967); White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

151. Justice Brandeis' formulation in *Chicago Board*—"[t]he true test of legality is whether the restraint . . . merely regulates and perhaps thereby promotes competition"—implied that a restraint that regulated competition might be reasonable even if it did not promote it. 246 U.S. at 238. *See* R. BORK, *supra* note 38, at 41–47 (1978). Justice Stevens' reformulation in *Professional Engineers* implies the contrary, and from the context it is clear that the reformulation was deliberate, *see* text accompanying note 145 *supra*.

152. 435 U.S. at 696 (quoting United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899)).

ming from different conceptions of the ultimate purposes of the Act.[153] Two categories of procompetitive effects eligible for consideration in a Rule of Reason case are already clearly identified in the decisions of the Court: the intensification of interbrand competition through the revival of a declining firm,[154] and the channeling of transactions into markets that operate in close approximation to the competitive ideal.[155] Clearly these do not exhaust the possibilities. Those who view competition as an instrument rather than an end in itself argue that agreements that have the effect of promoting certain ends must be held to be defensible under section 1, even when they significantly reduce the intensity of "competition" in the ordinary sense.[156] In recent decisions the Court has moved toward the adoption of that approach by suggesting that agreements with anticompetitive effects may be defended under section 1 on the ground that they "increase economic efficiency."[157] It remains to be seen what the Court means by "economic efficiency," and how far it is prepared to permit firms to go in sacrificing rivalry to that end.

Once an agreement is shown to have procompetitive as well as anticompetitive effects, the issue under the Rule of Reason is fairly joined. Now, in the words of Chief Justice White, "judgment must . . . be called into play."[158]

At this critical point the opinions of the Supreme Court give no clear guidance as to the procedure for decision. They offer various interesting formulations of the question. Is the agreement one which, in light of "all of the circumstances . . . should be prohibited as imposing an unreasonable restraint on competition"?[159] Is its "net effect . . . to preserve and not

153. *Compare* R. BORK, *supra* note 38, at 50–89 (1978), Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363 (1965) *and* Elzinga, *The Goals of Antitrust*, 125 U. PA. L. REV. 1191 (1977) *with* C. KAYSEN & D. TURNER, ANTITRUST POLICY 11–22, 44–99 (1959), Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377 (1965) *and* Sullivan, *Economics and More Humanistic Disciplines*, 125 U. PA. L. REV. 1214 (1977). *See generally* Bernhard, *Divergent Concepts of Competition in Antitrust Cases*, 15 ANTITRUST BULL. 43 (1970).

154. Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36 (1977); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

155. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). *Cf.* Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 584 (1925) (firm's use of trade association's statistics on production and market prices, although it may result in "stabiliz[ing] prices or limit[ing] production through a better understanding of economic laws and a more general ability to conform to them," does not violate Act). *See generally* L. SULLIVAN, *supra* note 21, § 106.

156. " 'Competition,' for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree." R. BORK, *supra* note 38, at 51 (1978).

157. *See* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 20 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978).

158. *Standard Oil*, 221 U.S. at 63.

159. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

to damage competition"?[160] They do not suggest a method for arriving at a principled answer.

At one point the Court seemed on the verge of giving up. In 1965, in *United States v. Arnold, Schwinn & Co.*,[161] the Court held part of the defendant's system of vertical restrictions on intrabrand competition reasonable under section 1 on the ground that "it was justified by, and went no further than required by, [interbrand] competitive pressures; and . . . its net effect [was] to preserve and not to damage competition in the bicycle market."[162] Seven years later, in *United States v. Topco Associates, Inc.*,[163] a majority of the Court joined with Justice Marshall in an opinion in which he argued forcefully that courts are hopelessly illsuited to make judgments of that kind:

> Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.
>
> . . . .
>
> . . . To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.[164]

After 1972, however, something happened to restore the Court's confidence. In 1977 Justice Powell, writing for the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[165] dismissed with a wave the plaintiff's argument that the only alternatives open to the Court in the case were blanket approval of the practice involved or a rule of per se illegality, stating that the plaintiff's "contention that balancing intrabrand and interbrand competitive effects of vertical restrictions is not a 'proper part of the judicial function,' . . . is refuted by Schwinn."[166] The Court did not strike the balance, however; instead, it remanded the case to the District Court to weigh "all of the circumstances."[167]

The short of it is that we do not have, under the effects branch of the Rule of Reason, any test comparable to the "lawful main purpose" test of *Addyston Pipe*. On the present state of the authority, as one respected

160. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967).
161. 388 U.S. 365 (1967).
162. *Id.* at 382.
163. 405 U.S. 596 (1972).
164. *Id.* at 609–10, 611–12.
165. 433 U.S. 36 (1977).
166. *Id.* at 57 n.27 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)).
167. *Id.* at 49, 59.

commentator has written, the evaluation of an agreement under section 1 "must be referred to the arts rather than the sciences of judgment. . . . [O]ne must call forth his best and most purposeful intuition."[168] If this seems unsatisfactory, it is far from obvious what to do about it.

In some cases the court is rescued from these difficulties by the final step of the analysis. Granted the basic premise of the Rule of Reason that restraints on competition must be tolerated when they yield compensating public benefits of certain types, it seems clear that the public interest lies in securing such benefits at the least possible sacrifice. A restraint that confers certain benefits at the cost of unnecessary injury to competition can fairly be said to be, to the extent of that unnecessary injury, "unreasonable." And so the courts have held in a series of cases denying a defense under section 1 when parties have bypassed available "less restrictive alternatives."[169]

Once again, there is no single authoritative statement of the doctrine. Its operation may be illustrated by examples from two decisions of the Supreme Court, *Standard Sanitary Manufacturing Co. v. United States*[170] and *Ethyl Gasoline Corp. v. United States*.[171] In *Standard Sanitary* the Court affirmed a judgment for the Government against a patentee and its licensees who had conspired to fix the terms on which they would sell products made by the patented process. The defendants contended their conspiracy would result in more widespread use of the process, which in turn would reduce the amount of defective enameled ironware on the market and create a more humane working environment for the enamelers. The Court was unimpressed. Since "all of the substantial good which is asserted to have been the object of the agreements" could have been obtained from licensing without the restraints,[172] the justification failed. In

168. L. SULLIVAN, *supra* note 21, § 68, at 188.

169. White Motor Co. v. United States, 372 U.S. 253, 271 (1963) (Brennan, J., concurring). *See* International Salt Co. v. United States, 332 U.S. 392, 396–98 (1947); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 459–60 (1940); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 42 (1912); Smith v. Pro-Football, Inc., 593 F.2d 1173, 1187–88 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606, 620–22 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 944–45 (5th Cir. 1975); Kapp v. National Football League, 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff'd in part & appeal dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). Other cases are cited in note 209 *infra*. *Cf.* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967) (restraint that "was justified by, and went no further than required by, competitive pressures" upheld as reasonable); IBM Corp. v. United States, 298 U.S. 131, 138–40 (1936) (doctrine applied in case decided under § 3 of the Clayton Act).

170. 226 U.S. 20 (1912).

171. 309 U.S. 436 (1940).

172. 226 U.S. at 42.

the *Ethyl* case the defendant, the leading manufacturer of a patented fluid used by refiners to increase the lead content of gasoline, required its customers to confine their sales of leaded gas to jobbers selected by the defendant. The defendant appealed the issuance of an injunction against this practice on the ground, among others, that restrictions were necessary to protect the public against the health risks of careless handling of leaded fuel by irresponsible jobbers. The Court affirmed the decree: "The avoidance of such dangers as there may be . . . would seem . . . to be amply secured [by] requiring the purchasers . . . to take proper health precautions including the posting of notices which appellant supplies . . . ."[173]

In these and other similar cases, the courts have refused to recognize compensating benefits as a justification for anticompetitive effects, because the same fine results could reasonably have been accomplished in a less anticompetitive way. In a Rule of Reason case "the problem is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in the light of extenuating interests."[174] To date the implications of this doctrine have not been fully explored in the decisions. It is not clear, for example, whether the less restrictive alternative that defeats a section 1 defense must be one that the parties, in the exercise of reasonable diligence, should have discovered themselves.[175]

The doctrine of "less restrictive alternatives," which has evolved in cases in which agreements have been held to violate section 1 because of their effects, is obviously closely related to the condition of "reasonable necessity" attached under the other branch of the Rule of Reason to the privilege to restrain competition for a lawful main purpose.[176] Both doctrines aim to minimize the adverse effects of an agreement on competi-

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173. 309 U.S. at 460.

174. White Motor Co. v. United States, 372 U.S. 253, 270 (1963) (Brennan, J., concurring).

175. The question is considered in American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248–50 (3d Cir. 1975). If the "less restrictive alternative" need not be one that the parties should reasonably have discovered themselves, businessmen who have pursued a lawful main purpose in a responsible way are potentially liable to severe sanctions without fault. If, on the other hand, reasonable diligence is a complete defense, the courts will be powerless to enjoin needlessly anticompetitive activity even once its needlessness is proven to all.

Other questions might be raised. For example, must the private costs of the "less restrictive alternative" be less than or equal to the private costs of the alternative chosen by the parties? Suppose, for example, that in a given case all the benefits resulting to the public from a flat ban on sales by distributors outside their vertically imposed exclusive territories could have been achieved without deterring all competition among distributors—by means, for example, of a requirement that any distributor selling in another's territory pass through a portion of its profits on these sales to the other. What is the relevance, if any, of the fact that the flat ban is cheaper to administer?

176. *See* text accompanying notes 82–88 *supra*.

tion, subject to some constraint. On the "purpose" side, the constraint is the accomplishment of a lawful main purpose; on the "effects" side, it is the promotion of competition in some form other than the form restrained.

This observation suggests a broader conclusion. Notwithstanding the separate character of the two branches of the Rule of Reason, and the sound reasons for holding that restraint of trade may be established by proof either of anticompetitive purpose or of anticompetitive effect, there are points at which the two branches of the Rule of Reason must converge. It would seem absurd to classify a purpose to cause certain effects as a lawful main purpose, unless under the other branch of the doctrine effects of that kind are held to redeem anticompetitive effects when they occur. Similarly, when a court evaluating an agreement entered into for an anticompetitive purpose holds it in violation of section 1 on the ground that the restraint imposed by the parties exceeds what was reasonably necessary to the attainment of the lawful main purpose for which it was imposed, in a sense the court is not really faulting the parties for their purposes. The true basis for the imposition of liability in that kind of case is that the probable anticompetitive effects of the agreement exceed any reasonable justification. At that point the two lines of analysis under the Rule of Reason converge again; for all practical purposes, it would seem, the criteria for "reasonable necessity" and "least restrictive alternative" must be the same.[177] Perhaps, though almost seventy years of experience with the Rule of Reason have not produced an integrated theory of "reasonableness," the materials are at hand.

C. Per Se Rules

Many of the significant developments in the law of restraint of trade since 1911 have taken the form of rules by which the Supreme Court has sought to define, in Justice Black's classic formulation, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they may have caused or the business excuse for their use."[178] In theory, these rules are particularized applications of the Rule of Reason: an agreement

177. The seeds of this notion are present in a number of opinions in which the distinction between purpose and effect is not carefully observed. *See, e.g.*, Justice Brennan's excellent concurring opinion in White Motor Co. v. United States, 372 U.S. 253, 270–72 (1963).

178. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

that has all of the characteristics specified in such a rule is unreasonably anticompetitive "per se."

Such rules can simplify restraint-of-trade determinations in several ways. Where a Rule of Reason analysis involves an inquiry into primary purpose, a per se rule might provide that agreements entered into for specific anticompetitive purposes are unlawful, regardless of what else the parties may have had in mind. On the effects side, the usual full-scale investigation required by the Rule of Reason can be cut off in appropriate cases by stipulation that agreements with certain kinds of anticompetitive effects are unlawful, no matter what good they may do. Per se rules can also be drawn to prohibit certain conduct, either by itself or in conjunction with other factors.[179]

In practice, the per se rules are a mixed bag. Some of them are so poorly defined that it is impossible to say in which of the above classes (purpose, effect, or conduct) they fall.[180] Two of the better ones, the price-fixing rule and the rule against tying arrangements, serve to illustrate the points important here. The price-fixing rule is an example of a rule that will condemn agreements entered into for a particular *purpose,* whether they have provable anticompetitive effects or not.[181] The per se rule against tying arrangements, by contrast, turns on proof of power and *effect,* and will summarily condemn certain classes of agreements entered into for entirely innocent reasons.

Under the Sherman Act, the Supreme Court announced in *United States v. Socony-Vacuum Oil Co.*,[182] "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."[183] The per se rule against price fixing has endured. In subsequent decisions the Court has invoked it to condemn not only agreements to raise prices,[184] but agreements to depress them,[185] peg them at a fixed

179. The law of restraint of trade has been evolving in the direction of per se rules in cases involving competitive torts. *See* Hutter, *"Dirty Tricks" and Section One of the Sherman Act: Federalizing State Unfair Competition Law,* 18 B.C. INDUS. & COM. L. REV. 239 (1977).

180. A notorious illustration is the putative per se rule against group boycotts. *See generally* Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination,* 79 COLUM. L. REV. 685 (1979); McCormick, *Group Boycotts—Per Se or Not Per Se, That is the Question,* 7 SETON HALL L. REV. 703 (1976).

181. Although a purpose to price fix alone is sufficient to create a per se violation of § 1, *see* notes 188–190 and accompanying text *infra,* in several cases the Court has also held, without any inquiry into purpose, that a combination with the effect of price fixing violates § 1. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 781–83, 785 (1975); United States v. Container Corp., 393 U.S. 333, 337 (1969); Unied States v. Frankfort Distilleries, Inc., 324 U.S. 293, 296 (1945).

182. 310 U.S. 150 (1940).

183. *Id.* at 223.

184. United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945).

185. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

minimum,[186] and stabilize them against the pressure of declining demand.[187] It is one of the few per se rules the lower courts take seriously, and the only one for the violation of which appreciable numbers of people have been sentenced to prison.

In one sense the standard formulation of the rule is misleading. As Justice Douglas noted for the Court in *Socony*, it is not generally true that "both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act."[188] In particular cases venue or other procedural considerations may require, as they did in *Socony*, that the prosecutor or the plaintiff prove that the conspiracy has had some anticompetitive effect.[189] To establish the substantive violation, however, such proof is unnecessary: "It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other."[190]

What makes the price-fixing rule a per se rule is the controlling effect of proof that the parties acted with a particular kind of anticompetitive purpose. Garden-variety anticompetitive purposes can be justified in section 1 cases by proof that the bad purposes were subordinate to lawful main ones. Agreements entered into for the purpose of raising, depressing, fixing, pegging or stabilizing prices cannot. Any price-fixing agreement is a "threat to the central nervous system of the economy";[191] in cases involving such agreements "[i]t makes no difference whether the motives of the participants are good or evil . . . ."[192]

Notwithstanding the courts' extensive reliance on the *Socony* rule since 1940, suspicion persists that some classes of agreements that fall within its literal condemnation are not in fact illegal per se.[193] Since *Socony* the

186. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

187. United States v. Container Corp., 393 U.S. 333 (1969).

188. 310 U.S. at 224 n.59.

189. *Id.*; *see* United States v. Trenton Potteries Co., 273 U.S. 392, 402–04 (1927).

190. 310 U.S. at 224 n.59. *Accord*, McLain v. Real Estate Bd., 444 U.S. 232, 243 (1980): "If establishing jurisdiction [in a § 1 case] required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases."

191. 310 U.S. at 224 n.59.

192. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956). Thus, for example, in the *Socony* case, the Court affirmed criminal convictions entered on verdicts returned on instructions charging the jury in effect to disregard the evidence in the record that the parties' purpose in conspiring to raise prices was to preserve productive capacity that would be needed in the future, in furtherance of an announced federal policy. 310 U.S. at 210–11.

193. *See* L. SULLIVAN, *supra* note 21, §§ 76–77. *Cf.* Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1 (1979) (BMI's blanket licensing agreements held not to be price fixing in violation of the per

Supreme Court has yet to hold lawful under section 1, however, an agreement that fails the *Socony* test. The mandate of the rule itself is clear: Juries in price-fixing cases are to be charged that the determination that the defendants' agreement was "in restraint of trade" does not depend in any way on whether their purpose to fix prices was their main one,[194] or whether they actually brought it off.[195]

By contrast to the rule against price fixing, the per se rule against tying arrangements makes no mention of purpose at all. A tying arrangement is defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[196] Only some tying arrangements are unlawful per se. The standard formulation is Justice Black's for the Court in *Northern Pacific Railway v. United States:* tying arrangements are "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected."[197] Ostensibly, an agreement or pattern of agreements that meets these conditions is unlawful regardless of the seller's purposes. In practice, the rule is generally treated as establishing only a presumption of illegality, rebuttable by a showing that the tie was essential to achieve one or another of certain good ends. In tying cases the burden of justifica-

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se rule.); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978) (concerted refusal of engineers to bid on jobs, while illegal, held not to be "price fixing").

194. *See* 2 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 55.22 (3d ed. 1977):

> A conspiracy to fix prices in or affecting interstate trade and commerce is unlawful, even though the conspiracy may be formed or engaged in for what appear to the conspirators to be laudable motives.
>
> A price-fixing conspiracy, such as charged in the indictment, cannot therefore be justified under the law, even though the conspiracy may have been formed, or engaged in, to prevent or halt ruinous competition, or to eliminate the evils of price cutting, or to give each competitor what the conspirators think is his fair share of the market.

195. *See id.* § 55.23:

> The proof need not show that the members of the alleged conspiracy did any act or thing to further, or accomplish, any object or purpose of the agreement or arrangement or understanding. Nor is it necessary for the proof to show that any of the accused actually adopted, or followed, or adhered to, any price schedule or formula or list which may have been agreed upon or arranged or understood.
>
> . . . .
>
> The gist of the crime charged in the indictment is knowingly making or arriving at an agreement, or arrangement, or understanding, in unreasonable restraint of interstate trade and commerce; that is to say, what the law forbids is the act of knowingly becoming a party to or member of a conspiracy such as charged in the indictment.

196. Northern Pac. Ry. v. United States, 356 U.S. 1, 5–6 (1958) (footnote omitted).

197. *Id.* at 6.

tion is clearly on the defendant; if the defendant fails to bear it, the arrangement is in restraint of trade, though proof of anticompetitive purpose is entirely lacking in the case.

"Tying agreements," the Court has observed, "serve hardly any purpose beyond the suppression of competition."[198] While some few tying arrangements may be voluntary on both sides, "[i]n the usual case only [the seller's] control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one."[199] In *Standard Oil Co. and Standard Stations, Inc. v. United States*,[200] this reasoning led the Court to conclude that "[t]he existence of market control" in the tying device warrants a "presumption" that the restraint on competition resulting from the arrangement is unreasonable.[201] The per se rule of *Northern Pacific* purports to make that presumption conclusive. In fact, however, no holding of the Supreme Court goes that far. In *Northern Pacific* itself, the Court noted that the defendant railroad's purpose in tying freight services to land leases was "to stifle competition."[202] Presented squarely with claims that a tying arrangement was necessary to preserve "good will" in the tying product, the Court has twice rejected the claims on the ground, not that such claims if proven afford no defense, but that on the facts of the case there were less restrictive alternatives.[203]

In the lower courts today, the prevailing view appears to be that proof that the elements of the *Northern Pacific* per se rule are made out in a given case does not cut off further inquiry into the reasonableness of the restraint. If the defendant's sole or primary purpose was anticompetitive, of course the arrangement violates section 1.[204] The plaintiff need not, however, prove bad purpose at all—he or she may stand on a showing under the per se rule.[205] In that event the burden shifts to the defendant to

198. Standard Oil Co. and Standard Stations, Inc. v. United States, 337 U.S. 293, 305 (1949).

199. *Id.* at 306.

200. 337 U.S. 293 (1949).

201. *Id.* at 306.

202. 356 U.S. at 8.

203. International Salt Co. v. United States, 332 U.S. 392, 396–98 (1947); IBM Corp. v. United States, 298 U.S. 131, 138–40 (1936).

204. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 835 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); Advance Bus. Sys. & Supply Co. v. SCM Corp., 415 F.2d 55, 66 (4th Cir. 1969); Osborn v. Sinclair Ref. Co., 286 F.2d 832, 840 (4th Cir. 1960); United States v. General Motors Corp., 121 F.2d 376, 412 (7th Cir.), *cert. denied*, 314 U.S. 618 (1941).

205. In a number of the reported cases, the analysis simply ends at this point, the court holding the defendant liable under the per se rule. *See, e.g.*, United States v. Loew's, Inc., 371 U.S. 38 (1962); Aamco Automatic Transmissions, Inc. v. Tayloe, 407 F. Supp. 430 (E.D. Pa. 1976); Detroit City Dairy, Inc. v. Kowalski Sausage Co., 393 F. Supp. 453 (E.D. Mich. 1975).

prove a legitimate business reason for the tie.[206] The range of legitimate business reasons that will justify a tying arrangement otherwise unlawful under the *Northern Pacific* test has not been defined. Thus, whether it includes all purposes that might support a defense in a Rule of Reason case is an open question. Clearly at least two purposes will support a defense even in a per se case: establishment of consumer confidence in a novel product,[207] and protection of the reputation of a trademark against debasement by association with inferior goods.[208]

In sum, tying arrangements that fulfill the criteria of the per se rule in terms of power and effect are presumed to be unlawful without the necessity of proof as to the purposes for which they were imposed, but the presumption is not conclusive. A defendant whose purpose was wholly innocent may still lose; the arrangement violates section 1 unless the innocent purpose is one that justifies an exception to the per se rule, and the tie has been imposed in the least restrictive form possible.[209]

Rhetoric aside, no practice that has been made the subject of a per se rule "lack[s] any redeeming virtue."[210] All, including price fixing and tying, sometime promote competition in some respects. The important question in each instance is whether the gains from a bright-line prohibition, in terms of predictability and enforceability, outweigh the costs. A rule that imposes liability without the usual full-scale inquiry into primary purpose and net effect may condemn some agreements that do more good than harm—but defining "restraint of trade" in terms so clear that a breach invites the harsher sanctions of the Sherman Act may also deter the formation of a great many agreements that do more harm than good.

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206. Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 46 (5th Cir. 1976); Switzer Bros., Inc. v. Locklin, 297 F.2d 39, 46 (7th Cir. 1961); Phillips v. Crown Cent. Petroleum Corp., 395 F. Supp. 735, 766 (D. Md. 1975); United States v. Jerrold Elecs. Corp., 187 F. Supp. 545, 560 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). *See generally* Bauer, *A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis*, 33 VAND. L. REV. 283, 324–27 (1980).

207. United States v. Jerrold Elecs. Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961). *Cf.* Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961) (maintaining consumer confidence in an established product).

208. Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), *cert. dismissed as improvidently granted*, 381 U.S. 125 (1965). *See* Note, *Quality Control and the Antitrust Laws in Trademark Licensing*, 72 YALE L.J. 1171 (1963); text accompanying note 203 *supra*.

209. International Salt Co. v. United States, 332 U.S. 392 (1947); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51–52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); N.W. Controls, Inc. v. Outboard Marine Corp., 333 F. Supp. 493, 505 (D. Del. 1971).

210. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). *See* text accompanying note 178 *supra* for the entire quotation.

II. CONTRACT, COMBINATION, OR CONSPIRACY

"Restraint of trade," however defined, is no offense against section 1 of the Sherman Act except in conjunction with a "contract, combination . . . or conspiracy." The drafters of the Act did not define those terms. All of them would have been familiar to the drafters in the context of common-law doctrines and statutes relating to the preservation of competition;[211] all suggest collaboration or cooperation among several parties, as distinguished from the single-firm conduct addressed by the prohibitions against monopolization and attempts to monopolize in section 2.

If Congress had seen fit to make the consequences of a section 1 violation differ depending on whether it took the form of a "contract," a "combination," or a "conspiracy," we would presumably have by now a reasonably well-developed definition for each term. Congress, however, did not so provide; nor did it leave any sign of having given serious thought to the choice of these terms over the many others with similar connotations—"pool," "trust," "combine," "confederation," "agreement," "arrangement," "understanding"—routinely employed in the state antitrust statutes of the day.[212]

As a result, ninety years after the enactment of the law, clear distinctions between "contract," "combination," and "conspiracy" have not emerged. The Supreme Court has implied that distinctions do exist.[213] More often than not, however, when the Court concludes that section 1 has been violated, it fails to specify which type of violation the record discloses. Sometimes it has referred to the offending arrangement as a "conspiracy and combination,"[214] or a "contract or combination."[215] Over time it has shown itself partial to terms that do not appear in the

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211. *See generally* W. LETWIN, LAW & ECONOMIC POLICY IN AMERICA 18–99 (1965); H. THORELLI, THE FEDERAL ANTITRUST POLICY 9–53, 155–63 (1955); Dicey, *The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century*, 17 HARV. L. REV. 511 (1904); Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 207, 213–19 (1926).

212. *See, e.g.*, Act of May 20, 1890, 1889–90 Ky. Acts, ch. 1621, § 1:

> [A]ny corporation . . ., partnership, company, firm or individual [that] . . . shall . . . become . . . a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, [etc.,] for the purpose of regulating or controlling or fixing the price of any merchandise . . . shall be deemed guilty of the crime of conspiracy, and punished therefor . . . .

213. On occasion, for example, it has pointedly referred to a given arrangement as a "combination" rather than a "conspiracy." *See* Albrecht v. Herald Co., 390 U.S. 145, 149–50 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 43, 44 (1960).

214. United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723 (1944). *Cf.* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 (1940) (terms used interchangeably).

215. United States v. Terminal R.R. Ass'n, 224 U.S. 383, 409 (1912).

statute at all—"agreement,"[216] "arrangement,"[217] and "plan."[218] Occasionally it has described the violation in terms that seem to be intended to get at essential characteristics of every section 1 violation—"joint and collaborative,"[219] or "collective,"[220] or "concerted action."[221]

This flexible approach to the interpretation of the statutory terms has brought within the ambit of section 1 a wide variety of multi-firm conduct. Some of the arrangements struck down in the cases fall conveniently into one of the three statutory categories: formal agreements containing anticompetitive terms, drawn up as bilateral contracts;[222] powerful "combinations" of formerly competing corporations, resulting from the concentration of voting stock in a few hands, in the style of the original "trusts";[223] and "conspiracies" formed along traditional lines for the purpose of eliminating competition among the conspirators[224] or bringing their competitors to heel.[225] Other arrangements the Court has held unlawful under section 1 are harder to classify: membership regulations of professional societies;[226] informal agreements to exchange information;[227] and the yielding by wholesalers to a manufacturer's threats to terminate those who sell to retailers disapproved by the manufacturer.[228] Had the individual categories in section 1 been specifically defined, some of these might well have fallen between the cracks.

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216. Goldfarb v. Virginia State Bar, 421 U.S. 773, 782 (1975); United States v. Container Corp., 393 U.S. 333, 335 (1969); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Trenton Potteries Co., 273 U.S. 392, 397, 398 (1927); United States v. Joint-Traffic Ass'n, 171 U.S. 505, 577 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 342 (1897).

217. United States v. Sealy, Inc., 388 U.S. 350, 352 (1967); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43–44 (1930).

218. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226–27 (1939). *Cf.* American Column & Lumber Co. v. United States, 257 U.S. 377, 399 (1921) (manufacturers' "Open Competition Plan" held to be a combination in violation of Act).

219. United States v. General Motors Corp., 384 U.S. 127, 143 (1966).

220. Silver v. New York Stock Exch., 373 U.S. 341, 348 n.5 (1963).

221. *Id.* at 347.

222. *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (tying arrangements); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (group boycott effectuated by a series of bilateral contracts); Standard Oil Co. (Indiana) v. United States, 283 U.S. 163 (1931) (cross-licensing of patents); United States v. Reading Co., 226 U.S. 324, 355–70 (1912) (output contracts); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (resale price maintenance).

223. *See* United States v. Union Pac. Ry., 226 U.S. 61 (1912); United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Northern Sec. Co. v. United States, 193 U.S. 197 (1904).

224. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

225. *See* Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914).

226. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

227. *See* United States v. Container Corp., 393 U.S. 333 (1969).

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

Perhaps the one generalization the Supreme Court's decisions on this issue will support is that to make out a section 1 violation there must be proof of the kind of mutual assent suggested by the word "agreement." The requirements of the Act have in general been held satisfied only when the record disclosed an exchange of commitments, each party making a commitment contingent on commitments by others, and expecting some benefit from their performance. Consciously parallel conduct—action taken by several parties, each in the knowledge that the others are taking similar action—may be evidence of the relationship the Act requires,[229] but the evidence must also support an inference that the parties' conduct is interdependent[230] in the sense that each is not only aware of the others' conduct, but is depending on it. The key to section 1 liability, in the words of Chief Justice Stone in *Interstate Circuit, Inc. v. United States*,[231] is the "[a]cceptance . . . of an invitation to participate in a plan."[232] From the perspective of any individual member, the core of the combination or conspiracy is a plan known to him and others, composed of a job for him and jobs for them. His knowledge that the plan has been proposed does not jeopardize him; liability attaches only when he and at least one other signify, by words or conduct, that they accept the plan and will do their part.

This doctrine meshes nicely with the doctrine that concerted action may be held to be an unlawful restraint of trade under section 1, though the parties are not shown to have acted with any anticompetitive purpose, if their conduct is unreasonably anticompetitive in its *effects*.[233] In order to reach such conduct under section 1, "contract, combination . . . or conspiracy" must be defined to include more than traditional conspiracy among parties who share a common unlawful purpose. The requirements of the doctrine are well met by a definition simply in terms of agreement, or acceptance of a common plan. The fact that somebody has accepted a plan says nothing in itself about his or her purposes.[234] They may be

229. *See* Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540–41 (1954): "To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement, or, phrased differently, that such behavior constitutes a Sherman Act offense."

230. *See* Turner, *The Definition of Agreement Under the Sherman Act*, 75 HARV. L. REV. 655, 657–63 (1962).

231. 306 U.S. 208 (1939).

232. *Id.* at 227.

233. *See* text accompanying notes 90–177 *supra*.

234. "Quite clearly," LaFave and Scott observe in their analysis of the mental components of conspiracy as traditionally defined,

> there may be an intent to agree without there also being a common intent to achieve an unlawful objective, as where *A* and *B* agree to burn certain property and *A* knows the property belongs to

"lawful" or "unlawful"; they may be the same as those of the other parties, or they may not.

The importance of a good fit between the doctrines defining "contract, combination . . . or conspiracy" and "restraint of trade" becomes clear when one compares two forms of horizontal price fixing—a formal cartel like the defendants' in *Addyston Pipe & Steel Co. v. United States,*[235] and a simple agreement to exchange price information such as the one in *United States v. Container Corp.*[236]

When the Addyston Pipe and Steel Company and the other five firms engaged in the manufacture of cast-iron pipe in the southeastern United States agreed to appoint a central committee to determine the price at which any of them would be permitted to bid on any contract in the region, and as a result the prices at which they all sold pipe rose to a point just below the price at which foundries outside the region could afford to ship pipe to customers within it,[237] none of the six could plausibly deny that reduction of price competition among them was one of the results they sought to achieve.[238] Under the Rule of Reason, their agreement was "in restraint of trade" unless they could establish an overriding lawful main purpose; under the present-day per se rule against price-fixing, even that would not have saved it. And on a definition of "contract, combination . . . or conspiracy" along the lines of traditional conspiracy, their agreement would qualify: the record disclosed not only an intent to agree, but an intent to achieve a common anticompetitive purpose.[239]

An agreement among manufacturers to exchange current price information on request requires a more subtle analysis. Depending on the circumstances, such an exchange may injure competition, or promote and facilitate it.[240] If such an agreement chills price competition and raises the market price above competitive levels, the proof may show that all of the

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C but *B* (perhaps because he has been misled by *A*) believes that the property belongs to *A*.

W. LAFAVE & A. SCOTT, *supra* note 4, § 61, at 464. Antitrust doctrine under § 1 dispenses with the requirement of an intent to achieve an unlawful objective. It does not, I believe, dispense with the requirement of an intent to agree. "The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme." United States v. Standard Oil Co., 316 F.2d 884, 890 (7th Cir. 1963). *See also* United States v. United States Gypsum Co., 438 U.S. 422, 443 n.20 (1978) (Court distinguishes between intent to agree and intent to "effectuate the object of the conspiracy").

235. 175 U.S. 211 (1899). *See generally* text accompanying notes 57–62 *supra.*

236. 393 U.S. 333 (1969). *See generally* text accompanying notes 121–126 *supra.*

237. 175 U.S. at 235–36.

238. *See id.* at 240–42.

239. *Id.* at 243.

240. L. SULLIVAN, *supra* note 21, § 94. *Compare* Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 582–83 (1925) *with* United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16, 457–58 (1978).

parties entered into the agreement with exactly that end in view. On the other hand, it may not. The proof may show, instead, that some or all of the parties entered into it in order to prevent "fraud" on the part of purchasers who misrepresent the prices at which other firms have offered to sell,[241] or in order to obtain the information necessary to determine whether they could lawfully cut their prices to selected customers.[242] The smaller firms in the industry may be able to show that they had no real expectations from the agreement, seldom were asked for any information, never asked for any themselves, and agreed to the exchange in the first place solely to get the larger firms to leave them alone. The court may well conclude, as the Supreme Court did in *Container Corp.*, that the agreement is "in restraint of trade" by virtue of its unreasonably anticompetitive effects. Under section 1, however, the parties cannot even be enjoined from implementing the agreement unless it qualifies as a "contract, combination . . . or conspiracy." A definition of that element in terms of acceptance of a common plan brings within the prohibition of the Act unjustifiably anticompetitive arrangements such as this one, which a definition in terms of common unlawful purpose would put beyond the reach of the law.

From the decisions of the Supreme Court in cases like *Container Corp.*, it is clear that proof of anticompetitive purpose is not in fact required to make out "contract, combination . . . or conspiracy" under section 1.[243] In horizontal cases, proof simply of agreement among competitors appears to be enough: "Acceptance by competitors . . . of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."[244] In vertical cases some-

241. *See* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925).

242. *See* United States v. United States Gypsum Co., 438 U.S. 422, 447–59 (1978).

243. *See id.* at 446 n.22 (1978) (citing cases); text accompanying notes 93–127 *supra*.

244. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939). Compare these jury instructions—all, I believe, correct under the Court's decisions:

(1) United States v. Huckaba & Sons Constr. Co., Crim. Nos. S-CR 74-3 through S-CR 74-9 (S.D. Ill. 1976), *instruction reprinted in* CRIMINAL JURY INSTRUCTIONS, *supra* note 10, at 54: "A conspiracy under Section 1 of the Sherman Act is an agreement by two or more persons or corporations to accomplish a common objective which would result in an unreasonable restraint of interstate commerce."

(2) Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962), *instruction reprinted in* 1972 CIVIL JURY INSTRUCTIONS, *supra* note 11, at 37: "A conspiracy under the antitrust law is an understanding between two or more persons with respect to engaging in a course of conduct. It is not necessary to find an express agreement in order to find conspiracy. It is enough that uniformity of action is contemplated by the defendants . . . ."

(3) Kenmore–Louis Theatre Inc. v. Loew's Boston Theatres, Inc., Civ. No. 59-184-J (D. Mass. 1963), *instruction reprinted in* 1972 CIVIL JURY INSTRUCTIONS, *supra* note 11, at 22: "[The] evidence

thing more is required, but it is not anticompetitive purpose. Under the doctrine of *United States v. Colgate & Co.*,[245] certain anticompetitive agreements between suppliers and customers are exempt from condemnation under the Act. In the application of this doctrine it is the supplier's tactics that matter, not his reasons. Though his purposes be wholly anticompetitive, he may lawfully secure adherence to his conditions by means that do not "go beyond his mere declination to sell to a customer who will not observe his announced policy."[246] If, however, he refuses to stop there, and "employs other means which effect adherence,"[247] the resulting agreement comes within the ambit of section 1. And in cases involving supplier-customer agreements effectuated by means not privileged under *Colgate,* as in cases involving agreements among competitors, the absence of proof of bad purposes is not controlling. "[A]ssuming nonpredatory motives and business purposes," the court must ascertain whether "the effect upon competition in the marketplace is substantially adverse. . . . It is only if the conduct is now unlawful in its impact on the marketplace . . . that protection is achieved."[248]

III. SANCTIONS

Under traditional conspiracy doctrine, one is civilly or criminally liable as a conspirator only if one shares in the common unlawful purpose of the conspiracy.[249] As the foregoing analysis shows, in the case of agreements that violate section 1, common unlawful purpose may be entirely lacking. The question thus arises whether the mere act of entering, without a wrongful purpose, into an agreement that proves to have unreasonably anticompetitive effects, renders a party liable to the full range of Sherman Act sanctions, including treble damages and criminal punishment.

It would be surprising if the answer were yes. To enjoin the *Container*

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must prove the existence of a continuous course of conduct or plan which each alleged member of the conspiracy accepts and which has the effect of unreasonably restraining trade."

245. 250 U.S. 300, 307 (1919):

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the . . . right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.

246. United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960).

247. *Id.* at 44.

248. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967).

249. As to civil liability, *see* 15A C.J.S. *Conspiracy* § 16 (1967); Burdick, *Conspiracy as a Crime, and as a Tort,* 7 COLUM. L. REV. 229, 245–47 (1908). As to criminal liability, *see* W. LAFAVE & A. SCOTT, *supra* note 4, § 61, at 464–66; Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute,* 61 COLUM. L. REV. 957, 968–70 (1961).

Corp. defendants[250] was one thing; to have branded them as felons would have been quite another. The doctrine that anticompetitive purpose is inessential to a section 1 violation has evolved primarily in suits for injunctive relief under section 1. In that context, it serves Congress' purposes well. How it applies or should apply in felony prosecutions and treble damage actions is far less clear.

The imposition of criminal sanctions and treble damages seems clearly appropriate in the case of agreements entered into primarily for anticompetitive purposes, or for purposes (like the purpose to fix prices) condemned by a widely understood per se rule. In these cases the traditional mens rea requirements of the criminal law,[251] and the element of "malice" or "wilfulness" associated in tort law with punitive damages,[252] are fully made out.[253] The public interest in deterring the formation of such agreements is very great, and cannot be well served in any other way.[254]

The problem arises from the fact that some agreements are also to be held to violate section 1 though their actuating purposes were neutral or benign, or though there is no credible evidence as to what those purposes were. To convict the parties to such agreements as felons on the same evidence that sufficed to prove the basic violation of the substantive standards of the Act is almost certainly wrong. In many such instances criminal punishment will be unfair. Though it has been held that the Rule of Reason is not unconstitutionally vague as a criminal standard,[255] it still

250. *See generally* text accompanying notes 121–127 & 240–243 *supra*.

251. *See generally* United States v. United States Gypsum Co., 438 U.S. 422, 436–46 (1978); W. LAFAVE & A. SCOTT, *supra* note 4, §§ 27–28.

252. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2, at 9–10 (4th ed. 1971).

253. *See also* Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405, 412–14 (1978). Compare the summary of the prosecutorial policy of the Antitrust Division in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 110 (1967):

> The solution of the Antitrust Division to [the] problem of potential unfairness has been to lay down the firm rule that criminal prosecutions will be recommended to the Attorney General only against willful violations of the law, and that one of two conditions must appear to be shown to establish willfulness. First, if the rules of law alleged to have been violated are clear and established—describing *per se* offenses—willfulness will be presumed. The most common criminal violation of the antitrust laws is price fixing; upwards of 80 percent of the criminal cases filed charge conspiracies to fix prices. The Supreme Court held more than 30 years ago that price fixing was a *per se* violation of the law—one for which no justification or defense could be offered. . . . Second, if the acts of the defendants show intentional violations—if through circumstantial evidence or direct testimony it appears that the defendants knew they were violating the law or were acting with flagrant disregard for the legality of their conduct—willfulness will be presumed.

254. Enormous pressures may be brought to bear on executives to enter into such agreements. *See* Bower, *A Managerial View of Compliance*, 46 ANTITRUST L.J. 498 (1977).

255. Nash v. United States, 229 U.S. 373, 376–78 (1913). *See* Cline v. Frink Dairy Co., 274 U.S. 445, 460–63 (1927).

seems intolerably hard that the consequence of a reasonable failure to predict correctly how a jury will decide a question of "reasonable necessity"[256] or "net effect on competition"[257] should be a felony conviction. If that is in fact the consequence of such an error, the threat of criminal sanctions is highly likely to deter the formation of agreements from which the public would benefit. Whether the corresponding gains from deterrence would balance the losses is at least open to doubt. Even if on balance the deterrent effects were beneficial, questions would remain as to the legitimacy of using the criminal sanction in this way to punish conduct which in the eyes of many is not morally reprehensible.[258]

If the Sherman and Clayton Acts[259] were held to require that every party to an agreement unlawful under section 1 is liable to every sanction provided for violations of that provision, the substantive doctrines of the Act would be placed under intolerable strain. For many years the courts have managed to avoid absurd consequences resulting from the failure of the statute to distinguish among violations for different remedial purposes, without confronting the problem directly. In 1978, in *United States v. United States Gypsum Co.*,[260] the Supreme Court squarely addressed the problem for the first time, and resolved it in a way that bodes well for the future development of the law.

Before the Court in the *Gypsum* case were seven defendants—four corporations and three individuals—appealing their convictions for combination and conspiracy in restraint of trade in the manufacture and sale of gypsum wallboard in violation of section 1.[261] At the close of their trial

256. *See* text accompanying notes 82–88 *supra*.

257. *See* text accompanying notes 158–168 *supra*.

258. The perspective of the defense bar is well stated in Mercurio, *Antitrust Crimes: Time for Legislative Definition*, 51 NOTRE DAME LAW. 437 (1976). It has been suggested that potential antitrust defendants prefer a state of uncertainty in the substantive law of antitrust, in part because it makes these kinds of arguments possible. *See* Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?*, 63 YALE L.J. 348, 350–53 (1954).

259. *See generally* 15 U.S.C. § 15 (1976); note 25 *supra*.

260. 438 U.S. 422 (1978).

261. The opinion of the Third Circuit in the case summarizes the proceedings at trial:

> The government's case on price fixing centered on a practice appellants call[ed] "verification." An officer of one gypsum board manufacturer would telephone a competing firm's officer to determine the price at which the competitor was offering gypsum board to a specific customer. The scope, purpose, and duration of this activity [were] sharply disputed by the parties. The Government contend[ed] that the purpose of verification was to enable competitors to stabilize prices and "police" agreed-upon increases, that the calls involved broad discussions of present and future pricing policies, that the appellants verified daily, and that they continued to do so until 1973. Appellants insist[ed] that the only purpose of the calls was to ensure compliance with the Robinson-Patman Act . . . , that the conversations were limited in scope and number, and that the practice had been discontinued, except for a few isolated, unauthorized calls, before the start of the applicable limitations period, December 27, 1968. There [was] evidence to support each claim of both sides.

the judge had charged the jury that in deciding whether to convict the defendants of price fixing on the evidence pertaining to their agreement to exchange current price information, it must determine whether they had acted "for the purpose of raising, fixing, maintaining, and stabilizing prices."[262] He then charged the jury on the significance of proof in the record that the defendants' exchange of information pursuant to agreement had had anticompetitive effects. First, he said, "if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these [exchanges] as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices."[263] Then he elaborated: "The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result."[264]

Holding that the jury had been erroneously instructed concerning the legal significance of proof of anticompetitive effects, the Supreme Court reversed all seven convictions.[265] The basic question, as Chief Justice Burger posed it in his opinion for the majority, was "whether intent is an element of a criminal antitrust offense."[266] The answer was yes: "[W]e hold that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom . . . . We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses."[267] As to the kind of "intent" required, in the Court's view the alternatives came down to two, corresponding to the respective definitions of "purpose" and "knowledge" in the Model Penal Code:

> Our question . . . is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow.[268]

United States v. United States Gypsum Co., 550 F.2d 115, 120 (3d Cir. 1977), *aff'd*, 438 U.S. 422 (1978).

262. 438 U.S. at 472 (Rehnquist, J., concurring in part and dissenting in part).

263. *Id.*

264. *Id.* at 430.

265. Seven Justices concurred in the reversal. Five joined with Chief Justice Burger in Part II of his opinion for the Court, the part discussed in the text.

266. 438 U.S. at 426.

267. *Id.* at 435–36.

Traditionally, according to the commentators, either "purpose" or "knowledge" satisfied the mens rea requirement for crime. Any defendant who acted with either the desire to injure competition or the awareness that it would be injured was "consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment."[269] Accordingly, the Court concluded 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 liability under the antitrust laws."[270]

It remained to apply this holding to the case before the Court. The trial judge had instructed the jurors that if they found that the defendants' information exchange stabilized prices, they must find that this had been the defendants' intent. This was error, for "although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of the fact alone."[271]

From the standpoint of the law of purpose and effect in cases arising under section 1 generally, the significant thing about the *Gypsum* decision is that the Court, after lengthy consideration, rejected the proposition that anticompetitive purpose is an indispensable element of a section 1 violation in a criminal case. Answering the defendants' contention that the Court's own precedents required that they be acquitted unless they were proven to have acted with the purpose of injuring competition, the Court cited a long list of civil precedents, including *Container Corp.*, to show that it was not so.[272] Since the Court first held in the *Trans-Missouri* case in 1897[273] that anticompetitive purpose is not an indispensable element of a section 1 violation, it has never been clear whether the doctrine applied in criminal as well as civil cases. *Gypsum* makes it clear. After *Gypsum,* in any criminal case involving an agreement with unreasonably anticompetitive effects, proof that two or more defendants sought to attain a "common unlawful purpose" is unnecessary to conviction.[274]

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268. *Id.* at 444. *See* MODEL PENAL CODE § 2.02 (Tent. Draft No. 4, 1955).

269. 438 U.S. at 445.

270. *Id.* at 444.

271. *Id.* at 446.

272. *Id.* at 446 n.22.

273. *See* text accompanying notes 103–106 *supra.*

274. In a footnote to the opinion the Court distinguished between civil and criminal violations of § 1: "Our analysis focuses solely on the elements of a criminal offense under the antitrust laws, and leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." 438 U.S. at 436 n.13. The thrust of that distinction is not clear. Plainly the point is not that in criminal cases, unlike civil cases, proof of anticompetitive effects is required: "[W]e do not mean to suggest," the Chief Justice noted elsewhere in the opinion,

While it may at first appear that the Court in *Gypsum* simply substituted "knowledge" for the traditional "purpose" requirement in criminal conspiracy cases, in fact the opinion went a step beyond that. In the traditional formulation, no party is liable for criminal conspiracy unless at least two parties share a common unlawful purpose. After *Gypsum*, the corresponding doctrine in section 1 cases would be that no party is liable criminally on the strength of his "guilty knowledge" unless at least one other party to the same agreement had that knowledge. It is very hard to see why this should be the law, and the Court's opinion in *Gypsum* strongly implies that it is not. Throughout the opinion, the Court treated criminal guilt in a section 1 case as an entirely individual matter. Liability under section 1 is "predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged."[275] In the context of a criminal prosecution under section 1, "the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent."[276] No party is criminally liable because of what any other party knew; and conversely, no party who foresaw the anticompetitive consequences of the agreement, and proceeded to implement it regardless, is exonerated because his partners were more naive.[277]

Though the Court in *Gypsum* supported its reasoning with precedents in civil cases, it took pains to make clear that it intended to leave the law of section 1 for civil cases undisturbed. The opinion is carefully qualified throughout. "Our analysis," the Chief Justice wrote, "focuses solely on the elements of a criminal offense under the antitrust laws . . . ."[278] The legislative history of the Sherman Act, he continued, "indicates that Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and . . . did not intend to do away with

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"that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass." *Id.* at 444 n.21. Equally plainly, the footnote cannot mean that anticompetitive *purpose* must be proven in criminal cases; in the text the Court analyzed that issue and resolved it the other way. *Id.* at 445–46.

The Court's point, therefore, must have been that criminal violations require proof of mens rea and civil violations ordinarily do not. The "general rule that a . . . violation can be established by proof either of an unlawful purpose or an anticompetitive effect" is in fact a rule for civil and criminal cases alike. To make out a criminal violation, however, unless the prosecution can establish anticompetitive purpose, it must establish, in addition to the anticompetitive effects that would suffice for civil liability, foreknowledge of those effects by the defendant. *See* United States v. Krasn, 614 F.2d 1229, 1236–37 (9th Cir. 1980); Garvey, *The Sherman Act and the Vicious Will*, 29 CATH. U.L. REV. 389, 396 (1980).

275. 438 U.S. at 463.

276. *Id.* at 446.

277. *See also comment to* MODEL PENAL CODE § 5.03, at 104–05 (Tent. Draft No. 10, 1960) (Code also takes "unilateral approach" to conspiracy).

278. 438 U.S. at 436 n.13.

them."[279] Concluding that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element,"[280] the Court characterized this conclusion as "[a]n accommodation of the civil and criminal provisions of the Act."[281] The importance of this accommodation is clear: parties to an agreement may be held liable to injunction or answerable in damages for their participation in an agreement, on evidence well short of what would be required to convict them of any crime.[282]

Notwithstanding the Court's disclaimers, the *Gypsum* opinion has important implications for one class of civil cases under section 1. Prior to *Gypsum,* the courts took for granted that all conspirators in restraint of trade were jointly and severally liable in treble damages[283] to anyone who had standing to sue and had suffered the kind of injury for which the law allowed recovery.[284] They did not, in other words, distinguish in these cases between violation and liability to sanction,[285] just as they did not in other kinds of cases under section 1. In *Gypsum* the Supreme Court, unfazed by the lapse of eighty-eight years since the passage of the Sherman Act, addressed the proposition that all section 1 violators are criminals as if it were new, and held that it contravened the original legislative intent. The parallel proposition regarding liability to treble damages is also open now to reexamination.

There are several possible outcomes. The same mens rea requirements might be imposed in private treble damage actions as in criminal cases. The Court's opinion in *Gypsum,* with its sharp distinctions in dictum between criminal and civil cases under section 1, is extremely hostile to that alternative.[286] Another alternative is strict liability. In the context of a treble damage statute, the pros and cons of strict liability will merit a careful new look.

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279. *Id.* at 443 n.19.

280. *Id.* at 443.

281. *Id.* at 443 n.19.

282. The Chief Justice noted specifically that the Court's analysis "leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *Id.* at 436 n.13. As the rest of the opinion makes clear, the distinction between civil and criminal cases is that criminal conviction requires, not proof of anticompetitive purpose, but proof of knowledge of probable anticompetitive effects. *See* note 274 *supra.*

283. *See, e.g.,* Washington v. American Pipe & Constr. Co., 280 F. Supp. 802, 804–05 (S.D. Cal.), *cert. denied,* 393 U.S. 842 (1968); cases cited, *id.* nn.4–8.

284. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

285. The few lower-court decisions that raise the problem of limiting treble damage exposure to the most culpable parties have generally analyzed it in terms of the conditions for membership in an antitrust conspiracy generally. *See, e.g.,* Kline v. Coldwell, Banker & Co., 508 F.2d 226, 231–33 (9th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975); Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 155 (S.D.N.Y. 1972).

286. *See also* Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 570–71 (1951).

There is intermediate ground. To date it is almost entirely unexplored. Now that the Court has broken out the problem of remedy under section 1 from the problems of substantive violation, the courts are free to treat the treble damage action under section 1 as a peculiar kind of action in tort. Viewing it that way, it would not be surprising if in some future case the Supreme Court observed that its language in *Gypsum* dismissing recklessness and negligence as concepts which "have no place" in antitrust jurisprudence[287] was unnecessary to its decision and, on reflection, premature.

IV. CONCLUSION

By its terms, section 1 of the Sherman Act punishes conspiracies. Perceiving that to interpret section 1 in strict accordance with traditional notions of conspiracy would defeat its purposes, the courts have held that concerted action may violate the statute though the parties lacked any purpose to bring about the effects the statute aims to prevent. Proof of an intention to enter into an agreement is essential. Proof of a purpose to injure competition is merely relevant. Agreements entered into for anticompetitive purposes are unlawful under section 1, whatever their effects, if they lack a lawful main purpose or if the restraint imposed on competition exceeds what is reasonably necessary to the accomplishment of such a purpose. Agreements with actual or probable anticompetitive effects are unlawful, regardless of their purposes, unless they promote competition in some way and do that by the least restrictive method available to the parties, and unless, on balance, they have a positive effect on competition. Any party to an agreement held unlawful on the strength of its actual or probable anticompetitive effects is liable to criminal conviction under the Act, whether or not the party acted with the purpose of causing such effects, if the party knew they were reasonably certain to occur.

In the years since 1897 the Supreme Court has dealt sensibly and straightforwardly with a number of the issues that have arisen as a result of section 1's emancipation from the constraints of traditional conspiracy doctrine. Important questions remain for decision—the criteria for "lawful" purposes and "procompetitive" effects, the standards for evaluating less restrictive alternatives, the technique for balancing good and bad effects to reach a final judgment, and the kind of culpability (if any) required for liability in treble damages. The thinking reflected in jury in-

287. 438 U.S. at 444.

structions like those quoted at the outset of this article, equating a section 1 conspiracy with a "partnership in criminal purposes," has been obsolete for more than eighty years. It is time we buried it.