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THE CONSTITUTIONALITY OF THE PER SE RULE IN CRIMINAL ANTITRUST PROSECUTIONS

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I. INTRODUCTION

The tumultuous history of the application of section 1 of the Sherman Anti-Trust Act[1] has resulted in a dichotomized rule regarding agreements alleged to restrain trade illegally. The original "rule of reason" test[2] forbids restraints of trade which are judicially determined to prejudice the public interest in an unreasonable manner.[3] However, certain classes of conduct, such as price-fixing, territorial allocation of customers, boycotts, and deliberate suppression of competition are deemed unreasonable per se.[4] This threshold determination prevents courts from analyzing in any detail the reasonableness—that is, the actual economic effect—of activities which fall within these classes.[5]

Thus the "per se rule" is used in federal antitrust litigation by the Government, or by the plaintiff claiming injury, as an irrebuttable or conclusive presumption[6] that certain types of

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1. 15 U.S.C. § 1 (1970), provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . . ."

2. This test was first applied in Standard Oil Co. v. United States, 221 U.S. 1 (1911), and American Tobacco Co. v. United States, 221 U.S. 106 (1911).

3. Cecil, *The Remedies in An Antitrust Proceeding*, in AN ANTITRUST HANDBOOK 529 (1958).

4. *Id.* at 525. *See* notes 29-34 *infra*.

5. REPORT OF THE ATTORNEY GENERAL'S NAT'L. COMM. TO STUDY THE ANTITRUST LAWS 11 (1955).

6. "Irrebuttable" and "conclusive" generally are used interchangeably to describe a presumption which has the evidentiary effect of foreclosing argument on an issue once certain facts have been proved. "The proved facts may be disputed but their effect in creating the presumed fact may not." Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 342 & nn.12-14 (1970) [hereinafter cited as Note, *Criminal Presumptions*].

A rebuttable presumption, by way of contrast, is an evidentiary construct used to establish which party has the burden of proof. For example, if the proponent establishes Fact A, Fact B is presumed to exist unless its nonexistence is proved by the

restraints are in fact unreasonable.[7] It is the purpose of this article to suggest that, in a criminal case, eliminating the Government's burden of proving each element of an antitrust violation beyond a reasonable doubt by introducing a conclusive presumption which assumes the existence of an element of the offense may be a denial of due process under the fifth amendment to the United States Constitution. Recent United States Supreme Court decisions invalidating irrebuttable presumptions will be examined and their applicability to criminal antitrust law analyzed.[8]

A Case Study

The only decision dealing directly with the unconstitutionality of the per se presumption is *United States v. Manufacturers' Association of the Relocatable Building Industry*,[9] in which both the trial and appellate courts rejected the constitutional argument. Defendants in the case were a trade association and its four members, who manufactured and distributed relocatable buildings in a market consisting primarily of California public school districts. As required by California law, school district contracts for construction of relocatable structures built and marketed by the defendants were awarded through a public bidding system.

Following incorporation of the association in early 1966, its four members adopted a code of ethics setting forth the association's general objectives: promoting the standing of its members in the industry and improving standards of performance in the industry as a whole. The Government indicted the defendants under section 1 of the Sherman Act[10] on the basis of a single provision in the code of ethics stating that each of the member manufacturers would "refuse to reduce his bid on a rebid in less than sixty days." This provision was designed to cover the situation that arises when, after soliciting and receiving original bids, a contracting district or agency—for reasons

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opponent of the evidence. Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 451 n.7 (1975) [hereinafter cited as Note, *Irrebuttable Presumptions*]. *See* Leary v. United States, 395 U.S. 6 (1969); Stumbo, *Presumptions — A View at Chaos*, 3 WASHBURN L.J. 182 (1964).

7. *See* ABA ANTITRUST SECTION JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 314, 497 (1965) [hereinafter cited as JURY INSTRUCTIONS].

8. U.S. CONST. amend. V, § 1.

9. 462 F.2d 49 (9th Cir. 1972). The authors participated as counsel for the trade association defendant at trial and on appeal.

10. 15 U.S.C. § 1 (1970).

such as errors in the bidding process, nonresponsible or excessively high bids, bids over the agency's budget, legal problems, or errors or ambiguities in specifications—has determined to reject all bids and to call for sucessive rounds of bidding. Successive invitations to bid were to be regarded as "rebids" within the meaning of the association's code only if they involved no substantial changes in the contracting agency's original specifications; if there were changes in the specifications, the successive rounds were to be regarded as completely new bids, and thus were not governed by the "no reduction" provision.

The government took the position that this limited rebid rule was a per se violation of the Sherman Act, in the nature of price fixing. No charge was made, however, that bids submitted by defendants were not the product of free and open competition; and in fact, individual bids were determined unilaterally and in highly competitive fashion. Defendants contended that the rebid rule was not per se conduct, and that the conclusive nature of the per se rule denied them due process of law.

In accord with its per se theory, the Government offered no evidence of the unreasonableness of the 60-day rebid provision. Defendants' successive motions for acquittal on the basis of this failure of proof were denied.

Defendants offered the testimony of expert witnesses to detail the several evils and abuses resulting from the adoption by contracting agencies of a policy of soliciting rebids. The 60-day rebid rule was designed to curtail those abuses.[11]

The trial court accepted the Government's per se theory; excluded the evidence of defendants' pro-competitive motiva-

11. The expert testimony would have shown that adherence to the Code would not necessarily produce anticompetitive effects; that artificial inflation of bids ordinarily resulted where rebids were invited, which lessens the effectiveness of the public bidding system; that bidder's cost estimates tended to be uncertain where rebids were a possibility, leading to inflation of original bids by inclusion of a risk premium; that if rebids were expected, initial bids would be camouflaged to prevent competing bidders from acquiring valuable pricing information; that rebids increased overhead, because each bid computation costs money, and this in turn increased price; that the rebid rule of the Code actually conformed to a widespread and long standing industry practice by purchasers not to put jobs out for rebids without changes in specifications; that school districts would not benefit from a policy of rebidding; that the 60-day rebid rule was not anticompetitive since it insured that bidders would put in their best price on the first round; and that the rule tended to eliminate opportunities for corruption and favoritism which occur when purchasers put out jobs for rebid without changing specifications.

tion in adopting the association code, and of the various economic factors justifying the rebid rule; denied defendants' motions to acquit despite the Government's failure to introduce evidence that the rebid rule was unreasonable; and instructed the jury that the case was governed by the per se rule.

A four-day jury trial resulted in conviction of all defendants and imposition of fines, followed by an appeal to the Ninth Circuit Court of Appeals. Defendants contended on appeal that the Government's burden of proving unreasonableness beyond a reasonable doubt had been replaced with a conclusive presumption that the rebid rule was in fact unreasonable, thus denying due process rights guaranteed by the fifth amendment.

The Ninth Circuit Court of Appeals held that the Supreme Court had consistently interpreted the Sherman Act as defining two distinct rules of substantive law applicable to two different classes of restraints: one type of conduct (price fixing, for instance) is governed by the per se rule, and no showing of unreasonableness is required; in all other cases, the challenged activity must be proved to constitute an unreasonable restraint.[12] In short, unreasonableness is an element of the offense only when no per se violation has occurred. According to the Ninth Circuit, "reasonableness" in this context "must be viewed as a legal term, and not in its ordinary sense. When the Supreme Court describes certain conduct as *per se* unreasonable, they do no more than circumscribe the definition of 'unreasonableness.' "[13] The court concluded:

> While the appellants deserve credit for their ingenious and novel attempt to trap the court in its own rhetoric, their contention that the *per se* rule should be set aside must be and is rejected. The *per se* rule does not establish a presumption. It is not even a rule of evidence.[14]

Perhaps this is true, and the argument is semantic and rhetorical, not constitutional. But it may also be that the argument was made too soon, that the courts have not yet been forced to confront and evaluate the impact on the delicate balance in a criminal case of a rule that is permitted to serve as a substitute for actual evidence and proof. Possibly the reason these questions have not been raised before is that few

12. 462 F.2d at 52.
13. *Id.*
14. *Id.*

criminal antitrust cases are actually tried. In addition, serious re-examination of the use of presumptions in criminal cases had only recently begun when *Manufacturers' Association* came before the federal court of appeals.[15]

The authors believe the question raised is a valid and interesting one, and that there is a more than colorable argument that the use of the per se rule in a criminal case is repugnant to the fifth amendment to the United States Constitution.

II. Lack of Reasonableness is a Distinct and Essential Element of a Sherman Act Charge

The Underpinnings of the Sherman Act

There is no doubt that the Sherman Act has become a fundamental and important element of the American social and political system. The objectives of the Act were succinctly summarized in Mr. Justice Black's opinion for the Supreme Court in *Northern Pacific Railway Co. v. United States*:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[16]

Sections 1 and 2 of the Sherman Act were drafted against the background of common law doctrines which imposed no prohibition against restraints reasonably ancillary to a lawful purpose. Enacting those statutes, Congress did not—as it might have chosen to do, in the exercise of legislative discretion —outlaw price fixing or any other specified conduct. Instead, in the most general of terms, section 1 declares it to be a misdemeanor to conspire "in restraint of trade."[17] In equally general terms, section 2 makes it a misdemeanor to "monopolize, or

15. *See* notes 68-69 and accompanying text *infra*. *See, e.g.*, Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. Chi. L. Rev. 141 (1966); Note, *Criminal Presumptions*, *supra* note 6.

16. 356 U.S. 1, 4 (1958).

17. 15 U.S.C. § 1 (1970).

attempt to monopolize, or combine or conspire with others to monopolize"[18] any part of trade. In *Appalachian Coals, Inc., v. United States*,[19] Mr. Chief Justice Hughes praised the Act's "generality and adaptability" on the theory that they provided the kind of flexibility necessary to insure that the broad purpose of the Act could be achieved without penalizing "legitimate enterprise" through mechanical application of rigid rules.

The Rule of Reason

Despite the general and inclusive language of the Act, a consistent line of decisions, dating at least from the 1911 case of *Standard Oil Co. v. United States*,[20] has established that not all restraints are prohibited by Section 1; the provision proscribes only those activities which are found to be "unreasonable" or "undue" restraints on commerce. The concept again was enunciated in *Chicago Board of Trade v. United States*,[21] in which Justice Brandeis pointed out that every agreement concerning trade restrains, but that the test of legality under the Act is whether a particular restraint operates to promote competition, or to suppress or destroy competition.

As a result of these decisions, it has been common for judges in cases involving per se restraints to instruct that, while normally the jury would be asked to determine whether the conduct at issue constitutes an unreasonable restraint, the case before the court involves per se activity; thus, that issue has been taken from them.[22] When a case does go to the jury on the question of unreasonableness, the factors to be considered in arriving at a verdict are those enumerated by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*: (1) facts peculiar to the business to which the restraint is applied; (2) the condition of the business before and after the restraint was imposed; (3) the nature of the restraint and its effects, actual or probable, on competition; (4) the history of the restraint; (5) the evil believed to exist; (6) the reason for adopting the particular remedy; and (7) the purpose or ends sought to be achieved.[23]

Since every business arrangement has as its very essence

18. *Id.* § 2.
19. 288 U.S. 344, 359-60 (1933).
20. 221 U.S. 1, 59-60 (1911).
21. 246 U.S. 231, 238 (1918).
22. *See, e.g.*, JURY INSTRUCTIONS, *supra* note 7, at 498-99.
23. 246 U.S. at 238.

a binding and hence to some degree a restraining effect upon its participants, the Brandeis analysis, which requires examining challenged conduct to determine its pro-competitive or anticompetitive purpose and effect, is consistent with the Sherman Act's dominant purpose: promoting and fostering competition.[24] Any other approach would eliminate opportunity for the day to day exercise of business judgment and discretion which is vital to the functioning of the free enterprise system.

Application of the enumerated factors to any given case, of course, will be as varied as the business contexts in which an antitrust question might be raised. In *Chicago Board of Trade*, the Supreme Court dealt with a "call" rule governing bids on grain "to arrive." Board members were forbidden to purchase or offer to purchase, between the close of the call and the opening of the session on the next business day, at any price but the closing bid at the call. Before adoption of the rule, members fixed their bids throughout the day at such prices as they individually saw fit; after adoption of the rule, bids had to be fixed at the day's closing bid on the call until the opening of the next session. The rule was defended on the basis that its purpose was not to prevent competition or control prices, but to promote the convenience of members by restricting hours of business, and to break up a monopoly in that branch of the grain trade held by a small number of Chicago warehouses.

An analysis of the "call" rule in light of the factors set forth above enabled Justice Brandeis to conclude (1) that the rule restricted only the *period* of price-making; (2) that the restriction was reasonable in scope, since it applied only to a small part of the grain market in a single city, and only during a small part of the business day; and (3) that the rule had no appreciable effect either on general market prices or on the total volume of grain coming to Chicago. In addition, the Court found that local market conditions had in fact improved in several identifiable respects during the period of the rule's operation.[25]

In the absence of a judicially fashioned conclusive presumption that certain types of activity are unreasonable, such an analysis is permitted: the reasonableness of the challenged

24. *See* text accompanying note 16 *supra*.

25. 246 U.S. at 239-41. The improvements included creating a public market in which buying and selling could occur with adequate knowledge of actual market conditions, thereby ameliorating the lot of rural dealers and farmers.

conduct is evaluated by the jury in light of the relevant economic facts. The Government is obliged to prove that the restraint in question has a detrimental effect on competition, the defendant is entitled to offer rebutting evidence, and failure of proof requires aquittal. The per se rule removes all of these risks and responsibilities from the Government's shoulders, replaces them with a conclusive presumption, and takes unreasonableness as an element of the offense away from the jury.

The Per Se Concept

The case that introduced the full-blown concept of per se illegality into Sherman Act litigation was *United States v. Trenton Potteries*,[26] in which the Government challenged a price fixing agreement between manufacturers controlling 82 percent of the production and distribution of vitreous pottery fixtures in the country. Defendants contended that because the prices fixed by their agreement were reasonable, the agreement itself was reasonable and therefore not in violation of the Sherman Act. The Supreme Court rejected the argument, reasoning that the aim of every price-fixing agreement is to eliminate competition.[27] Focusing on the manipulative power inherent in concerted action, rather than the manner in which the power had been exercised, the Court concluded that agreements which confer such potential monopoly status

> may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through mere variation of economic conditions.[28]

Since the *Trenton Potteries* decision, the per se rationale has been expanded to cover classes of restraints other than price fixing. Categories of absolutely prohibited conduct in-

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26. 273 U.S. 392 (1927).

27. *Id.* at 397.

28. *Id.* at 397-98.

29. A tying arrangement involves an agreement by a party to sell a product on the condition that the buyer will also purchase a different "tied" product, or agree not to purchase the "tied" product anywhere else. Von Kalinowski, *The* Per Se *Doctrine —An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A.L. REV. 569, 576-77 n.88 (1964).

clude tying arrangements,[29] group boycotts,[30] and horizontal[31] and vertical[32] divisions of markets.

At the core of the per se concept in section 1 cases is the judicial conclusion that, despite the *Standard Oil*[33] and *American Tobacco*[34] cases establishing unreasonableness as an element of the offense to be proved, certain conduct is so clearly anti-competitive in nature and so inherently devoid of any purpose other than stifling competition, that it is conclusively presumed, without further inquiry, to be unreasonable and hence illegal.[35]

Application of the Per Se Rule: An Empirical Consideration of Reasonableness

Cases which have involved the per se rule demonstrate that it operates as a conclusive presumption. At the same time, it is a rule of experience which by its nature is factual. When the Supreme Court is called upon to consider whether a particular restraint should be classified as a per se violation, the Court typically inquires whether enough is known of both the economic and business considerations out of which the arrangement emerges, and of the actual impact of the arrangement on competition, to provide material for the necessary analysis and conclusion. Thus, in *White Motor Co. v. United States*,[36] the Court considered the legality of limitations placed by a supplier on the territories in which independent distributors of its products could operate and the customers to whom they could sell. The Government urged that the restrictions be adjudged per se illegal. The district court had accepted the Government's argument and granted summary judgment in its favor on that issue. The Supreme Court reversed. Noting that *White Motor* was the first case to come before the Court involving a vertical arrangement restricting territory,[37] Mr. Justice Douglas emphasized the need for a trial where the facts that would

30. Radiant Burners, Inc. v. People's Gas, Light & Coke Co., 364 U.S. 656 (1961); Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

31. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

32. *See* text accompanying notes 36-40 *infra*.

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

34. American Tobacco Co. v. United States, 221 U.S. 106 (1911).

35. For a classic enunciation of the operation of and the principles behind the per se rule, *see* Mr. Justice Black's opinion in Northern Pac. Rwy. Co. v. United States, 356 U.S. 1 (1958).

36. 372 U.S. 253 (1963).

37. *Id.* at 261.

establish motive and economic effect could be produced and examined:

> Horizontal territorial limitations, like "[g]roup boycotts, or concerted refusals by traders to deal with other traders", are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect. We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" and therefore should be classified as *per se* violations of the Sherman Act.[38]

When such an inquiry into the "economic and business stuff" of an arrangement is undertaken, judges have disagreed as to the amount of experience with a particular restraint necessary to warrant the conclusion that it is inherently pernicious. In *United States v. Arnold Schwinn & Co.*,[39] decided only four years after *White Motor*, the Court declared the per se rule applicable to territorial and customer restraints of the type which *White Motor* declined to label per se violations. Mr. Justice Stewart, joined in his dissent by Mr. Justice Harlan, observed:

> [T]he court in *White Motor* refused to apply a *per se* rule to invalidate these restrictions, and declared that their legality must be tested under the rule of reason by examining their actual impact in a particular competitive context. The court today is unable to give any reasons why, only four years later, this precedent should be overruled. Surely, we have not in this short interim accumulated sufficient new experience or insight to justify embracing a rule automatically invalidating any vertical restraints in a distribution system based on sales to wholesalers and retailers. Indeed, the court does not cite or discuss any new data that might support such a radical change in the law.[40]

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38. *Id.* at 263 (citations omitted).
39. 388 U.S. 365 (1967).
40. *Id.* at 389 (citation omitted).

Applications of the per se rule are based upon the courts' conclusion that an overwhelming proportion of the cases involving a particular restraint have demonstrated its unreasonableness,[41] and generally the rule is applied to new situations only after a series of cases have developed a sufficient accumulation of factual experience to support the conclusion.[42] Categorization is the product of an empirical process.

A Rule of Expedience

Particularly troublesome from a constitutional viewpoint is the underlying rationale for the per se rule: it is a rule of convenience or expedience. The Supreme Court has pointed out that the per se rule avoids the necessity for extensive inquiry into whether a particular practice is reasonable or unreasonable, and removes from the Government the burden of ascertaining whether a practice acceptable in the past has become unreasonable in light of altered economic conditions.[43] The Court also has stressed that use of the per se rule eliminates the need for "elaborate inquiry" as to the precise harm the restraint might have caused, or the business excuse for its use, and further avoids what the court has described as an "incredibly complicated and prolonged" economic investigation into the history of the industry involved, all of which would otherwise be necessary to determine whether a particular restraint was unreasonable.[44]

The position of the courts is that ordinarily a practice is declared a per se violation of section 1 of the Sherman Act only

41. *E.g.*, Kennedy v. Long Island R.R., 319 F.2d 366, 370 (2nd Cir. 1963).

42. Where such a practice has been before the court on numerous occasions and has been uniformly condemned . . . the judicial mind feels that it is unnecessary for a court to continue to weigh carefully its purpose and effect. Rather, in the case of a practice which is a "hardened offender," the courts take judicial notice that its effect is substantially to restrain trade, and rule that there is an "inference or presumption" that the only intent underlying the practice is to achieve such an anti-competitive effect. Accordingly the courts thereupon rule that the practice is per se unlawful. However, these cases also show that generally a restraint of trade in the past has been declared to be per se unlawful only after a cumulative series of rulings—adverse to the practice—has given the courts a solid basis for arriving at this per se condemnation.

J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 122-23 (1970 ed.) (footnote omitted).

43. United States v. Trenton Potteries, 273 U.S. 392, 397-98 (1927).

44. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958), *reiterated in* White Motor Co. v. United States, 372 U.S. 253, 262 (1963); *see* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963); Kennedy v. Long Island R.R., 319 F.2d 366, 370 (2d Cir. 1963).

after a body of cases representing considerable judicial experience with that practice and its variations has demonstrated its inherently anticompetitive nature. When the activity has been examined initially under the rule of reason and repeatedly found unreasonable, courts conclude that blanket prohibition is appropriate, and conduct subsequently deemed to fit within the general category is subject to the per se rule. The authors contend that in a criminal proceeding this approach sacrifices due process for judicial expedience, with respect to parties whose activities are alleged to be included in one of the established categories of per se illegality.

An activity such as the rebid agreement discussed in connection with *United States v. Manufacturers' Association of the Relocatable Building Industry*,[45] may not in fact contravene the purposes of the Sherman Act at all. But because the label "per se violation" has been applied to the broad category of activities that can be called "price-fixing," the *Manufacturers' Association* defendants were afforded no opportunity in a criminal proceeding to demonstrate the reasonableness of their particular agreement.[46]

III. Conclusive Factual Presumptions Deny Due Process

At least in cases where they have not been challenged on due process grounds, irrebuttable or conclusive presumptions (as distinguished from rebuttable presumptions) have traditionally operated as rules of substantive law rather than as rules of evidence.[47] While the term "presumption" has evidentiary connotations, the conclusive nature of the irrebuttable presumption effectively removes it from the fact-finding process. Where such a presumption applies, once Fact A is found to exist, Fact B (the presumed fact) must be inferred regardless of any evidence to the contrary. However, in the final analysis, the presumed fact is no more than a principle of substantive law: given the existence of the basic fact, the substantive principle declares the legal outcome either by conferring a benefit or by imposing a burden.

The per se presumption, on the other hand, does have an evidentiary effect. Given a determination that the conduct in

45. 462 F.2d 49 (9th Cir. 1972). *See* text accompanying notes 9-14 *supra*.

46. *See* note 11 *supra*.

47. *See* Note, *Irrebuttable Presumptions*, *supra* note 6, at 462, *citing* 4 J. Wigmore, Evidence § 1353 (Chadbourn rev. ed. 1972).

question falls within a prohibited class, the *fact* of unreasonableness is presumed, and it is that fact with establishes criminal or civil liability. This was the point rejected by the Ninth Circuit Court of Appeals in *Manufacturers' Association of the Relocatable Building Industry*;[48] that court emphatically declared that the per se rule "is not even a rule of evidence."[49]

Recent Evidentiary Treatment of Conclusive Presumptions by the United States Supreme Court

In contrast to the Ninth Circuit view, the United States Supreme Court, in recent decisions dealing with due process attacks on irrebuttable presumptions, in effect has treated such presumptions as evidentiary rules involved in the process of fact-finding. The decisions have invalidated statutes which the Court construed or characterized as creating irrebuttable presumptions, when it was "not necessarily or universally true"[50] that the basic fact implied the presumed fact, or when experience proved the presumption "often contrary to fact."[51]

In *Vlandis v. Kline*,[52] the Court declared unconstitutional a Connecticut statute which classified individuals on the basis of present or former residence as nonresidents for the purpose of determining tuition charges at a state university. The factors used to determine classification were found to constitute an irrebuttable presumption. The Court held:

> [I]t is forbidden by the Due Process Clause to deny an individual resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination.[53]

Standards of due process, according to the Court, require that students be afforded an opportunity to present evidence of bona fide residency.[54] Responding to the State's argument that the school system would be the target of college-shoppers in the

48. 462 F.2d 49 (9th Cir. 1972). *See* note 9 and accompanying text *supra*.

49. *Id.* at 52.

50. Vlandis v. Kline, 412 U.S. 441, 452 (1973). *See* text accompanying notes 52-55 *infra*.

51. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 519 (1973). *See* text accompanying notes 56-58 *infra*.

52. 412 U.S. 441 (1973).

53. *Id.* at 452.

54. *Id.*

absence of the provision, the court held that efficiency cannot outweigh the individual student's right to a judicial determination of his entitlement to the reduced tuition afforded residents.[55]

In *United States Department of Agriculture v. Murry*,[56] the Court considered section 5(b) of the Food Stamp Act of 1964,[57] which excluded from the food stamp program any household containing a person over 18 who had been claimed as a tax dependent in the previous year by an individual not himself eligible for food stamps. The court concluded that the exclusion was based on an irrebuttable presumption as to the relationship between the parent's prior deduction and the need of a child living in another household, a presumption which was sometimes contrary to fact and therefore a violation of due process.[58]

As those cases suggest, and as others discussed below will demonstrate, the American judiciary has always felt a bit ill at ease in the presence of presumptions,[59] and especially so in the presence of criminal presumptions.[60] This discomfort is understandable, since a presumption removes the Government's normal burden of producing evidence on the fact in question sufficient to support a criminal judgment against the defendant. Indeed, as the following section will demonstrate, considerations of due process have been held to be sufficient to strike down even rebuttable presumptions.

Due Process and Rebuttable Presumptions: Judicial Acceptance

Early in this century the use of rebuttable statutory presumptions was scrutinized but accepted. In *Mobile, Jackson & Kansas City Railroad v. Turnipseed*,[61] the Supreme Court approved a rebuttable statutory presumption of negligence on the

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55. *Id.* at 451-52.

56. 413 U.S. 508 (1973).

57. 7 U.S.C. § 2019(b) (1970).

58. 413 U.S. at 514.

59. " 'Presumptions,' as happily stated by a scholarly counselor, . . . 'may be looked upon as bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' " Mockowit v. Kansas City, St. J. & Council Bluffs R.R., 196 Mo. 550, 571, 99 S.W. 256, 262 (1906).

60. Since the early 1900's the Court has required that the legislative power to create presumptions be exercised in a non-arbitrary manner. *See* Note, *Criminal Presumptions*, *supra* note 6, at 344-45.

61. 219 U.S. 35, 41-43 (1910).

part of a railroad. According to the Court, there was no denial of due process because the party against whom the presumption worked was afforded an opportunity to submit to the jury in its defense all of the facts bearing upon the issue in question.[62]

In *Manley v. Georgia*,[63] the Court considered a rebuttable criminal statutory presumption of fraudulent conduct on the part of the president and directors of any bank which became insolvent, and declared that a statute which creates a presumption that is arbitrary or *that denies a fair opportunity to repel it* violates the due process clause.[64] The Court emphasized that mere legislative fiat may not take the place of fact in determining issues involving life, liberty or property. The Court relied on language in *McFarland v. American Sugar Co.*,[65] which declared that it is "not within the province of a legislature to declare an individual guilty of a crime."

At mid-century a seminal decision, *Tot v. United States*,[66] cleared up confusion regarding tests of the constitutionality of statutory presumptions by approving the "rational connection" test: when the connection between the fact proved and the fact presumed is so rational as to establish that the statutory inference is not arbitrary, it is permissible to shift to the defendant the burden of going forward with the evidence.[67]

A reformulation of the test was used in *Leary v. United States*,[68] which held that a criminal statutory presumption is unconstitutional unless "the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." The *Leary* Court was not forced to determine whether rebuttable criminal presumptions must meet a reasonable

62. The Court, using a "rational connection" formulation, determined that the fact proved bore such reasonable relationship to the fact presumed as to indicate that the legislative inference was not arbitrary. That, in conjunction with the defendant's opportunity to rebut the presumption, was sufficient to satisfy due process requirements. *Id.* at 43; *see* Note, *Criminal Presumptions, supra* note 6, at 344-45. *See also* Luria v. United States, 231 U.S. 9 (1913), which upheld on a *Turnipseed* rationale a rebuttable presumption that a naturalization certificate had been obtained by an alien with lack of intent to become a permanent citizen.

63. 279 U.S. 1 (1929).

64. *Id.* at 6.

65. 241 U.S. 79, 89 (1916).

66. 319 U.S. 463 (1943) (one in receipt of weapon presumed to have obtained it through interstate commerce in violation of the Federal Firearms Act).

67. Barnes v. United States, 412 U.S. 837, 846 n.11 (1973).

68. 395 U.S. 6, 36 (1969), *citing* United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965); Tot v. United States, 319 U.S. 463 (1943).

doubt standard as well as the "more likely than not" standard in order to satisfy due process requirements, and subsequent decisions also have hedged the issue.[69]

Thus the courts have accepted use of rebuttable presumptions under circumscribed conditions. Conclusive presumptions, on the other hand, do more than allocate the burden of proof; once applied, they terminate examination of an issue.[70] To analyze the use of the conclusive presumption inherent in the per se rule, it will be helpful to take a historical look at judicial treatment of conclusive presumptions and due process considerations.

Due Process and Irrebuttable Presumptions: History Shows A Marked Contrast in Judicial Attitude

Conclusive presumptions have not fared as well as rebuttable presumptions in the courts. In *Schlesinger v. Wisconsin*,[71] the Court found no adequate basis for upholding a conclusive presumption that gifts made inter vivos within six years of death were in contemplation of death. The state trial court had determined that the donor, within six years of his death, had made four sizable gifts aggregating more than five million dol-

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69. The Court in Barnes v. United States, 412 U.S. 837 (1973), discussed the relationship between the rational connection test and the reasonable doubt standard:

> . . . To the extent that the "rational connection," "more likely than not," and "reasonable doubt" standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.
>
> . . . .
>
> [The evidence in this case] was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable-doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, we conclude that it satisfies the requirements of due process.

Id. at 843, 845-46. The *Barnes* fact situation thus permitted the Court to avoid determining which of the two standards governs. The decision which first considered the applicability of the reasonable doubt standard to statutory criminal presumptions was Turner v. United States, 396 U.S. 398 (1970). *See* Note, *Criminal Presumptions, supra* note 6, at 352-53.

70. *See* note 6 *supra*.

71. 270 U.S. 230 (1926).

lars to his wife and three children, but that none of the gifts had been made in expectation, apprehension or contemplation of death. The presumption was arbitrary, since gifts inter vivos within six years of death were conclusively presumed to have been a substitute for testamentary disposition, whatever the true facts, while like gifts made more than six years before death were not so treated. Responding to the state's assertion that the presumption was necessary to prevent evasion of inheritance taxes, the Court stated that rights guaranteed by the Constitution took precedence over the alleged necessity.[72]

An identical statutory tax presumption was considered by the Court in *Heiner v. Donnan*,[73] which held that basing the imposition of a tax on an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it violates the fifth amendment. The Government in *Heiner* had argued that the conclusive presumption created by the statute was actually a rule of substantive law. The Supreme Court disposed of that contention by pointing out that a rebuttable presumption, which is clearly a rule of evidence shifting the burden of proof, cannot be transformed into a rule of substantive law by the simple expedient of enacting a statute making it conclusive.[74] Whether the presumption is a rule of evidence or a rule of substantive law, it is a substitute for proof, open to challenge if it is rebuttable, and conclusive if it is irrebuttable.[75] Treated as a rule of evidence or as a rule of substantive law, the presumption in *Heiner* constituted an attempt by the legislature to enact into existence a fact. Since a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, the Court determined that "certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law."[76]

In *United States v. Provident Trust Co.*,[77] the Court refused to apply, despite the urging of the Government, the conclusive common law presumption that a woman is capable of bearing children as long as she lives. The case involved evaluation for estate tax purposes of charitable remainders preceded

72. *Id.* at 240.
73. 285 U.S. 312 (1932).
74. *Id.* at 329.
75. *Id.*
76. *Id.*
77. 291 U.S. 272 (1934).

by life estates in the decedent's daughter and her issue. The daughter had had her reproductive organs surgically removed prior to the date in question. The Government argued that the presumption was a valid rule of substantive law designed to maximize the value of the taxable estate. The Court responded by citing an earlier decision which held that all presumptions as to matters of fact capable of tangible proof are in their nature disputable: no conclusive character attaches to them, and they may always be rebutted and overthrown.[78] The Court perceived no considerations of expediency and no policy so compelling in character (the historical bases for formulation and application of conclusive presumptions) as to warrant acceptance of the Government's theory. In fact, it concluded that the Government's position would subvert rather than sustain the policy of encouraging charitable bequests by exempting them from the provisions of the estate tax.[79]

In light of the foregoing decisions, it is not surprising to find that in *Morissette v. United States*,[80] the Court overturned a criminal conviction despite the fact that the defendant had admittedly taken discarded government bomb casings from a practice bombing range. Morissette believed that the property had been abandoned by the government, and did not know that he was doing anything in violation of the law. He was convicted under a statute which did not by its terms require any element of knowledge or specific intent to establish guilt; the trial court had ruled that the only intent required was an intent to take the property which was in fact taken. Conceding the minor nature of the offense involved, the Court nevertheless found the due process issue "fundamental and far-reaching."[81]

In the face of substantial evidence that Morissette had lacked any vestige of criminal intent, the trial judge refused to submit the issue of felonious intent to the jury; he ruled that the statute did not require any particular state of mind, and that even if mens rea was an essential element of the offense, criminal intent was to be conclusively presumed from the act of taking.

The Supreme Court reversed. Construing the statute as requiring felonious intent despite Congress' failure to specify

78. *Id.* at 284, *citing* Lincoln v. French, 105 U.S. 614, 616-17 (1881).
79. *Id.* at 285-86.
80. 342 U.S. 246 (1952).
81. *Id.* at 247.

mens rea,[82] the Court pointed out that where the state of mind of the accused is an element of the offense charged, its existence is a question of fact which must be submitted to the jury.[83] However clear the proof may be, or however incontrovertible the inference of criminal intent may seem to the judge, the issue of intent can never be ruled on as a question of law.[84] In the words of the Court:

> We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, the presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary.[85]

Judicial disapproval of conclusive criminal presumptions continued on into the late sixties, as evidenced by *United States v. Bowen*.[86] Bowen had been convicted of failing to report for induction into the military. His defense was based upon the failure of the draft board to supply him with a requested conscientious objector application prior to the scheduled date for induction. The board countered by asserting that forms had been mailed to defendant in accordance with his request, and relied upon a Selective Service regulation providing that mailing of any form to a registrant shall constitute notice to him of the contents, whether actually received by him or not. The Court, reviewing many of the cases discussed above as well as two state court decisions,[87] treated this regulation as creating an irrebuttable presumption of receipt of the form,

82. *Id.* at 247-48.
83. *Id.* at 247.
84. *Id., citing* People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891).
85. *Id.* at 275 (footnote omitted).
86. 414 F.2d 1268 (3d Cir. 1969).
87. Carolene Products Co. v. McLaughlin, 365 Ill. 62, 5 N.E.2d 447 (1936); Juster Bros. v. Christgan, 219 Minn. 108, 7 N.W.2d 501 (1943).

and held that such a presumption violated the fifth amendment.[88]

Principles Analyzed

Several constitutional principles can be distilled from the cases cited. A rebuttable presumption of fact, which affords the affected party the opportunity to introduce all available evidence contradicting the inferred fact, is permissible,[89] and is tolerated even in a criminal case so long as there is a rational connection between the fact proved and the fact presumed.[90] However, an irrebuttable factual presumption which either operates without regard to actualities, or is not universally or even necessarily true in fact, denies due process of law.[91] Further, the legislature is powerless under the Constitution to declare the existence of a fact, even though the legislative fiat poses as a rule of evidence, when it forecloses a litigant's right to prove that an element of the charged offense is absent. An attempt to do so cannot be sustained by merely labeling the enactment a rule of substantive law.[92] Moreover, in a criminal prosecution the judiciary has no greater power than the legislature to improvise incriminating irrebuttable presumptions of fact as a substitute for proof of an essential ingredient of the offense charged.[93]

The per se rule, when applied in a criminal antitrust prosecution, violates those principles. This judicially articulated and expanded doctrine, adopted in essence as a rule of convenience designed to dispense with otherwise necessary and appropriate proof on complex issues, is a conclusive presumption of fact that certain conduct is by virtue of its very existence unreasonable. The element of unreasonableness is essential to a finding of liability, either civil or criminal, under section 1 of the Sherman Act.[94] The per se presumption is irrebuttable and

88. 414 F.2d at 1273.

89. Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35 (1910). *See* text accompanying note 61 *supra*.

90. Leary v. United States, 395 U.S. 6 (1969); Tot v. United States, 319 U.S. 463 (1943). *See* text accompanying notes 66-69 *supra*.

91. *E.g.*, Vlandis v. Kline, 412 U.S. 441 (1973); Morissette v. United States, 342 U.S. 246 (1952). *See* text accompanying notes 73-76 *supra*.

92. Heiner v. Donnan, 285 U.S. 312 (1932). *See* text accompanying notes 73-76 *supra*.

93. Morissette v. United States, 395 U.S. 6 (1969). *See* text accompanying notes 83-84 *supra*.

94. 15 U.S.C. § 1 (1970). *See* note 1 *supra*.

forecloses the criminal defendant from introducing any evidence that the challenged conduct is in fact reasonable or otherwise defensible as consistent with the language and objectives of the antitrust laws.

Although the Ninth Circuit Court of Appeals has declined to accept that reasoning,[95] the point is an open one in other circuits and in the Supreme Court; it can be anticipated that appropriate circumstances for testing it will be before the courts again.

IV. The Per Se Rule and Reasonable Doubt

The use of the per se rule in a criminal case may be examined from an additional perspective. In *In re Winship*,[96] the Supreme Court said:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[97]

Although the theory has not yet been approved by the United States Supreme Court, it has been argued—correctly, we contend—that the *Winship* standard should apply to criminal presumptions. In *United States v. Johnson*,[98] it was held that because proof beyond a reasonable doubt is itself an indispensable ingredient of due process in criminal cases, a rule of inference which can pass the rational connection or "more likely than not" test must still satisfy the criminal reasonable doubt standard of proof if it is used to establish an essential element of the crime. The use of the per se rule in a criminal antitrust case, however, absolves the Government of the requirement of proving the element of unreasonableness. In addition, the rule as interpreted deprives the accused of any opportunity to offer controverting evidence of reasonableness or justification of the conduct charged. Thus, the use of the per se rule does not seem to be an adequate substitute for proof beyond a reasonable doubt.

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95. United States v. Manufacturers' Ass'n of the Relocatable Bldg. Indus., 462 F.2d 49 (9th Cir. 1972). *See* notes 9-14 *supra*.

96. 397 U.S. 358 (1970).

97. *Id.* at 364.

98. 433 F.2d 1160, 1168 (D.C. Cir. 1970).

V. CONCLUSION

An attack on the per se rule undoubtedly appears to be a call for a major reversal of antitrust precedent. In fact, the authors of this article advocate only that a defendant be afforded the right to dispute the existence of a fact which is vital to the Government's charge. It is not unreasonable to assert that a defendant in a criminal case cannot be denied that right. What more dangerous principle can be found than one that dispenses with proof of a vital factual element on the ground that, in the opinion of judges, a certain type of economic restriction is unreasonable most of the time, and thus in the interests of expedited judicial administration a crucial question may be excluded from the jury's consideration?

To ask the question is to grasp the answer. The Government cannot be allowed conclusively to assume facts in a criminal case. In short, the per se rule is not constitutionally appropriate for use in a criminal antitrust prosecution.