

The Sherman Act is Unconstitutional as a Criminal Statute: (Part 1)

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If you get lost, sometimes you must go back and start again from the beginning. I've been a bit lost on whether the Sherman Act is unconstitutional as a criminal statute. It is well accepted that *per se* violations of the Sherman Act can be prosecuted criminally. An individual can be sentenced to up to ten years in prison. But, is the accepted learning on this issue wrong? I think I've found my way to the Sherman Act being unconstitutional as a criminal statute.[1]

Forget everything you know about Supreme Court jurisprudence involving the criminal application of the Sherman Act (that was easy for me). Take a look at the statute:

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.

Can you advise your client what exactly is declared to be illegal? And watch his face show even more alarm when you explain that whatever it is that he can't do, if he does do it, the penalty is up to 10 years in prison.[2] The Sherman Act is void for vagueness. Justice Sutherland explained the void for vagueness doctrine in *Connally v. General Construction Co*, 269 U.S. 385, 391 (1926):

The terms of a penal statute...must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties....and a statute which either forbids or requires the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

The Sherman Act does not sufficiently inform business people (including foreigners) what conduct can land them in jail or on a Red Notice. This must be true because even the Supreme Court has said the Sherman Act cannot possibly mean what it says because every contract is in restraint of trade, and every contract cannot be illegal. Thus, the first Supreme Court triage on the Sherman Act was that only “unreasonable restraints” of trade were prohibited.[3] But, that doesn’t clear things up too much—What is an unreasonable restraint of trade? Under the Rule of Reason, a restraint is unlawful only, if after an inquiry to balance the pro-competitive benefits of the agreement versus its anticompetitive effects, the agreement is found to unreasonably restrain trade. But can you find someone guilty of a crime after weighing the pro-competitive and anticompetitive effects of the agreement? That doesn’t seem like the notice required by due process either. Further Supreme Court surgery on the Sherman Act separated out *per se* violations—restraints of trade that are so highly unlikely to have any redeeming competitive benefits, that the restraints (price-fixing, bid rigging and customer/market allocation) are *per se* illegal. As a result, juries are charged in a criminal antitrust case that they do not need to find that the restraint was unreasonable, but simply that the defendant(s) entered into an agreement to fix prices, which, by judicial fiat, is *per se* unreasonable.

Does the *per se* rule solve the void for vagueness problem? The conventional wisdom is that it has. But changed circumstances sometimes compel a “fresh look” at accepted wisdom. It is time for that fresh look. The changed circumstance that comes to mind is that the Sherman Act is no longer a misdemeanor. It is not a “gentlemen’s crime” meriting a slap on the wrist with a mild scolding from the judge.[4] The Sherman Act, as a criminal statute, provides for an individual to be sentenced to up to 10 years in jail. And the ten years is not just theoretical; the Antitrust Division sought a 10-year prison sentence for the CEO of AU Optronics after his conviction. While the ten-year sentence was not achieved, the record prison sentence for a criminal antitrust violation is now 5 years.[5]

I am not a constitutional scholar, but I do have a blog so I'll opine what I think is wrong with the Sherman Act as a criminal statute.^[6] First, the Supreme Court cannot save a criminal statute by grafting on elements such as condemning only "unreasonable" restraints of trade, and further holding that only certain types of agreements are *per se* unreasonable. But even if the Supreme Court could address the void for vagueness doctrine by holding that only certain restraints are *per se* illegal, this violates another constitutional tenet; the Supreme Court takes away the issue from the jury with an un rebuttable presumption. Charles D. Heller has written on this subject and argued that the current practice of instructing the jury that price-fixing is *per se* illegal, i.e., presumptively unreasonable, is unconstitutional. The jury should be the fact-finder of whether a restraint is unreasonable.^[7] Finally, the definition of a *per se* offense is that the restraint (price-fixing for e.g.) is so highly likely to be anticompetitive that there is no inquiry as to whether the actual restraint the defendant is charged with was anticompetitive. This may be fine for a civil case, but in a criminal case the defendant must be allowed to argue that the charged restraint was the exception to the rule. Instead, in a criminal case the jury may be charged:

It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results.

This seems like a very odd jury instruction for a crime that carries a ten-year maximum prison sentence, especially when one considers that many of the defendants in criminal antitrust indictments are foreigners.^[8]

In short, the Sherman Act is void for vagueness. But, if the Act does pass the void for vagueness hurdle by grafting on the *per se* rule, juries should decide whether the restraint in question is unreasonable, and that inquiry should not be contained by a presumption the restraint was *per se* unreasonable if it was price-fixing, bid rigging or market allocation. If these standards were applied, however, the Sherman Act would be unworkable. If juries decided, in an after the fact deliberation, whether a restraint was unreasonable, the void for vagueness doctrine would trump a conviction. Sad. Very sad.

My solution to the problem, if there really is a problem, will come as soon as I figure it out—but no later than next week— in Part II.

Thanks for reading. Comments would be much appreciated, but maybe hold your fire until after Part II?

This post originally appeared in the [CartelCapers blog](#).

[1] I am not the first to reach this conclusion. The work of several other authors who find likewise is mentioned in the post.

[2] Maybe this language that is in Sherman Act indictments will clear things up: “For the purpose of forming and carrying out the charged combination and conspiracy, the defendant and his co-conspirators did those things that they combined and conspired to do.” To be fair, the indictments then “bullet point” a list of acts the defendant(s) engaged in to carry out the conspiracy.

[3] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

[4] I was a brand new Antitrust Division attorney in one trial where we obtained convictions not too long after Sherman Act had been made a felony. At sentencing, the first convicted defendant got a wicked tongue lashing, but the judge said that, due to his youth and relative inexperience, he would not be sentenced to prison. The next defendant—ditto on the tongue lashing—but the judge found he should not be sentenced to prison because he was elderly and now retired.

[5] Frank Peake was sentenced to 5 years in prison for his participation in a conspiracy to fix the prices on cargo shipped by water between the United States and Puerto Rico. See, <https://www.justice.gov/opa/pr/former-sea-star-line-president-sentenced-serve-five-years-prison-role-price-fixing-conspiracy>. Foreign executives are frequent defendants in criminal antitrust cases and may be put on a Red Notice with dire consequences simply by being indicted.

[6] For a more scholarly article that takes a look at the void for vagueness doctrine and its implications for the Sherman Act, see *Sherman Act and Avoiding Void-for Vagueness*, [Matthew G. Sipe](#), posted May 16, 2017, available at, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2968933&download=yes.

[7] See Charles D. Weller, *The End of Criminal Antitrust Per se Conclusive Presumptions*, 58 ANTITRUST BULL. 665 (2013).

[8] Some strict liability crimes (i.e., statutory rape) can have no intent element but the Sherman Act is not a strict liability crime.