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A Redrafted Section 1 of the Sherman Act

Robert H. Heidt*

I. INTRODUCTION

The Chicago School's radical simplification of antitrust, much to its credit, invites a redraft of section 1 of the Sherman Act¹ that is more pointed and intelligible than the current version.² This article presents one such redraft. If successful, the redraft should reduce the effort needed to understand the statute and the mischief caused when courts fail to understand it.

Specifically, the redraft eliminates the core concept of "agreement in restraint of trade," a concept that unduly risks befuddling and misdirecting the reader. In its place the redraft, first, generally prohibits agreements by horizontal rivals to reduce rivalry *inter se* on price or on any other dimension of rivalry.³ Second, the redraft exempts from that prohibition all of those agreements whose net effect is to enhance efficiency.

The redraft aims to incorporate the Chicago School's view that antitrust's sole goal ought to be economic efficiency.⁴ It aims

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This article is primarily written for teachers of antitrust. Terms such as output, value, rivalry, competition, exclusion, collusion, allocative and productive efficiency, and the welfare tradeoff assume their conventional meanings. The cases and hypotheticals discussed are, whenever possible, drawn from the prominent casebooks on antitrust such as P. AREEDA & L. KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* (4th ed. 1988) and R. POSNER & F. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* (2d ed. 1981).

1 Codified at 15 U.S.C. §§ 1-7 (1988).

2 Nothing here is meant to suggest that the Chicago School approach accords with the legislative history of the Sherman Act. That the Chicago School approach contends seriously to displace other approaches to the Sherman Act warrants a fresh look at how its version of the Act might be worded.

3 The Chicago School would flinch at any use of the term "rivalry" since it has rightly criticized courts for emphasizing rivalry at the expense of efficiency. This error has led courts to condemn efficient practices that suppressed rivalry. *See, e.g.*, *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949); *see also* R. BORK, *THE ANTI-TRUST PARADOX* 23 (1978).

"Rivalry" is used primarily because it is easy for judges to understand and apply. Read as a whole, the redraft should address any concerns that have arisen from the courts' past overzealous commitment to rivalry.

4 Economic efficiency is also stated as the maximization of the gains from trade or

to pick up the Chicago School's division of antitrust into its "anti-collusion" and "anti-exclusion" aspects and to condemn only collusion. Exclusionary conduct under section 1 does not, at bottom, involve an agreement to reduce rivalry *inter se* but only the taking of concerted action that handicaps a rival. Thus the "exclusionary" conduct condemned by *Klor's, Inc. v. Broadway-Hale Stores*,⁵ *Silver v. New York Stock Exchange*,⁶ *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*,⁷ *Associated Press v. United States*,⁸ the dicta of *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,⁹ the "essential facility" doctrine,¹⁰ and the other law governing horizontal "group boycotts" is condemned no longer.¹¹ Fol-

of the sum of producer and consumer surplus, the ideal welfare tradeoff between productive and allocative efficiency, and the ideal balance between cooperation and rivalry. See Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoff*, 58 AM. ECON. REV. 18, 21 (1968). A more controversial synonym for "economic efficiency" is "consumer welfare." See Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 84 (1982) (using "consumer welfare" as a synonym for "efficiency" misleads when, for example, a merger results in higher prices for consumers but even lower costs for producers, thereby increasing efficiency).

5 359 U.S. 207 (1959) (condemning concerted refusal to supply a dealer who was a rival to one of the defendants).

6 373 U.S. 341 (1963) (condemning withdrawal of wire connections to a broker).

7 364 U.S. 656 (1961) (condemning gas association's decision not to certify plaintiff's burner).

8 326 U.S. 1 (1945) (condemning bylaw that allows a member of Associated Press to prevent Associated Press from dealing with the member's rival).

9 472 U.S. 284 (1985) (condemning a joint venture's refusal to deal with a rival when the joint venture is motivated by an "anticompetitive animus" or possesses "market power or unique access to a business element necessary for competitive success").

10 The redraft does not affect the use of the essential facility doctrine in cases arising under 15 U.S.C. § 2 (1988). See, e.g., *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir. 1982), *cert. denied*, 464 U.S. 891 (1983). I understand the "bottleneck doctrine" to be just another name for the essential facilities doctrine.

11 Few Chicago School efforts have expressly called for exempting all "exclusionary" behavior from the reach of § 1. Professor Liebler's work comes the closest and constitutes the clearest expression of the Chicago School's position on exclusion. W. LIEBLER, *ANTITRUST ADVISOR* § 1.32, at 45-59 (C. Mills 2d ed. Supp. 1984).

Judge Posner's sweeping claim that boycotts should be illegal when, and only when, they are employed to enforce practices that are objectionable on the basis of substantive antitrust policy in effect eliminates any legal sanction against exclusionary behavior. Judge Posner's claim amounts to saying that exclusionary behavior never adds anything, *i.e.*, never makes illegal behavior that is not already illegal. R. POSNER, *ANTITRUST LAW* 212 (1976).

Perhaps because of the Chicago School's relative reticence about exempting exclusionary behavior from the reach of § 1, the current Justice Department, although adopting the Chicago School's approach generally, continues to subscribe to the essential facilities doctrine, and to the notion that when exclusionary practices are attacked, a group's capacity to hurt a rival measures the group's monopoly power. See Brief for the

lowing the insight that vertical agreements pose an insignificant danger to economic efficiency, the redraft only condemns certain horizontal agreements.¹²

The reader's immediate reaction may be that the redraft condemns horizontal price-fixing and nothing else. But this reaction is accurate only if one understands price-fixing broadly (and not literally) to include not only the obvious variations, such as horizontal bid-rigging, horizontal customer or territorial allocations, and horizontal agreements to limit output,¹³ but also horizontal agreements on any of the many non-price dimensions of rivalry, such as product quality, terms of credit, or willingness to give buyers information. In other words, this reaction misses the mark unless one understands the multi-dimensional nature of rivalry and is willing to condemn equally agreements to refrain from rivalry on any of those dimensions. Thus the redraft condemns the agreements in *National Society of Professional Engineers v. United States*,¹⁴ *Catalano, Inc. v. Target Sales, Inc.*,¹⁵ and *FTC v. Indiana Federation of Dentists*¹⁶ under the same language and reasoning

United States as Amicus Curiae at 18-19, *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (No. 83-1368).

12 In an appropriate case, vertical restraints may still be condemned as a facilitating practice designed to perfect oligopolistic coordination. Of course, they may also provide potent evidence of horizontal collusion. For example, the unanimous and long term use of resale price maintenance by manufacturers who collectively hold a substantial market share and who do not appear to be using the price restraint for any efficiency-enhancing purpose may constitute unlawful facilitating behavior as well as evidence of horizontal price-fixing. See subsection (b) of the redraft, *infra* text accompanying notes 80-91.

The redraft's embrace of the horizontal/vertical distinction flies in the face of some Chicago School commentators who reject that distinction as the guide to an efficiency analysis. See, e.g., Liebler, *Intrabrand "Cartels" Under GTE Sylvania*, 30 UCLA L. REV. 1 (1982) (finding fundamental to an efficiency analysis the interbrand/intrabrand distinction; not the horizontal/vertical distinction); Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 508 (1974) (the division of practices into horizontal and vertical is not useful). But even those commentators would find the distinction useful when defined in Judge Bork's substantive terms: "The test is simply whether, assuming market power to exist, the agreement eliminating competition [rivalry] could lead to a restriction of output. If it could, the restraint is horizontal; if it could not, the restraint is vertical." Bork, *The Rule of Reason and the per se Concept: Price Fixing and Market Division—Part II*, 75 YALE L.J. 373, 424 (1966).

13 Joint buying and selling agencies and other partial integrations that centralize pricing decisions are also condemned as price-fixing when they include no efficiency-enhancing gains.

14 435 U.S. 679 (1978) (defendants agreed to withhold information about prices until after an engineer was selected).

15 446 U.S. 643 (1980) (defendants agreed on credit terms to offer customers).

16 476 U.S. 447 (1986) (defendants agreed to withhold x-rays from patients' insurance companies).

that condemns the quintessential price-fixing agreement.

In order to permit horizontal agreements to reduce rivalry that, on balance, yield efficiency-enhancing gains,¹⁷ the redraft incorporates the ancillary restraint doctrine of *United States v. Addyston Pipe & Steel Co.*¹⁸ in a separate subsection. And that subsection enjoys the same dignity as the general prohibition.

With a particular emphasis and a few qualifications, therefore, the redraft incorporates the anticollusion law that has developed over the last century. It takes as the twin pillars of that law the ancillary restraints doctrine of *Addyston Pipe* and the single-minded commitment to efficiency of *National Society of Professional Engineers v. United States*.¹⁹ To be sure, the redraft abandons the language of a number of landmarks, for example, *United States v. Topco Associates*,²⁰ *United States v. Sealy*,²¹ and *Appalachian Coals v. United States*.²² It also ends the Sherman Act's application to acquisitions and mergers, leaving them to be governed entirely by section 7 of the Clayton Act.²³

The redrafting effort also presents an opportunity to refine section 1 through a few minor substantive changes. A separate subsection establishes civil, but not criminal, liability for agreements to exchange information or to engage in other practices that facilitate horizontal collusion. The redraft also reaches, for the first time, *attempts* to collude like that in *United States v. American Airlines*.²⁴ It then imposes a less severe maximum penalty on attempts to collude than on collusion itself.

Procedurally, the plan is simply to substitute the redraft for the current section 1, leaving all other statutory provisions unchanged. The only change of language in the other provisions called for is the substitution of "agreement" for "contract, combination or conspiracy" in various sections of the Sherman and Clayton Acts.²⁵ This change is without substantive significance. Drafting considerations alone inspire it, specifically the wish to keep

17 *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

18 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

19 435 U.S. 679 (1978).

20 405 U.S. 596 (1972).

21 388 U.S. 350 (1967).

22 288 U.S. 344 (1933).

23 15 U.S.C. § 13a (1988).

24 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985).

25 "Agreement(s)" would replace "contract, combination . . . or conspiracy" in § 3 of the Sherman Act, "contract or any combination, or pursuant to any conspiracy" in § 6 of the Sherman Act, and "combinations or conspiracies" in § 6 of the Clayton Act.

the redrafted section 1 as short as possible. The Federal Trade Commission Act,²⁶ especially section 5 prohibiting "unfair or deceptive acts or practices," remains unaffected. Section 2 of the Sherman Act, condemning monopolization and attempts to monopolize, also remains unaffected.²⁷

Various peripheral doctrines of section 1 likewise remain unaffected. For instance, the "state action" doctrine—which indicates when collusive action is sufficiently identified with the government to be exempt from section 1—remains unaffected, as does the doctrine which indicates the amount and type of evidence needed to infer a horizontal agreement. Nor is there a need to alter the *Noerr-Pennington*²⁸ doctrine, although its application, like that of the state action doctrine, will narrow a good deal when section 1 no longer reaches exclusionary practices.

In striving to be more pointed and intelligible, the redraft serves some teaching and heuristic goals. It offers the relevant first-time readers—businessmen, lawyers, law students, judges and juries—a quicker, easier, and more reliable entree into the substantive issues that govern modern anticollusion analysis. It helps these readers to identify the appropriate considerations. It relieves the anxiety—if not paralysis—engendered by a concept as fraught with multiple possible meanings as "restraint of trade." It aims to ameliorate the effect on the first-time reader of the enormous gulf that has developed between his likely understanding of "agreement in restraint of trade" and the substantive meaning of "agreement that impairs efficiency" that has emerged after a century of adjudication. That gulf increases the mental effort a first-time reader must expend in converting from the present statutory language to the inquiries that now determine the statute's applicability. In any statute, this gulf and the conversion effort it requires not only mystify the law but multiply the reader's risk of error.

The redraft also aims to improve section 1's administrability by minimizing the judicial energy expended on those unanswer-

26 38 Stat. 717 (1914), codified as amended at 15 U.S.C. §§ 41-51 (1988).

27 15 U.S.C. § 2 (1988). The spirit behind the Chicago School approach would call for limiting § 2 drastically.

28 The *Noerr-Pennington* doctrine is derived from *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). It provides that agreements to lobby for favorable legislation cannot constitute, or provide the evidentiary predicate for finding a violation of the Sherman Act.

able inquiries that, when undertaken, only embarrass the law and all associated with it, namely the inquiries into "the relevant market" and "market or monopoly power."²⁹ Admittedly, agreements reducing rivalry *inter se* do not impair efficiency unless defendants collectively possess some monopoly power. But that does not mean a court should launch into an effort to define the relevant market whenever the agreement involves more than naked price-fixing. When agreements both enhance productive efficiency and reduce rivalry, thereby requiring a measure of the welfare trade-off, the redraft acknowledges that defendants' collective power becomes a factor.³⁰

On the substantive front, dropping "exclusionary" behavior from the reach of section 1 improves its administrability in several respects. Private cases between rivals, such as horizontal boycott cases, will no longer present the embarrassing spectacle whereby jurors, having been crudely instructed to decide whether the defendants "unreasonably restrained trade," are allowed to decide simply whether the defendants treated the plaintiff-rival fairly or reasonably. That spectacle ignores the interests of those absent parties to whom the Act is said to be devoted, the consumers.³¹

The redraft is presented, therefore, for many of the reasons that a bill draftsman might take a stab at redrafting a statute even when there is no chance that the redraft will be enacted. Concepts that move a reader more quickly, easily and securely to the appropriate considerations, fewer words with stipulated meanings at odds with ordinary parlance, and a subsection-by-subsection structure that signals a step-by-step inquiry satisfy an aesthetic of

29 See Rowe, *Market as Mirage*, 75 CALIF. L. REV. 991 (1987) (proving monopoly power more troublesome than useful).

30 My wish to avoid judicial inquiries into monopoly power arguably collides with the Chicago School's frequent insistence that plaintiff show defendants possess monopoly power. Professor Eleanor Fox, for instance, thinks the Chicago School would go so far as to absolve the defendants in *FTC v. Indiana Federation of Dentists* on the ground that the plaintiffs did not show defendants' market power. Fox, *The Battle for the Soul of Antitrust*, 75 CALIF. L. REV. 917, 921 (1987). I disagree. Because the Chicago School recognizes the multidimensional nature of rivalry, I believe it would view the agreement there as an instance of naked horizontal collusion. Thus, market power need not be shown.

Although Judge Easterbrook calls for courts to ascertain whether market power exists before deciding whether a restraint is naked, a sequence which the redraft reverses, he joins with me in insisting that an inquiry into market power need not entail the definition of the relevant market. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 22 (1984).

31 See, e.g., the jury instructions described *infra* at notes 48-49 used at the trials in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and *Patrick v. Burget*, 486 U.S. 94 (1988).

their own. In addition, this redraft brings into relief the substantive changes that I believe lie implicit in the Chicago School's approach.

This is not to say the redraft unties the Gordian knot of all cases. Nor does it lead the reader inexorably to an efficiency analysis. The world's complexities mock unduly ambitious attempts to order it. Redraft after redraft push their way forward only to stumble on embarrassing fact patterns that throw them, like Sisyphus, back to oblivion. Some past and doubtless some future fact patterns embarrass this redraft. And of course, the redraft only brings the reader to the contending issues. Genuinely difficult cases like *BMI* require grappling with those issues. With this effort, the redraft helps not at all.

II. THE REDRAFT

Section 1 of the Sherman Act currently reads:

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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.³²

My proposed section 1 reads:

(a) A person may not agree, or attempt to agree, with an actual or potential rival to reduce, or to refrain from, rivalry among them on price, terms of credit, features of their respective product or service, or on any other dimension of sale or purchase (including output, place of doing business, manner of production, promotion, or negotiation, information to be provided to buyers or sellers, inputs to be used, or method by

32 15 U.S.C.A. § 1 (Supp. 1991). Section 1 was recently amended by the Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4(a), 104 Stat. 2880 (1990), raising statutory fine amounts to \$10,000,000 from \$1,000,000 and to \$350,000 from \$100,000. See also the enhanced fines for criminal behavior provided by 18 U.S.C. § 3623 (1988) (the maximum fine is the greatest of the amount specified in 15 U.S.C. § 1, twice the pecuniary gain derived from the crime, or twice the pecuniary loss caused to the victims of the crime).

which cost or price is calculated) whenever the agreement affects interstate commerce.

(b) Whenever the agreement affects interstate commerce, a person may not agree with an actual or potential rival to adopt practices (including an exchange of information) whose purpose or effect is to reduce rivalry among them and thereby to obtain noncompetitive terms of sale or purchase.

(c) Subsections (a) and (b) do not apply to an agreement that so increases the value of, or so assists the introduction of, a product or service (for a reason other than the mere reduction in the competing alternatives offered to buyers or sellers), or otherwise so enhances productive efficiency that the economic benefit to consumers from the reduction in actual or potential rivalry substantially outweighs the harm. Evidence supporting the application of this subsection may not be received unless the court finds a reasonable basis for believing that the agreement yields these economic benefits to consumers in significant magnitude.

(d) Subsections (a) and (b) do not apply to an agreement governed by section 18 of this title.

(e) Penalties

(1) A person who attempts to agree with an actual or potential rival in violation of (a) shall be fined not more than \$5,000,000 if a corporation, or, if any other person, \$175,000 or shall be imprisoned for not more than two years or both.

(2) A person who agrees with an actual or potential rival in violation of (a) enters a conspiracy and shall be fined not more than \$10,000,000 if a corporation, or, if any other person, \$350,000 or shall be imprisoned for not more than three years or both.

(3) A person who violates (a) or (b) is subject to civil liability for damages to persons injured in their business or property as provided in section 15 of this title, and to the government under section 15a of this title, and is also subject to equitable remedies in a suit brought by the government under section 4 of this title.

Granted, the proposed draft seems so fraught with difficulties that the drafter's credibility barely survives a first reading. Its greater length should raise an immediate bias against it, as should the use of concepts like "enhances productive efficiency" that lie outside ordinary parlance, and the use of coined concepts like "attempt to agree." Using a lengthy parenthetical expression in a criminal statute amounts to an offense against a drafting convention. The emphasis on reduction in "rivalry" encourages the unhappy tendency of courts to equate efficiency with rivalry and to

preserve rivalry at the expense of efficiency. The vagueness of such notions as "an actual or potential rival" and "value" threatens to inflict a burden of interpretation on courts, and thus years of uncertainty upon legal planners, that continued use of the current version would avoid entirely. Worst of all, there is a danger of compromising the one clear and reasonably administrable rule to emerge from a century of labor with the current version, namely, the condemnation, without further evidence, of naked, horizontal price fixing. The redraft plainly attempts to avoid compromising that rule. But who would want to risk that it will fail?

A closer look at the redraft suggests other difficulties. Subsection (a) seems to put in jeopardy too much innocuous and beneficial integration and seems to call for an unwarranted atomization of industry. How would it apply, say, to an agreement among law partners to charge \$150 per hour for their services? If (a) reaches this agreement, the partners are forced to resort to (c) and to bear the burden of showing the obvious, namely that the agreement is ancillary to the partnership. Reaching (c) unduly burdens the partners, in part because their conspicuous lack of monopoly power should immediately rule out any exposure. In order for the partners to avoid any need to rely on (c), unfortunately, a court would need to rule that they are not "actual or potential rivals."

By requiring interpretations like this, however, the redraft adds a layer of difficulty to the resolution of these cases. Under the redraft, courts must not only decide a case based on an efficiency standard but must then explain its decision in terms of the language of the statute. That second step is not needed at present because courts are not limited by, indeed they pay no attention to, the current language "restraint of trade." And that is the great strength of the current version, just as lack of guidance and needless mystification are its great weaknesses. Surely the last thing antitrust analysis needs is language that, by requiring interpretation and characterization, further complicates the effort to apply an efficiency standard.

These objections and many others, nearly conclusive in themselves, could all be raised by those who agree completely with the major substantive changes that the redraft will enact. Those who differ with all or part of the substance, and this may include many who align themselves with the Chicago School, will naturally raise further objections. This redraft recommends itself, therefore, primarily because of the deficiencies of the current version.

III. WHY ANY REDRAFT

What is the careful first time reader likely to make of a prohibition against agreements in "restraint of trade"? I believe this core language of the current section 1 evokes a wide variety of meanings from such a reader. And almost all of these meanings differ markedly from the modern meaning of an agreement with a negative effect on competition, the meaning established by *National Society of Professional Engineers v. United States*.³³ The Chicago School's translation of *Professional Engineers'* concept as "agreements impairing economic efficiency" gives it content but, if anything, increases the distance between the meaning of "restraint of trade" in section 1 and in ordinary parlance.

In English and American history "agreement in restraint of trade" has carried at least four meanings other than this modern meaning: an agreement that impairs the right to work of one of the parties to the agreement; an agreement that restrains alienation by impairing the ability of one party to the agreement, typically the buyer, to resell the products involved after title and possession have passed to him; an agreement that restrains further trading by the parties in the products or services involved; and, most important, an agreement that impairs the trading capacity of another business, usually an outsider to the agreement and a rival of at least one of the parties. The first two of these ancient meanings of "agreement in restraint of trade," and, perhaps the third, amount to historical footnotes that seem relatively unlikely to mislead modern readers. But the fourth meaning clings to this term like a barnacle and misleads readers into using section 1 to attack concerted "exclusionary" practices.

More generally, the historical baggage of these multiple meanings increases the risk of reader error. Using a concept that connotes so many different meanings to mean strictly "agreements that impair efficiency" asks too much of the first time reader. A reader alert enough to translate "restraint of trade" as "impairing efficiency" most of the time may still fail to translate it correctly all of the time. The banished meanings wait in the wings of the reader's consciousness to re-enter during a lapse in concentration. These banished meanings, after all, still prevail in England and the Commonwealth, and in the United States in contract cases. In

an English court, for instance, "restraint of trade" has nothing to do with economic efficiency. The opposition to restraints of trade in England has to do solely with protecting a trader's ability to trade for its own sake, despite its past promise not to and despite the interests of consumers.³⁴ Yet the contrary meaning of the concept in England is rarely recognized here. Thus the English meaning—along with the other banished meanings—inevitably color the presuppositions that the first time reader brings to the concept.

The first meaning—an agreement that impairs a party's right to work—prevailed in England from the Black Death to the 17th century and was used to strike down restrictive covenants. Here the hostility to agreements in restraint of trade sprang from the court's paternalistic impulse to save a party from his promise not to work at a designated vocation in a designated area. The courts gave no consideration whatsoever to the defendant's reliance upon plaintiff's promise or to the compensation the promise extracted, not to mention the diminished marketability of a business and the impaired incentives to develop business goodwill that followed from voiding these restrictive covenants.³⁵ The public interest in avoiding idleness where labor was critically scarce or where the promisor might become a public charge overwhelmed all other concerns. Even after the 17th Century, the judicial willingness to uphold some of these agreements had nothing to do with concern for competition or efficiency. Rather the concern was entirely with the promisor's ability to fend for himself financially. As guild restrictions on vocations relaxed, that ability improved, rendering the restrictive covenant less oppressive to the plaintiff in the eyes of the court.³⁶

Under the second meaning—restraint of alienation—the doctrine deemed unenforceable agreements between a seller and a

34 See Heidt, *Populist and Economic v. Feudal: Approaches to Industry Self-Regulation in the United States and England*, 34 MCGILL L.J. 39 (1989); Yuen, *Exclusive Purchasing at Common Law and Under Anti-trust Law: A Re-examination of the Restraint of Trade Doctrine*, 16 ANGLO-AM. L. REV. 1 (1987).

35 See Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981).

36 See *Mitchel v. Reynolds*, 24 Engl. Rep. 347 (K.B. 1711). See generally Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954). Likewise, the English opposition to monopoly stemmed not from concern with consumers but from concern with the monopolist's rivals whose ability to trade may be impaired. See J. GORDON, *MONOPOLIES BY PATENTS AND THE SUITABLE REMEDIES AVAILABLE TO THE PUBLIC* 226-28 (1897).

buyer which restrained the buyer's ability to resell as he wished. As every introductory course in antitrust points out, the Supreme Court opinions in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*³⁷ and *United States v. Arnold, Schwinn & Co.*³⁸ echo this ancient meaning of restraint of trade.

A third possible meaning of "agreement in restraint of trade" is an agreement that restrains further trading by a party to the agreement in the products or services involved in the agreement. The overbreadth of this meaning is well recognized—at least since the 1918 Supreme Court decision in *Chicago Board of Trade v. United States*,³⁹ which identified it as an incorrect interpretation that section 1 embraced only in drastically modified form. As courts and commentators have long pointed out, every executory contract inhibits at least one of the parties to it from further trading of the products or services involved. One who promises to deliver widgets to the promisee two months hence is restrained by that agreement and by the penalties for breach from trading the products to another, even if the other values the products more and offers more accordingly. Nor is this restraint on the promisor's freedom to further trade incidental to the contract. The assurance that the promisor will be restrained from trading with all others often constitutes a promisee's reason for contracting in the first place. Far from condemning it, the common law blesses this restraint of trade so enthusiastically that it enforces the ban on further trading not just against the promisor but against outsiders. An outsider who attempts a subsequent trade, sometimes merely by offering a higher price, will find himself subject to tort liability for interfering with a contract. In *Chicago Board of Trade* the Supreme Court recognized the overbreadth of this meaning of restraint of trade in language familiar to every antitrust student:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of the very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy

37 220 U.S. 373 (1911) (resale price maintenance condemned because it restrains the retailer's freedom to alienate the product).

38 388 U.S. 365 (1967).

39 246 U.S. 231 (1918).

competition.⁴⁰

While the Supreme Court in *Chicago Board of Trade* alerted the reader that restraint of trade did not mean "restraint of further trading in a product or a service by a party to the agreement," the Court left as a possible interpretation a fourth meaning that is less obvious, and therefore more dangerous: agreement to impair the trading capacity of another business, usually an outsider to the agreement and a rival of at least one of the parties. This alternative meaning understandably invites the reader to use section 1 in order to condemn "exclusionary" behavior. So read, section 1 is wildly overbroad, for the natural tendency of rivalry is to exclude, often by directly or indirectly impairing a rival's trading capacity. Thus section 1 threatens a great deal of normal rivalry that happens, fortuitously, to involve firms acting together. So read, section 1's requirement of agreement becomes formalistic. So read, section 1 instructs lower courts to include as antitrust violations a wide range of garden variety business torts and dirty tricks directed against a rival, even though no one can advance a plausible explanation of how this concerted behavior impairs efficiency. One result is the current hostile approach toward horizontal group boycotts, an approach represented by *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,⁴¹ *Silver v. New York Stock Exchange*,⁴² *Associated Press v. United States*,⁴³ the dicta of *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,⁴⁴ and the bottleneck or essential facilities doctrine.⁴⁵

The long historical relationship between "restraint of trade" and "impairing the trading capacity of another, usually a rival," would make any court hesitate before holding that the two concepts are unrelated. For both English and American classical economists, "restraint of trade" meant a restraint on a firm's freedom to do business of the kind imposed by the exclusive privileges so common in the Mercantilist period. Likewise, competition meant the freedom from those constraints, not the current concept of an end state of efficiency. In a cosmic sense, the goal of the clas-

40 *Id.* at 238.

41 359 U.S. 207 (1959).

42 373 U.S. 341 (1963).

43 326 U.S. 1 (1945).

44 472 U.S. 284 (1985).

45 See generally Heidt, *Industry Self-regulation and the Useless Concept "Group Boycott"*, 39 VAND. L. REV. 1507 (1986).

sical economist—protecting and enlarging individual freedom and entrepreneurial opportunity—supported efficiency, but that is a far cry from saying that efficiency was his goal. Because ancient laws against restraints of trade took aim at coercion and the impairment of a nonconsenting party's freedom to act, they concerned exclusion much more than collusion. Indeed collusion—*i.e.*, wholly voluntary agreements to eliminate rivalry *inter se*—was not considered a restraint of trade since no trader's freedom was being denied. Twentieth century economics, represented here by the Chicago School's revolution and its embrace of efficiency, has turned this upside down. Yet thanks in part to continued use of the old language "agreement in restraint of trade," exclusionary conduct with unknown (and perhaps unknowable) effects on efficiency continues to be condemned under section 1.

The Chicago School's approach brings into relief this fundamental conflict between the classical and neo-classical meanings of restraint of trade. But this contribution, and this conflict, are rarely appreciated. No single set of principles—and no single phrase like "agreement in restraint of trade"—should govern behaviors as different as collusion and exclusion. By its inherent nature, collusion can harm efficiency; economic theory confirms that relation, explains how and why, and suggests when it will not be so. The same can not be said of exclusionary behavior by private firms. Exclusionary behavior's effect on efficiency is much less knowable or measurable. Nor is it related to whether defendant's behavior is concerted or unilateral. Exclusionary behavior, moreover, inevitably triggers a reaction based on a moral assessment of defendant's methods. In all these respects exclusionary behavior resembles the behavior attacked by those unfair competition torts which involve a firm or a group of firms impairing the trading capacity of another firm, usually a rival. Accordingly, exclusionary behavior is best treated not under any efficiency statute but under an analysis similar to that accorded these unfair competition torts.

The language "agreement in restraint of trade" causes the most mischief when it constitutes the ultimate question on a jury verdict in a group boycott case between rivals, usually qualified only by the requirement that the restraint of trade must be "unreasonable." Consider the issue put to the jury at two recent Supreme Court cases in which plaintiffs prevailed, *Allied Tube &*

*Conduit Corp. v. Indian Head, Inc.*⁴⁶ and *Patrick v. Burget*.⁴⁷ In *Indian Head*, the plaintiff based his claim on defendants' successful effort to persuade a standard-setting body to adopt a safety standard for electrical conduits which plaintiff's product did not satisfy. In *Patrick*, the plaintiff-doctor based his claim on the decision of the defendant peer review committee to reprimand him.

In both cases plaintiffs suffered financial injury from defendants' concerted action. In both cases the jurors were expected to return a verdict on the ultimate question of whether the defendants committed an unreasonable restraint of trade. To be sure, jury instructions gave, or at least could have given, some structure to that ultimate inquiry. Following past cases, those instructions could have required plaintiff to show that defendants possessed "market power," entered a Sherman Act agreement, and injured "competition." But even the best instructions imaginable under the best of the current law⁴⁸ would not limit a faithful jury to ruling for plaintiff only when the defendants impaired efficiency. Nor would they prevent the jury from viewing the cases as bipolar disputes that hinged ultimately on whether defendants acted unfairly toward the plaintiff.

Moreover the judge's rulings on evidence in these cases rein-

46 486 U.S. 492 (1988).

47 486 U.S. 94 (1988).

48 *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), represents the Supreme Court's latest effort to handle exclusionary behavior under § 1. It gives lip service to the notion that the plaintiff must show that defendants impaired efficiency and did not merely disadvantage competitors like itself. For per se liability to attach, it requires that defendants possess "market power or unique access to a business element necessary for effective competition." *Id.* at 298. As explained more fully in a forthcoming article, these requirements are not appropriate proxies for the likelihood that exclusionary behavior has impaired efficiency. See Heidt, *The Conflicting Meanings of Restraint of Trade* (publication forthcoming).

Pacific Stationery differs sharply from the Chicago School approach by favoring the plaintiff in at least four respects: (1) It allows the plaintiff to show the defendant groups' "market power" and thereby an "injury to competition" merely by showing the defendant groups' practicable capacity to handicap plaintiff severely. In other words it continues to suggest incorrectly that the mere capacity of an association of otherwise competitive firms to handicap rivals severely measures their power to reduce output. Despite its insistent language to the contrary, therefore, it allows injury to competitors to suffice. And it offers no explanation for why an injury to plaintiff by a firm with market power means an injury to competition, i.e., efficiency. (2) More generally it continues to profess that "exclusionary" business practices, by handicapping rivals, impair efficiency. (3) At least in rule of reason cases, it allows the fact-finder to infer an injury to efficiency from defendants' "anticompetitive animus." (4) At least in rule of reason cases, it allows the plaintiff to prevail by showing a less restrictive alternative business practice that defendants might have used.

forced the impression that the juries could understand "unreasonable restraint of trade" to amount to a test of fairness or reasonableness. For example, in *Indian Head*, the judge invited the jury to consider such matters as whether defendants' lobbying efforts against plaintiff were customary and in compliance with National Fire Protection Association's own rules, whether a determination that the plaintiff's product was non-standard would hurt plaintiff severely, and whether the plaintiff was given a fair opportunity to respond to defendants' charges against his product.⁴⁹ Similarly,

49 The lengthy jury instructions in the *Indian Head* trial show that the case became a referendum on whether defendant Allied acted fairly toward the plaintiff, if not simply on whether the plaintiff, as a matter of sympathy, deserved some compensation from defendant. See generally Trial Transcript at 2146-2216, *Indian Head, Inc. v. Allied Tube & Conduit Corp.*, No. 81-Civ-6250 (S.D.N.Y. 1985). The effect of Allied's action on efficiency received virtually no consideration.

The court told the jury that the purpose of § 1 of the Sherman Act was to secure "freedom in the economic area." *Id.* at 2163. In the court's words, the Act "is a kind of bill of rights for free competition." *Id.* at 2164. The clear implication was that the issue before the jury was whether defendant's conduct had violated plaintiff's economic right to engage in business. In general the respective rights of the parties figured prominently in the court's instructions, with the court noting that defendant had no right, in the name of safe products, to injure competition. *Id.* at 2164.

To be sure, the court said that "the Sherman Act protects competition and not competitors." *Id.* at 2165. But that sound principle did not throw the jury's attention upon the effects of defendant's behavior on consumers, as it should have. Instead the court emphasized that the Act was designed to protect rival businesses like plaintiff:

The Sherman Act is not designed to protect people [i.e. rival businesses like plaintiff] from the effect of competition, only from the unreasonable restraints of trade which impede the free flow of competition in the marketplace.

... Congress has said people [i.e. rival businesses like plaintiff] have a right to enforce free competition, which is enunciated in the statute itself.

Id. 2165-66.

The instructions as a whole stressed that the jury was to decide, under § 1, whether defendant had unreasonably restricted the trading capacity of its rival, the plaintiff. This issue, of course, resembles the issue presented by a tort claim for unfair competition much more than it resembles any issue having to do with efficiency.

The requirement of *Professional Engineers* that under § 1 one must balance the procompetitive and anticompetitive aspects of defendant's conduct came to the jury in a disfigured form. The court said that plaintiff's exclusion from the market was itself an anticompetitive aspect. Once again the jury was not required to link that injury to any reduced output, artificially enhanced price or injury to consumers. *Id.* at 2168-69. The instructions further allowed the jury to find that the defendant's tactics of block voting and defendant's other lobbying methods nullified any possible procompetitive aspects of the NFPA's standard setting. The instructions also emphasized that the jury could find for plaintiff if they believed defendant could have taken some other action to satisfy its concern about safety that would have hurt the plaintiff less.

The various special verdicts put to the jury dispel any hope that the jury might have limited themselves to the welfare tradeoff. The court instructed the jury to consider

in *Patrick*, the court admitted extensive evidence on the question of whether the defendants' reasons for their reprimand of the plaintiff were advanced in good faith.⁵⁰ All of these matters

the following issues:

[Question number 1:] Did Allied have a genuine belief as of May 1980 that electrical non-metallic tubing was unsafe? . . .

.
Question [n]umber 2: In opposing Article 331 in May 1980, did Allied act, at least in part, based upon a genuine belief that ENMT [plaintiff's product] was unsafe?

.
Question number . . . 3: Was Allied genuinely attempting to influence the NFPA [National Fire Protection Association] in opposing Article 331?

.
Question number 4: Did Allied's conduct violate any of the rules or regulations of the NFPA? . . .

Question number 5: Regardless of whether Allied's conduct violated any of the rules or regulations of the NFPA, did Allied's conduct subvert the consensus making process of the NFPA? . . .

Question number 6: Under the NFPA rules and regulations in effect as of May, 1980, did the vote of the membership at the annual meeting effectively determine whether Article 331 would be excluded from the NEC [National Electrical Code]? . . .

Question number 7: Were the NFPA rules and regulations fair in that they provided a full and effective appeal from the vote of the membership? . . .

Question number 8: Did Allied's conduct deprive Carlon of full and effective access to the NFPA? . . .

Question number 9: Was Allied's conduct a substantial or material factor in excluding Article 331 from the 1981 NEC? . . .

Question number 10: Did Allied's opposition at the May 1980 NFPA meeting constitute the least restrictive means of effectively expressing Allied opposition to the use of ENMT in the marketplace? . . .

Question number 11: Did Allied's conduct in opposing Article 331 adversely impact competition? . . .

Question number 12: Does Allied's conduct constitute an unreasonable restraint of trade in violation of the antitrust laws?

Id. at 2194-99.

50 The instructions in *Patrick v. Burget* gave the jury no idea what harm to efficiency would entail or the criteria by which it would be shown or measured. The instructions merely tracked the vague factors mentioned in *Chicago Board of Trade*:

[C]oncerted action or conduct violates the antitrust laws when either its purpose is, or its probable effect will be, to unreasonably restrain competition.

In deciding whether defendants' action constituted an unreasonable restraint on competition you may consider the following factors:

First, the nature of the particular industry involved;

Second, facts which are peculiar to the particular industry involved;

Third, the nature of the restraint and its effects, actual and probable;

Fourth, the history of the restraint; and

Fifth, the reasons for engaging in the particular restraint.

You should determine from a consideration of all the facts and circum-

seem relevant if restraint of trade means "impairing the capacity of an outside firm, especially a rival, to do business" and if "unreasonable" is understood in its colloquial, rather than economic, sense. But they have little, if any, relevance when restraint of trade means impairing efficiency. Indeed, the judge's failure to emphasize that the defendants' actions, at their worst, handicapped one doctor in a region of many competing doctors, or one type of electrical conduit in a market of several competing types, suggest that the effect on efficiency was never his central focus. As Judge Posner has written:

Now there is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality.⁵¹

Given these evidence rulings in *Indian Head* and *Patrick*, can anyone believe that the jury understood that the "unreasonable restraint of trade" instruction confined them to assessing the wel-

stances revealed by the evidence whether either the purpose or effect of the acts of any of the defendants was sufficiently harmful to competition to outweigh any benefits to competition that such actions may have had. The test is whether defendants' actions suppress or even destroy competition or whether they merely regulate or perhaps promote competition. Please note that in deciding this issue you are not free to consider every possible benefit that defendants' actions may have. You may consider only those benefits that will tend to promote competition in the relevant market as I define that term for you.

You should consider the purpose or end sought to be achieved by the defendants as a result of the conduct and practices alleged by plaintiffs. Whether the particular restraint was reasonable or unreasonable does not turn merely on the presence of a sound business purpose or motive for imposing the restraint. An unreasonable restraint may result even though defendants apparently act for sound business reasons and without any predatory intent to injure competition. You should consider evidence of purpose or motive only insofar as it may assist you in interpreting defendants' conduct and determining or predicting the effects of that conduct upon competition. However, if you find that the conduct and practices of defendants as alleged by plaintiffs had the effect of unreasonably restraining trade, then the antitrust laws have been violated regardless of legitimate business purposes or motives.

Trial Transcript at 2916-17, *Patrick v. Burget*, Civ. Action No. 81-260 (D. Ore. 1984). The Chicago School has long criticized using this language from *Chicago Board of Trade* in jury instructions. See Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sykamia Decision*, 45 U. CHI. L. REV. 1, 6, 15 (1977).

⁵¹ *Products Liability Ins. Agency v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663-64 (7th Cir. 1982).

fare tradeoff? Even if, under some hitherto unexplained theory, defendants' behavior could reduce output, do these instructions lead a jury to focus on that reduction in output and to measure it against the behaviors' efficiency gains?⁵² Surely not. The jury seems far more likely to understand "unreasonable restraint of trade" to mean unreasonable impairment of the trading capacity of the plaintiff-rival.

Thus any business behavior that excludes (and this can, of course, include any rivalry, provided only that it be concerted), must face the test of whether a jury will deem it "reasonable." Not surprisingly, juries are likely to feel free to decide simply whether defendants have hurt the private plaintiff (or in a case brought by the government, the private firms who are hurt by defendants' action) unreasonably or unfairly. Thus a jury that shared the belief—feudal in origin but still widespread today—that firms ought not destroy rivals, however impeccable the methods of rivalry employed to that end, could decide for the plaintiff simply because they consider the plaintiff to be hurt more severely than seems fair. No standard jury instruction in an antitrust case emphasizes that eliminating a rival may be perfectly appropriate business behavior. Similarly, a jury could find for the plaintiff on the ground that the defendants seemed unreasonably greedy.

Even if more careful instructions prevent a jury from basing a violation on normal rivalry, the jury is still free to decide for plaintiff on the ground that the defendants acted abnormally. Witness the emphasis in *Indian Head* on whether the defendant conformed to the customs and rules of the NFPA. Hence, the defendants' mere violation of some business norm unrelated to

52 The standard setting of the National Fire Protection Association, in which Allied participated, and the closely related peer review efforts of the defendants in *Patrick* enhance efficiency in several respects. Standard-setting is best seen as an especially effective species of joint advertising that lowers consumer search costs and generally provides all the efficiency enhancing benefits of advertising. The greater the perceived independence of the NFPA from the firms whose products it approves, and the greater its perceived expertise and stature, the more its "advertising" becomes especially effective. NFPA's standard setting also assists entry into the marketplace by reducing the scale advantages in quality assurance that large and long-established companies may enjoy.

When made public, physician peer review efforts reduce patients' search and evaluation costs, costs that seem particularly high in the doctor-patient context. They also help to avoid the reduction in the demand for (and thus the value of) physician services that would result if patients had negative experiences in dealing with the suspect doctor or the team or institution in which the doctor participated.

Even if the defendants misled the public in these cases, there is no more reason to invoke § 1 than there would be in any instance of misleading advertising.

efficiency can trigger liability.

In short, the "restraint of trade" language in jury instructions brings into the trial a host of factors unrelated to efficiency. It subjects the fate of businesses to the vagaries of jury decision-making. It introduces considerable risk into concerted business practices that benefit society. In private antitrust suits, it invites the jury to decide simply which party before it wears the "white hat." It thus allows the bipolar nature of litigation to control the outcome.

By the bipolar nature of litigation, I mean the tendency of litigation to seem primarily an affair between the parties visibly before the court. From the image of the mythological goddess of justice who sees her mission as comparing the weight on two ends of a scale, to the classic physical arrangement of the courtroom where a judge sits between two opposing parties, to the customary two party titles of legal cases, to the sequence in which the attorneys address the jury, the jury receives the message that their role is to square matters between the parties before the court. And the primary effect of this bipolar view of litigation is that the interests of absent outsiders, here consumers, are disregarded. If one views antitrust's sole goal as benefiting consumers, one must support aggressive measures to keep the jury from viewing an antitrust suit between rivals as a rectification of injustices between those parties, without any concern for the absent consumers.

Yet the lower courts that allowed the jury to decide the "unreasonable restraint of trade" question on fairness grounds followed a long tradition and a well established line of authority that has never been expressly repudiated. Even the Chicago School's commentators, who have dismembered the law against vertical restraints under a firestorm of criticism, have fired relatively few shells against the judicial treatment of horizontal boycotts.⁵³

Granted, "combination in restraint of trade" has survived constitutional attack on the grounds of vagueness.⁵⁴ But that concept nevertheless fails to focus attention on a business practice's

53 See *supra* note 11. I suspect the Chicago School's relative reticence about group boycotts reflects a fear that some boycotts may in effect impose a tariff against a lower cost rival, thereby appearing to impair efficiency just as a state imposed tariff would. See, e.g., the discussion of *Eastern States Retail Lumber Dealers Assoc. v. United States*, 234 U.S. 600 (1914), in R. POSNER & F. EASTERBROOK, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 719-20 (2d ed. 1981).

54 *Nash v. United States*, 229 U.S. 373 (1913).

effect on efficiency. A concept that leaves the jury free to apply the "white hat theory" defeats the public policy goals of a statute devoted to often absent consumers. A concept whose legal meaning differs so widely from its historic meanings or its meanings in ordinary parlance does not belong in a jury instruction or a jury verdict.

IV. EXPLANATION OF THE REDRAFT

A. Subsection (a)

1. "A *person may not agree . . . with a[] . . . rival to reduce . . . rivalry among them on price . . . or on any other dimension of sale or purchase*"

Explanation.—The italicized language incorporates the past jurisprudence of section 1 to the fullest extent possible. "Person" carries the broad meaning set forth in section 8 of the Sherman Act to include corporations, associations and other entities.⁵⁵ "Agree" means entering a "contract, combination or conspiracy." "Agree" incorporates the substantial case law concerning the amount of evidence that allows a factfinder to infer agreement. It also incorporates the case law governing intra-enterprise conspiracy. To make clear that conspiracy law applies, with the significant procedural advantages it affords, subsection (e) (ii) expressly provides that a person who agrees with a rival in violation of (a) enters a conspiracy.

I cast about in vain for language to confirm that this offense, like that condemned by the current version, consists of the sole element of a meeting of the minds on the forbidden subject. Specifically, the offense does not require an overt act.⁵⁶ It is complete upon the meeting of the minds no matter how quickly or completely the common plan is aborted. Accordingly, 18 U.S.C. § 401—which governs statutory conspiracies and which requires the government to show an overt act in furtherance of the common plan—does not apply. The chance of an interpretation different from that given the current version seems too remote to warrant any confirming language.

55 15 U.S.C. § 8 (1988).

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

2. "A person may not agree, or *attempt to agree*, with a[] . . . rival to reduce . . . rivalry among them on price . . . or on any other dimension of sale or purchase"

Explanation.—The language "attempt to agree," which admittedly sounds awkward if not oxymoronic, aims to reach the behavior attacked in *United States v. American Airlines, Inc.*⁵⁷ In this case, the defendant urged a rival executive at Braniff Airlines to join him in fixing prices, only to be rebuffed. The tape recording of one phone call in particular showed the defendant urging his rival to fix prices in unequivocal, emphatic and forceful terms.

Because no meeting of minds to tamper with price was reached, section 1 was useless in attacking the defendant's behavior. And neither antitrust law nor federal criminal law prohibit attempts to form illegal conspiracies. Nor did section 2 seem useful, for American's individual market share was too small to establish a dangerous probability of monopoly, much less monopoly power itself.

American's behavior, however, offended the policies of the Act too flagrantly for the Justice Department or the courts to ignore it. As the Fifth Circuit feared, letting American escape would create a "strong incentive to propose the formation of cartels. If the proposal is accepted, monopoly power is achieved [with cartel pricing the result]; if the proposal is declined, no antitrust liability attaches."⁵⁸ Thus suggesting collusion to a rival is left undeterred. If the suggestion is accepted, both parties reap the benefits of the collusion deterred only by the specter of liability for all. If the suggestion is rejected, the one making the offer loses nothing. The law-abiding party can turn its rival's guilty suggestion neither to the rival's harm nor to his own benefit. Hence, the Justice Department charged an attempt to monopolize and hoped for an unprecedented and rather tortured interpretation of section 2.

This was plainly an unsatisfactory alternative. Section 2 indicates at least some concern with the monopoly power of the defendant firm. Yet the reasons for outlawing the defendant's behavior apply regardless of the defendant's monopoly power.⁵⁹

57 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985).

58 *Id.* at 1122.

59 See Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV. 898,

The redraft captures these undesirable proposals to collude without doing violence to section 2. It provides a more appropriate deterrent to these offers. Besides its deterrence value, the redraft ought to spur more law-abiding rivals to bring unaccepted offers to the government's attention, thereby augmenting the information available to the government for ferreting out collusion generally.

The primary disadvantage of condemning attempts to agree lies in the difficulty of administration. Few cases will present evidence as unambiguous as that in *American Airlines*. Offers to collude that were floated in jest, or to measure the rival by his reaction, or otherwise for effect need to be distinguished from serious attempts to collude. But on balance the advantages of condemning attempts seem to outweigh this administrative concern.

3. "A person may not . . . agree with an actual or *potential rival* to reduce . . . rivalry among them on price . . . or any other dimension of sale or purchase"

Explanation.—The language referring to a "potential rival" requires a narrow interpretation. The language seeks to reach only horizontal, territorial, and customer allocations that might otherwise escape liability on the formalistic ground that the colluding firms are not currently confronting each other in the same locale or for the same customers, and thus are not "rivals." For example, the language is intended to condemn an agreement between U.S. and Japanese manufacturers of rival products whereby the U.S. manufacturer promises to refrain from selling in Japan in return for the Japanese manufacturer's promise to refrain from selling in the United States. Likewise it would reach an agreement between a firm selling on the east coast and another selling on the west coast whereby each agrees not to expand into territory currently served by the other. Whether the firms are regarded as potential rivals will depend on the likelihood of rivalry between them absent the agreement.

Horizontal customer allocations constitute the most common agreement this language seeks to capture. Many bid-rigging arrangements, for instance, may call for the designated losers to re-

925 (1986) ("proof of market power unnecessarily complicates . . . [this] type of case"); see also *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

frain from bidding for certain customers at all. After years of repeating this agreed-upon practice the defendants may claim that as to this customer, they are not "rivals." The italicized language should nullify this claim.⁶⁰

A narrow interpretation of "potential rival" is needed lest a court consider as "potential rivals" any vertically related firms that could in theory integrate forward or backward to the horizontal level of the party with whom they are dealing. Such an interpretation would put in jeopardy many purely vertical agreements, simply because of the possibility that the party subject to the vertical restraint could someday become the horizontal rival of the firm imposing the restraint. Arguably the requirement that the agreement be one to "reduce rivalry" exempts vertical agreements. But a narrow interpretation of "potential rival" would obviate the need to rely on any other language.

4. "A person may not agree with a[] . . . rival to reduce . . . rivalry among them on price . . . or on any other dimension of sale or purchase"

Explanation.—This is the most vulnerable part of the redraft because so much depends on an astute, careful, and non-obvious interpretation of "rival." With an improper interpretation of "rival" the redraft would do more harm than good.

First, the interpretation given "rival" must reinforce the interpretation given "agree" so that together those consistent interpretations assure the proper approach to intra-enterprise conspiracies. In other words, persons who ought to be considered single entities within the meaning of the Act, with the result that their internal decisions are safe from antitrust scrutiny, must not be deemed "rivals." The partners in a law firm who agree on the firm's hourly charge should not be deemed rivals. Nor should a company and its wholly owned subsidiary. To reach this result, "rival" must be interpreted in a way that does not include divisions, subsidiaries, or any subdivisions of a parent or holding company. Nor should one subsidiary be viewed as a rival of another subsidiary of the same parent entity. Increasingly the deter-

60 These defendants may also claim that an agreement not to solicit certain customers at all does not constitute an agreement to refrain from *rivalry on any dimension of sale or purchase*. But when the agreement not to solicit is aimed at extracting better financial terms from the buyer-victim, this claim should fail. See *infra* text accompanying notes 75-83.

mination of whether the defendants constitute a single entity turns on the ultimate substantive issue, namely whether defendants' action on balance enhances or impairs efficiency.⁶¹ Although *Copperweld Corp. v. Independence Tube Corp.*⁶² interpreted "agreement" and not "rival," its approach to intra-enterprise conspiracies should control the interpretation of "rival."

Secondly, "rival" needs an interpretation that will yield the proper treatment of intrabrand cartels. The classic illustration is the price agreements between General Motors' dealers in *United States v. General Motors Corp.*⁶³ that were condemned under the rubric "group boycott." The Chicago School's itself is sharply divided about the efficiency implications, and thus the proper legal treatment, of these dealer cartels. No one claims that dealer cartels create any new efficiencies. But Professor Liebler believes it too difficult to distinguish attempts at cartelization from efficiency enhancing attempts by dealers to alleviate free rider problems.⁶⁴ Accordingly, he would not condemn dealer cartels, a result reached under the redraft by interpreting "rival" narrowly to exclude agreements among intrabrand dealers, retailers or distributors.

Judges Bork and Posner, though for different reasons, would condemn dealer cartels.⁶⁵ Under the redraft then, "rival" must be interpreted to include intrabrand rivals. With this interpretation, the dealer cartel of *United States v. General Motors Corp.*⁶⁶ is condemned without any need to resort to the current rubric "group boycott." Granted, this interpretation condemns an agreement fixing a brand's retail prices when the agreement is imposed through collusion by the dealers but tolerates an agreement about a brand's retail prices that is imposed vertically by the manufacturer. This interpretation, therefore, compels a court to distinguish horizontal agreements from vertical ones, with a great deal depending on the distinction. The redraft generally invites this

61 See, e.g., Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 238-60 (1984) (with many group actions, deciding the single entity issue requires reaching the merits).

62 467 U.S. 752 (1984).

63 384 U.S. 127 (1966).

64 See generally Liebler, *supra* note 12 (finding fundamental to an efficiency analysis the interbrand/intrabrand distinction, not the horizontal/vertical distinction).

65 See Bork, *supra* note 12, at 406; F. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 13 (1981).

66 384 U.S. 127 (1966).

distinction and hopes the courts will define it in economic rather than formalistic terms. The distinction accords with the sharply different threats to efficiency that vertical and horizontal agreements pose. As ample literature has demonstrated, vertical arrangements typically reflect the interest of the manufacturer in improving the overall package being offered to the consumers so as to succeed more effectively in interbrand rivalry. Only horizontal agreements threaten to reduce output.⁶⁷

A more general goal of the interpretation of "rival" is to refrain from capturing agreements vertical in substance while capturing agreements horizontal in substance. When the parties are never rivals in any market, the word "rival" itself should suffice to protect the agreement. But difficulty arises when the parties to a vertical agreement also happen to be horizontal rivals in some other respect or with some other product. The plastic manufacturer may sell to fabricators (the vertical relation) but also fabricate some products itself in competition with that same fabricator (the horizontal relation). Airlines may compete with each other but also feed passengers and freight to each other. A manufacturer may opt to distribute its product through some variety of dual distribution, appearing at times to compete as a retailer with independent retailers who also retail its product. Two rival firms who happen to develop blocking patents, *i.e.*, patents that cannot be used as a practical matter without infringing the other, typically need to pool or to cross license the patents. Those arrangements in turn may require an agreement about the minimum price the licensee will charge consumers for the patented product. The price agreement is vertical in substance and unobjectionable. Yet because the firms are generally rivals, a court may rule that (a) condemns it.

On the other hand, an interpretation that persons vertically related in some respects are never "rivals" opens an unacceptable loophole. Such an interpretation would wrongly allow firms with competing patents to agree that one will play the role of patentee and the other the role of the licensee, thereby avoiding all rivalry between them.⁶⁸ When attacked, these companies could claim that they are not "rivals" but are only related vertically. More gen-

67 See, *e.g.*, Posner, *supra* note 65, at 6; Telser, *Why Should Manufacturers Want Fair Trade*, 3 J. LAW & ECON. 86 (1960).

68 See, *e.g.*, *United States v. General Electric Co.*, 272 U.S. 476 (1926) (GE and Westinghouse, rivals in the manufacture of certain lamps, agreed that Westinghouse would act as GE's licensee).

erally, the fear is that an unduly narrow interpretation of "rival" will encourage rivals or potential rivals to create the appearance that one is merely a downstream distributor or licensee of the other. Having done so, they can fix prices between themselves with impunity.

Ideally, some qualifying language added after the word "rival" would help a court separate agreements which are vertical in substance from those which are horizontal. After much experimenting, however, I found no language that would significantly reduce the court's burden and not create confusion elsewhere. Statutory language does not help to resolve every issue. Courts will need to apply the conventional analysis separating vertical and horizontal agreements that the case law and the commentators provide.⁶⁹

An interpretation of "rival" that captures too much poses less of a problem than an interpretation that captures too little. For under (c), agreements captured by (a) may nevertheless be lawful if the defendants can point to some efficiency enhancing gain. The flexibility of (c) can cure virtually all unduly inclusive interpretations of (a), albeit at the cost of some extra judicial work, consisting mainly of the need to identify and articulate the efficiency-enhancing gain.

5. "A person may not agree with a[] . . . rival to reduce, or to refrain from rivalry among them on price . . . or on any other dimension of sale or purchase"

Explanation.—The language "agree with a rival to reduce rivalry" needs a non-literal interpretation broad enough to reach partial integrations, the formation of which plainly reduce rivalry *inter se*. In other words, the reach of (a) must not be limited to explicit reductions in rivalry. For example, the creation by rivals of a joint sales agency obviously implies an agreement to reduce rivalry in violation of (a). Courts must not let this behavior escape on the literal ground that the agreement setting up the agency said nothing about reducing rivalry.⁷⁰ To take another example,

69 See, e.g., *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n.4 (1988).

70 In light of this desired interpretation of (a), the reader may wonder why (a) is not worded like (b) to capture agreements whose effect is to reduce rivalry *inter se*. But focusing on effects would unduly broaden the reach of (a). Under *U.S. Gypsum*, for example, the *mens rea* requirement for criminal prosecution is not met merely by entering into an agreement whose effect is anti-competitive. And (a) is a criminal prohibition. A

the appointment of a potential rival as one's distributor in a designated territory may well provide persuasive evidence of an agreement that the appointing rival is to refrain from rivalry in that territory and the appointed rival is to refrain from rivalry in some other territory. The formal agreement's silence about refraining from rivalry, and its exclusive concern with the details of the distribution agreement, do not bar the factfinder from inferring an (a) agreement. Often the distribution agreement itself will support an inference that the parties agreed to refrain from rivalry in certain territories. Of course, if some economies arise from having as distributor the potential rival, rather than some other firm, (c) may apply.⁷¹ For a final example, (a) would reach the GM-Toyota joint venture to manufacture light-weight trucks as long as GM and Toyota were potential rivals in the manufacture of that type of truck. In the language of the redraft, the joint venture would plainly constitute an agreement among potential rivals to refrain from rivalry. Whether the venture was lawful would depend on whether (c) applied.

The words "refrain from" are largely redundant with "reduce." They are inserted only to capture agreements to prevent rivalry before the rivalry begins. Without those words, an agreement with a potential rival to avoid entering each other's territory or to avoid bidding for each other's customers might escape liability on the ground that it is impossible to "reduce" rivalry that has not yet begun.

The words "among them" strive to assure that the courts will not reach agreements to take "exclusionary" action that handicap an outside rival. One might think "among them" redundant for this purpose with "agree to reduce rivalry." But courts have often said, oddly, that "rivalry" is impaired whenever some rival is disadvantaged.⁷² Hence I fear that courts might be persuaded to view an agreement to take exclusionary action against an outside rival as an agreement "to reduce rivalry."

better course is to keep the wording used and then rely on the common sense of courts to interpret (a) so as to capture agreed upon behavior that will obviously reduce rivalry *inter se*.

71 *United States v. Penn-Olin Chemical Co.*, 217 F. Supp. 110 (D. Del. 1963), *vacated*, 378 U.S. 158 (1964) is the classic example of potential rivals agreeing that one of them will be the distributor of the other. Whenever the integration between the rival is so complete that § 7 of the Clayton Act applies, as occurred in *Penn-Olin*, § 7 will govern. If only a distribution agreement exists, § 1 of the Sherman Act will govern.

72 *See, e.g., United States v. Realty Multi-List*, 629 F.2d 1351, 1364 (5th Cir. 1980).

Beyond that, the redraft's emphasis on attacking agreements that reduce rivalry *inter se* hopes to encourage courts to fashion a *de minimis* rule that would save agreements concerning dimensions of sale or purchase on which there neither is nor is ever likely to be any significant rivalry. For example, some of the many rules of amateur sporting associations designed to govern the behavior of the athletes and their institutions seem too inconsequential for the defendant association to persuade a court that the rule is saved by (c). Accordingly, the best reason for upholding such a rule may be that their subject, although a remotely possible dimension of rivalry, is not now nor is ever likely to be a significant one. Consider the rule governing the proper weight of football helmets that member schools are to use. The rule could conceivably suppress possible rivalry between those schools that opt for helmets of one weight and those opting for helmets of a different weight. But no significant rivalry based on the weight of the football helmets exists now nor is ever likely to exist. Thus the agreement could fall outside (a) on the ground that it is unrelated to rivalry *inter se*.

Properly understood, (c) would save this agreement and would, as a general matter, render unnecessary such a *de minimis* rule. The italicized language, by allowing such a rule, merely aims to increase the probability that courts will spot quickly and reliably agreements that do not impair efficiency.

6. "A person may not agree with a[] . . . rival to reduce rivalry among them on price . . . or on any other dimension of *sale or purchase . . .*."

Explanation.—The words "sale or purchase" seek to reaffirm that (a) condemns collusion designed to extract non-competitive terms from upstream or downstream victims. But the words must be interpreted to protect upstream or downstream victims whatever they are called. Collusion directed against downstream or upstream consignees, assignees, licensees or indirect sellers or buyers must not escape simply because trade usage refers to the victim by some name other than buyer or seller.

The italicized reference to the dimension of purchase aims to remind the reader that monopsony, or buying-side collusion, is condemned no less than monopoly, or selling-side collusion. By expressly indicating in (c) that the redraft is concerned about consumers, the redraft may unfortunately increase the danger that

courts will tolerate buying-side collusion. The court may reason that by lowering the costs of the direct seller to the consumer (cost savings which might be passed on at least in part) the buying-side collusion may lower the price to the consumer. The express condemnation of agreements that limit rivalry on purchases aims to eliminate this risk of judicial error. Buying-side collusion, after all, artificially lowers prices and output from suppliers. This leads to an undesirable substitution of resources, thereby distorting efficiency and eventually harming consumers.

7. "A person may not agree with a[] . . . rival to reduce . . . rivalry among them on *price, terms of credit, features of their respective product or service, or on any other dimension of sale or purchase (including, output, place of doing business, manner of production, promotion, or negotiation, information to be provided to buyers or sellers, inputs to be used, or method by which costs or prices is calculated)*"

Explanation.—This partial list of dimensions of rivalry should ensure that the reader appreciates the multi-dimensional nature of rivalry. Because this principle has not been appreciated consistently, agreements to reduce rivalry *inter se* receive very different treatment depending on the dimension of rivalry involved.

FTC v. Indiana Federation of Dentists,⁷³ for example, involved a straightforward elimination of rivalry among dentists about whether to supply insurance companies with x-rays, as the insurance companies who had been paying the dentists had requested. Given *National Society of Professional Engineers v. United States*⁷⁴ where an agreement among rivals to withhold information from buyers had been condemned, a court aware that price is not the only dimension of rivalry would have ruled against the dentists with little difficulty. Following *National Society of Professional Engineers*, the only defense worth the court's attention would have been a claim that the agreement to refuse to supply x-rays somehow enhanced efficiency.

Nevertheless, the Seventh Circuit Court of Appeals employed an approach much more favorable to the defendants and reversed the Commission's decision. The Seventh Circuit required the

73 476 U.S. 447 (1986).

74 435 U.S. 679 (1978).

Commission to define the market in which the defendant dentists restrained trade and to show the power of the defendants in that market. Beyond that, the Commission was required to show that the absence of rivalry as to the supplying of x-rays actually made dental services more costly.⁷⁵

Had the dimension of rivalry involved been price instead of the provision of information, the Commission would not have been subjected to any of these requirements. In its unanimous decision reversing the Seventh Circuit, the Supreme Court suggested that the reasons which call for dispensing with these requirements when price rivalry is suppressed apply as well when other dimensions of rivalry are suppressed:

A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by insuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market . . . such an agreement limiting consumer choice by impeding the “ordinary give and take of the market place,” . . . cannot be sustained⁷⁶

Unlike the current section, the redraft leads judges to the appropriate, and straightforward, two-step approach in collusion cases: first, is there an agreement among rivals to reduce rivalry among them on some dimension of sale or purchase?; and second, is that reduction in rivalry more of a benefit to consumers than a harm because of the efficiency gains it provides?

By emphasizing the multidimensional nature of rivalry, the redraft should make the outcome of many cases more predictable. For instance, the redraft applies straightforwardly to five hypothetical agreements among rivals about the nature of their products that Professors Areeda and Kaplow posit in their casebook.⁷⁷ One involves an agreement among manufacturers of gym shoes to refuse to sell their “rejects” domestically. A second involves an agreement among lawyers not to advertise their prices

⁷⁵ *Federation of Dentists*, 476 U.S. at 463.

⁷⁶ *Id.* at 459 (citations omitted).

⁷⁷ P. AREEDA & L. KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* ¶ 222, at 259-61 (4th ed. 1988).

on the ground that advertising is inherently deceptive. A third involves an agreement among grocery chains to refuse to issue trading stamps on the ground that stamps are a bad investment for their buyers. The fourth involves an agreement by rival television producers to avoid scheduling cultural programs on top of each other. Subsection (a) would plainly reach each of these agreements, just as it would reach price-fixing. The defendants would then need to resort to (c) to avoid condemnation. As discussed in Subpart C below, (c) incorporates *Professional Engineers'* severe limit on the range of permissible arguments in defense of these agreements. Accordingly, defendants would need to advance some explanation of how their agreement enhanced efficiency. There being no plausible efficiency-enhancing justification, the agreements would be swiftly condemned.

A fifth hypothetical of Professor Areeda involves an agreement among rival radio stations (in the days before federal regulation) to allocate radio frequencies among themselves. Again we can assume that (a) would apply. Here, however, the defendants could plainly escape by satisfying (c). Thanks to the agreement, the rival stations do not interfere with each other's broadcasts, the consumers search costs of finding the desired station diminish and the value of the radio stations' product increases dramatically.

By condemning agreements on so many dimensions of rivalry, (a) reaches some agreements to adopt facilitating practices that one might guess would be reached only by (b).⁷⁸ For example, both (a) and (b) reach an agreement among rivals to use basing point pricing. Both also reach an agreement to adhere to published prices and an agreement to offer buyers price protection assurances. In general, as long as the agreement tampers with a potentially significant dimension of rivalry, (a) is likely to reach it. This leaves to (b) the treatment of rivals' other collective actions, like agreeing to exchange price information or agreeing to publish their prices in advance of the prices' effective date.

The redraft's express recognition of the multidimensional nature of rivalry should lead courts to a more sound analysis of the cases sometimes categorized as vertical boycotts. These boycotts are identical to price-fixing in that their goal is to extract non-competitive terms from the immediately upstream or down-

78 A facilitating practice typically helps to police price-fixing or to perfect oligopolistic coordination. For a fuller discussion, see *infra* text accompanying notes 76-82.

stream victims by eliminating a dimension of rivalry *inter se*. Every price-fixing agreement involves such a vertical boycott in the sense that an agreement among rivals to sell only at \$11.00 implies a refusal to deal at any lower price. Professor Areeda's casebook offers two famous examples of these boycotts, *United States v. Paramount Famous Lasky*⁷⁹ and *United States v. First National Pictures*.⁸⁰ Both involve straightforward price-fixing except that the agreements concern non-price dimensions of rivalry. In *Paramount Famous Lasky* the defendant film producers and distributors agreed that they would contract with exhibitors only under a standard contract requiring exhibitors to submit all disputes to arbitration or to post a \$500 deposit with each distributor. Defendants further agreed on the penalty each would impose on an exhibitor who failed to comply with the contract.⁸¹ In *First National Pictures* the defendant film distributors agreed that they would require new exhibitors to assume and complete the existing contracts of their predecessors and to post a cash deposit.⁸² Unhappily, courts and commentators have focused on the agreed upon refusal to deal, thereby grouping these agreements with other agreements involving a refusal to deal that differ fundamentally in purpose and effect. The redraft should lay bare the virtual identity between defendants' behavior here and price fixing. Were it not for the fundamentally unsound notion that "group boycotts" called for separate analysis, courts probably would have realized this identity long ago.

Once those "group boycott" cases involving price-fixing are plucked from the group boycott category (and captured under (a) like any other price-fixing), the group boycott category should contain only instances of exclusionary behavior. That being true, the redraft jettisons the group boycott category entirely.

The redraft's approach strives to separate, on the one hand, agreements among rivals that allow them to extract non-competitive terms from upstream or downstream victims by eliminating rivalry *inter se* from, on the other hand, agreements that merely strengthen the rivals' position vis-a-vis their other rivals. The redraft does not capture the latter agreements. To use a duality that anticipated the Chicago School's, the redraft reminds the

79 282 U.S. 30 (1930).

80 282 U.S. 44 (1930).

81 *Paramount Famous Lasky*, 282 U.S. at 41.

82 *First Nat'l Pictures*, 282 U.S. at 45.

reader that section 1 prohibits peace among rivals when there should be war. The section does not prohibit too much war, *i.e.*, it does not attack excesses of rivalry that may be objectionable on non-economic grounds.⁸³ That is the domain of criminal law, property law, contract law, the law of fiduciary relationships, the law of private associations, and, most of all, tort law—especially the law of unfair competition. As long as such excesses of rivalry do not threaten to violate section 2 of the Sherman Act, they will not trigger antitrust concerns.

B. Subsection (b)

"Whenever the agreement affects interstate commerce, a person may not agree with an actual or potential rival to adopt practices (including an exchange of information) whose purpose or effect is to reduce rivalry among them and thereby to obtain noncompetitive terms of sale or purchase."

Explanation.—The goal of (b) is to supplement (a) by reaching agreements to undertake "facilitating practices." Subsection (b) aims to incorporate the existing law concerning when agreements to exchange information or to adopt other "facilitating practices" are unlawful. Again, the redraft's main benefit lies in bringing the readers to the appropriate considerations more quickly and straightforwardly.

To be sure, agreements among rivals that each will adopt a facilitating practice will often supply damaging evidence of an agreement to reduce rivalry condemned by (a).⁸⁴ Naturally the redraft says nothing about the value of these agreements as evidence of (a) agreements. But the agreements may also violate section 1 in themselves on the ground that their tendency to facilitate price-fixing or successful oligopolistic coordination outweighs any efficiency-enhancing benefit they provide. And it is the law on this claim that (b) seeks to incorporate.

Agreements to exchange information or to adopt other practices, such as the publication of one's prices, may aid or impair efficiency. An agreement to exchange price information can move price and output toward competitive levels, depending on, among

⁸³ See Callman, *Boycott and Price War: Violation of the Antitrust Laws or Unfair Competition?*, 23 OHIO ST. L.J. 128, 136-42 (1962); Callman, *What Is Unfair Competition*, 28 GEO. L.J. 585 (1940).

⁸⁴ See, *e.g.*, *FTC v. Cement Institute*, 333 U.S. 683 (1948).

other factors, the industry structure and the type of information exchanged. But the same kind of agreement may help to enforce price-fixing or to perfect oligopolistic coordination by assuring that price cutters will be quickly and accurately identified. Ever since *Maple Flooring Manufacturers' Association v. United States*,⁸⁵ the Supreme Court has recognized the ambiguous nature of these agreements and has made their legality turn on whether the agreed upon practices are more procompetitive or anticompetitive,⁸⁶ i.e., whether they help or hurt efficiency. The language of (b) was chosen to continue this approach.

The language "to obtain noncompetitive terms of sale or purchase" aims to prevent condemnation of agreements that merely reduce the dispersion of prices. Exchanges of information that merely alert all sellers and buyers to the offers being made reduce the cost of information and promote efficiency. But they also produce a more uniform market price. If (b) was worded simply to condemn agreements to exchange information that reduced rivalry, it might put these agreements in jeopardy. The enhanced uniformity of prices could be wrongly interpreted as a reduction in rivalry. The wording chosen ought to focus the court's attention on price levels not price dispersions and on whether the agreement moved that level toward or away from the competitive level.

Insofar as those agreements to exchange information which merely reduce price disparity have been wrongly condemned, this language seeks to change the substantive law. For instance it would change the result in the *American Column & Lumber Co. v. United States*,⁸⁷ where the agreed upon exchange of price, output, and production plans seemed geared to avoid overproduction. The exchange also helped to substitute for the more centralized information exchange that an organized commodities exchange would provide. Thus, the agreed-upon exchange more likely

85 268 U.S. 563 (1925).

86 As in my previous articles, I avoid referring to behavior as anti-competitive or pro-competitive because of the thoroughgoing ambiguity of these adjectives. At various times "anti-competitive behavior" has referred to (1) any behavior that hurts a rival and is not obviously "fair" rivalry on the merits, (2) any behavior that displaces rivalry with some administrative direction, (3) more generally, any behavior that impairs rivalry in any respect, (4) any behavior likely to disturb allocative efficiency by reducing output, and (5) any behavior that imposes a net efficiency loss by impairing the maximization of allocative and productive efficiency. I use the term here only in the last sense. "Anti-competitive conduct" means conduct that impairs efficiency.

87 257 U.S. 377 (1921).

moved the industry toward the competitive market-clearing price than away from it. The opinions in *United States Gypsum Co. v. United States*⁸⁸ and *United States v. Container Corp. of America*⁸⁹ likewise drew a negative inference from (if they do not condemn outright) agreed-upon exchanges that merely reduce the disparity of prices.

The redraft supports the Court's condemnation of the agreements in *Sugar Institute v. United States*.⁹⁰ The agreement of the rivals there to announce their new prices publicly in advance of the time the prices would take effect (the Moves Convention) constituted a quintessential example of the kind of agreement (b) condemns. This agreement helped to perfect oligopolistic coordination by signaling each major rival that it would not increase its market share by lowering its price. For each of the other major rivals, thanks to the advance announcement, would be able to match the rival's lower price before that lower price would increase the rival's sales. Because a price cut, therefore, would yield little benefit to the price cutter, and would only reduce the prices and thus the overall revenue of the rivals, the incentive for any rival to initiate a price-cut was diminished. In this way the Moves Convention reenforced the oligopolistic coordination made possible by the structure of the industry and the homogeneity of the product.⁹¹

The language "to reduce rivalry among them" in the phrase "practices . . . whose purpose or effect is to reduce rivalry among them and thereby to obtain noncompetitive terms" strives to keep (b) from becoming overbroad. Without that language, courts might think (b) reached concerted exclusionary behavior.

Although the redraft does not change the efficiency test of *Maple Flooring* that governs these agreements, it does change the penalty. Violations of (b) give rise only to civil action, not to a criminal prosecution. But this works very little change in practice, for the Antitrust Division would rarely, if ever, bring a criminal

88 438 U.S. 422 (1978).

89 393 U.S. 333 (1969).

90 297 U.S. 553 (1936).

91 Granted, the Supreme Court in *Sugar Institute* did not expressly condemn the agreement to announce prices publicly in advance. The court upheld the lower court decision against defendants by relying on their agreement to adhere to those published prices. *Sugar Institute*, 297 U.S. at 571. That agreement, which can be characterized as an agreement to refrain from any discounting, constituted a straightforward example of an agreement to reduce rivalry condemned by (a).

action when it was attacking (b) agreements in themselves (rather than as evidence of an (a) agreement). As a practical matter, virtually any agreement for which past and present Antitrust Divisions might consider criminal proceedings would remain subject to the current criminal sanctions.

The redraft eschews criminal penalties for violations of (b) in order to avoid the situation presented in *United States Gypsum Co. v. United States*⁹² In that case the Court felt obliged to impose a more demanding *mens rea* requirement in criminal prosecutions than in civil actions. More specifically, the Court was unwilling to accept a jury instruction that imposed criminal penalties on a person for agreeing to exchange information with the purpose or effect of stabilizing prices. Instead, the Court insisted that criminal exposure arises only if the defendant had knowledge of the probable anticompetitive consequences of the behavior.⁹³ Because (b) gives the government and private plaintiffs a statutory violation that is purely civil, the redraft eliminates any need for different interpretations of the same statutory language. Because (b) precludes criminal penalties for facilitating agreements, the redraft also encourages courts applying (b) to undertake a more fearless application of *Maple Flooring's* test. In other words, (b) allows a court to subject agreements to adopt facilitating practices to the test of whether they help or hurt efficiency free from the pro-defendant concerns that would arise if the controlling statutory language imposed criminal penalties. The continued imposition of treble damages for violations of (b) should satisfy those who fear that the removal of criminal penalties unduly tolerates facilitating agreements.

Plainly some agreements will violate both (a) and (b). An agreement among sellers to use a basing point pricing system would be an example. This overlap creates no difficulty as long as the same agreement does not subject defendants to double recovery, or, in this instance, sixfold recovery. The government and private plaintiffs may use (b) much like a lesser included offense in that violations of both (a) and (b) may be alleged but the same agreement can give rise to only one recovery.

Because (b) continues to require an agreement, it does not reach unilateral or interdependent behavior that facilitates price-

92 438 U.S. 422 (1978).

93 *Id.* at 441.

fixing or oligopolistic coordination. Such behavior might include selling products only at delivered prices, giving notice of price increases well in advance, or using most favored nation clauses which bind a company to charge each customer no more than it charged its most favored customer. Unilateral behavior like this appeared in *DuPont v. FTC*,⁹⁴ *Triangle Conduit and Cable Co. v. FTC*,⁹⁵ and *Boise Cascade Corp. v. FTC*,⁹⁶ and is not affected by the redraft. Those seeking to attack unilateral facilitating behavior will need to continue to resort to section 5 of the Federal Trade Commission Act.

C. Subsection (c)

1. "Subsections (a) and (b) do not apply to an agreement that so increases the value of, or so assists the introduction of, a product or service (for a reason other than the mere reduction in competing alternatives offered to buyers or sellers), or otherwise so enhances productive efficiency that the economic benefit to consumers from the reduction in rivalry substantially outweighs the harm"

Explanation.—In the language of draftsmen, (c) consists of a series of three items followed by a qualifying clause, "that the economic benefit to consumers from the reduction in . . . rivalry substantially outweighs the harm." The series of three items indicates the grounds on which an agreement may satisfy the qualifying clause. The first two of the three items in the series, namely "so increase the value of, or so assists the introduction of, a product or service (for reason other than the mere reduction in competing alternatives offered to buyers or sellers)" illustrate the more general concept which forms the third item in the series "or otherwise so enhances productive efficiency." Therefore, the three items in the series are more realistically seen as a single item. That being true, the first two items in the series could be deleted and the first sentence of (c) could be shortened to: "Subsections (a) and (b) do not apply to an agreement that so enhances productive efficiency that the economic benefit to consumers from the reduction in rivalry substantially outweighs the harm." The first two items are included, nevertheless, because

94 729 F.2d 128 (2d Cir. 1984).

95 168 F.2d 175 (7th Cir. 1948), *aff'd*, 336 U.S. 956 (1949).

96 107 F.T.C. 76 (1986).

they illustrate how (a) agreements can enhance productive efficiency. Without them the chance that the reader will misunderstand what "enhances productive efficiency" means is too great.

Subsection (c) aims to incorporate the ancillary restraints doctrine of *United States v. Addyston Pipe & Steel Co.*⁹⁷ *National Society of Professional Engineers v. United States*⁹⁸ clarified the ancillary restraint doctrine by reducing the range of possible justifications for collusion. As read by the Chicago School, *Professional Engineers* limits courts in collusion cases to undertaking the efficiency calculus or welfare tradeoff.

The redraft begins by signaling the reader that some of the agreements to reduce rivalry that are covered by (a) and (b) will nevertheless be allowed. To be allowed the agreement must benefit consumers more than it harms them. After all, efficiency calls for the proper balance of rivalry and cooperation. Cooperation—in the form of an (a) agreement—may help more than hurt.

The explicit language about benefitting and harming "consumers" should prevent courts from worrying about benefits and harms to rivals or, for that matter, the benefits and harms to any non-economic interests. Thus, the redraft mirrors *Professional Engineers* in emphasizing that only the effect on competition (or, as the Chicago School's would say, "efficiency") counts.

Placing (c) in a separate subsection from (a) and (b) signals the desired allocation of the burdens of production. The redraft expects defendants to produce the efficiency-enhancing explanations. It then requires plaintiff to show the explanations wrong.⁹⁹

2. "Subsections (a) and (b) do not apply to an agreement that *so increases the value of . . . a product or service (for a reason other than the mere reduction in the competing alternatives offered to buyers or sellers) . . . that the economic benefit to consumers . . . outweighs the harm . . .*"

Explanation.—Again, antitrust students will find the reasoning behind this choice of language straightforward and predictable. The language refers to agreements that increase the demand for a

97 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). See also *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

98 435 U.S. 679 (1978).

99 Cf. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (title 7 of the 1964 Civil Rights Act allocates burdens in a similar fashion).

product or service, that is, increase the product's marketability (increase its value). Many horizontal restraints on rivalry increase a product's marketability. Often they achieve this by overcoming market failures, like the free rider problem, or by otherwise assuring a more complete specification of property rights. Restrictive covenants on the sale of a business will typically involve an agreement by rivals to reduce rivalry among them. Yet these agreements help to establish property rights in the businesses' good will and, therefore, increase the value of the business being sold.

Many other value-enhancing agreements are captured by (a) but saved by this language in (c). One example is an agreement by rivals to conform to an industry standard that is designed to assure that all conforming products will interconnect with complementary products. This agreement enhances the value of all the products involved. It assures the consumer that the complementary product will not become useless should the product of the firm or of the rival become unavailable. Thanks to such an agreement, for example, a consumer knows that if his tire goes flat he will not be tied to that tire company but may confidently turn to any company making the standard size tire. For much the same reason, an agreement by rivals to make interchangeable products may also increase the value of those products. These agreements widen markets, reduce a buyer's search cost, and by making comparisons easier, intensify rivalry on the remaining dimensions of rivalry.

An agreement among rival members of a commodities or stock exchange to refrain from certain practices that diminish investor confidence in the exchange supply another example. By maintaining investor confidence and thereby bringing more traders into the exchange, the agreement increases the number of buy and sell offers that can be compared, thus increasing the chance that pareto-superior transactions will be made. This agreement increases the value of the exchange, for which a crude proxy is the value of a seat on the exchange.

Another (a) agreement that would be saved by (c) appeared in *Rothery Storage & Van Co. v. Atlas Van Lines*.¹⁰⁰ Rothery agreed with local moving companies—that had acted as its agents but also as its (at least potential) rivals—to avoid rivalry. The agreement prevented the local companies from free-riding on

Rothery's promotional and managerial efforts, thereby assuring a more optimal amount of those value-enhancing efforts. The well-known territorial agreements in *Sealy* and in *Topco*¹⁰¹ enhanced the value of the respective products for much the same reason. So did the agreement in *Polk Bros. v. Forest Service Enterprises*¹⁰² which allocated the products that each retailer collaborating on the building of a joint facility would sell.

Agreements that reduce rivalry may overcome other market failures. An agreement discussed earlier—the allocation of frequencies by rival radio broadcasters—gives the listener clearer reception and avoids the search costs of finding the desired channel. This increases dramatically the value of the broadcasts.

Agreements among the member teams in a sporting league to reduce rivalry among themselves for new players, like the NFL draft, also increase value. By helping to promote parity of player talent throughout the league, the draft increases the appeal of the league's products, *i.e.*, the sporting events and related paraphernalia. The enhanced appeal from parity helps these products compete more successfully with other recreational products. Thus, the redraft would overrule the decisions condemning the NFL draft such as *Smith v. Pro Football, Inc.*¹⁰³ and *Mackey v. NFL*.¹⁰⁴ Those decisions suggest that the draft's contribution to parity and to the resulting enhancement in the league's appeal was not a legitimate factor in its defense, a position flatly at odds with the redraft.¹⁰⁵

The language in parenthesis is needed because naked price fixing, by increasing the price of defendants' products or services, may appear to increase their value. And this apparent increase in value must not allow the defendants to escape. In other words, if an agreement raises the price of defendants' product by ten per-

101 *United States v. Sealy*, 388 U.S. 350 (1967) (members of a joint venture allocate territories to give each member more incentive to advertise in its territory); *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (same).

102 776 F.2d 185 (7th Cir. 1985) (agreement allocating the products that each firm will feature creates incentive for investing in the construction of a joint facility).

103 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part and rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978) (NFL draft a violation of § 1 of the Sherman Act).

104 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (the "Rozelle Rule" violated § 1 of the Sherman Act).

105 Professor Gary Roberts' incisive critique of *Smith* and *Mackey* has discredited them. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337 (1986).

cent, that apparent increase in value must arise because the agreement increased the demand for the product and not because the agreement reduced the price rivalry the product encountered. Hence, the redraft calls on the court to separate those agreements that appear to increase the value of a product or service based on the reason for the increase. Agreements that allow the parties to obtain a higher price simply because of the reduction in competing alternatives offered to buyers that follows from the reduction of rivalry *inter se* should be condemned as naked price fixing.¹⁰⁶

106 The reader may wonder at the wording of the parenthetical expression. Its goal is, of course, to condemn agreements that increase value, assist the introduction of a product, or lower costs simply because of the illegitimate power over the buyer or seller that defendants gain by their refusal to compete with each other. These agreements must be distinguished sharply from agreements that effect these results because of the efficiency gain they make possible. With this goal in mind, the reader might expect the parenthetical expression to read: "(for a reason other than the mere reduction in rivalry itself)." Since the "reduction in rivalry" concept has been used throughout, that wording saves the reader the burden of a new concept, "the mere reduction in competing alternatives offered to buyers or sellers," and keeps the reader from being confused about how, if at all, the new concept differs in meaning from the previous one. On legislative drafting grounds alone, therefore, the "reduction in rivalry" wording seems more appropriate.

The problem with using the "reduction in rivalry" wording in the parenthetical expression is the risk that judges, instead of undertaking the welfare tradeoff, will dismiss efficiency gains once they attribute those gains to "the mere reduction in rivalry itself." Therefore, a judge will wrongly condemn agreements that yield these efficiency gains. In other words, I believe judges are less likely to attribute efficiency gains to the "mere reduction in competing alternatives offered to sellers and buyers" than to "the mere reduction in rivalry itself." As a result, fewer desirable agreements will be wrongly condemned under the wording used.

An example based on a problem in Professor Areeda's casebook may illustrate the advantage of the wording used:

Six banks in a metropolitan area of five million served by sixty banks establish a "Lending Center" to take over the work and personnel of the six banks' credit investigators and loan officers. The savings from reduced duplication of effort allows the banks to transfer some of their employees who used to work in these fields and to layoff others. All borrowers are referred to the Lending Center, which investigates the borrower and decides on the terms, if any, that will be offered the borrower.

Cf. P. AREEDA, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES* ¶ 371, at 499 (3d ed. 1981). This hypothetical case should be decided by weighing the efficiency gained from the reduced duplication against the reduced output from the loss of rivalry. My fear is that a judge might condemn the banks' agreement and cease further inquiry once she attributes the efficiency gain from avoiding duplication to the reduction in rivalry (or at least finds that the reduction in rivalry contributed to those gains). Without the reduction in rivalry, a judge might think, no economies would have been achieved. Thus the judge never undertakes the appropriate welfare trade-off. The judge seems much less likely to attribute the efficiency gain to "the mere reduction in competing alternatives offered to buyers or sellers," the latter concept more narrowly referring here to the

One would expect the language "so increases the value of a product or service" to be followed by some language acknowledging that these horizontal agreements can enhance efficiency by reducing costs. The language "or reduces the cost of offering a product or service" cries out to be inserted here. Subsection (a) agreements can reduce costs through avoiding duplication or through some economy of scale or scope that reduces either transaction costs or a more tangible cost of physically producing the product or service.

Familiar examples of the cost-saving potential of (a) agreements abound. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,¹⁰⁷ the agreement by rival composers to sell through BMI or ASCAP (virtually exclusive sales agencies) and to offer only a blanket license suppressed almost all price rivalry among them. But it saved buyers of the compositions the substantial costs of negotiating with each composer. In general, joint buying or selling agencies lower the costs of their members by reducing duplication of effort. Each member no longer needs to employ as many of its own salesmen, account clerks, and credit investigators. The agency can perform these functions for the members more efficiently. Likewise an agreement among small retailers to run a joint newspaper advertisement may markedly lower each retailer's cost of advertising.

Subsection (c) contains no language referring to cost savings because of the same fear seen earlier, namely that the language might prevent prompt condemnation of buying-side price-fixing agreements. The classic example consists of an agreement by horizontal rivals aimed at upstream firms to depress artificially the price the rivals pay for their inputs. These buying side price-fixing agreements may seem to lower the colluding parties' costs and, of course, the colluding parties can claim that the cost savings get passed on to consumers, at least in part. This lower price to consumers, so the argument might go, ought to justify the agreements. This is the argument the redraft is determined to prevent courts from considering.

Properly read, the redraft would condemn such a naked buying side price agreement even if the language "or reducing the cost of offering a product or service" were added. The parentheti-

negligible effect on borrowers from the reduction in the number of lenders that are competing with each other for their patronage.

107 441 U.S. 1 (1979).

cal language "(for a reason other than the reduction in competing alternatives offered to buyers or sellers)" prevents (c) from applying to such an agreement. The naked buying side price-fixing agreement yields savings to the colluding rivals only because of the reduction in competing alternatives offered to the seller as a result of the collusion. That is, the lower costs do not stem from the achievement of any efficiency, but stem entirely from the monopsony power the rivals acquire by eliminating rivalry *inter se*.

That being said, the decision to drop all references to cost savings reflected the fear that some judges would take the literal meaning of "cost savings" and would disregard the admittedly awkward and unfamiliar parenthetical language. If so, they might listen to defendants' argument that (c) saves a naked buying side price fix.

With all references to cost savings omitted, a horizontal agreement or other partial integration that legitimately reduces costs must justify itself under the language "or otherwise enhances productive efficiency." The explicit reference to enhancements in productive efficiency should help courts focus on whether cost savings arise from efficiency, on the one hand, or from the absence of rivalry and the accompanying monopsony power, on the other hand. One of Professor Areeda's examples referred to before illustrates the inquiry:

Among the reasons why small independent retail grocers find it difficult to compete with chains and supermarkets is their inability to purchase groceries in amounts sufficiently large to give them comparable quantity discounts. To meet this problem, most independent grocers in a metropolitan area agreed to establish a joint buying agency and to make all their purchases through that agency. The agency has in fact been able to purchase at discounts comparable to those obtained by the various chains and supermarkets. Is the arrangement unlawful?¹⁰⁸

The prevailing collusion analysis that the redraft incorporates makes the key issue the reason for the lower prices, specifically, whether the joint buying arrangement exploits genuine economies of scale in buying or, on the other hand, extracts the lower prices through the illegitimate power gained over the grocery suppliers by eliminating rivalry *inter se*. To resolve the issue, the standard analysis first checks whether the output of the grocery suppliers

108 P. AREEDA, *supra* note 106, ¶ 357, at 469.

increases or decreases. Lacking that information, the analysis then checks whether rivals collectively are likely to have monopsony power. If the grocery supplier could easily turn to other rivals or groups of rivals, the "monopsony power" story for the lower prices becomes less plausible. When monopsony power is plausible, standard analysis looks more closely at joint versus separate buying. Does joint buying in its context plausibly reduce the transportation or transaction costs of the supplier? Does it aid the supplier's convenience in any way? One can also compare similar markets where rivalry is vigorous. If similar joint buying commonly develops, and if it yields similar discounts, the lower prices are more likely attributable to genuine economies. Whatever the merits of this standard analysis, the redraft leads a first time reader to its jumping off point much more directly than does the current section.

3. "Subsections (a) and (b) do not apply to an agreement that . . . *so assists the introduction of a product or service (for a reason other than the mere reduction in the competing alternatives offered to buyers or sellers)* . . . that the economic benefit to consumers . . . outweighs the harm"

Explanation.—Subsection (a) agreements may enhance efficiency by assisting the introduction of a product or service. When they do so, the reduction in rivalry may be considered ancillary to that efficiency-enhancing goal.

The *Topco* case illustrates this benefit.¹⁰⁹ There retail grocery stores formed a joint venture in order to offer a product line called Topco. The agreed-upon reduction of rivalry consisted of promises by the rival grocery stores forming Topco not to offer Topco products outside each rival's designated territory. The grocery stores defended this reduction in rivalry on the ground, among others, that it was needed in order to induce the initial investment in the joint venture and in order to encourage sufficiently vigorous promotion of Topco products that the products' appeal would justify the initial investment. Without the territorial agreement, the group feared that each Topco member would temper its promotional efforts and seek to free ride on the promotional efforts of other members in its territory. This would

109 *Topco*, 405 U.S. 596 (1972).

result in an inappropriately low level of promotion.¹¹⁰ Anticipating this result, the grocery stores would not join in the venture, and the Topco products would never be introduced.

Had the defendant grocery stores in *Topco* proven all this, the territorial agreement would still have been condemned under the Supreme Court's approach in that case. Under the redraft, in contrast, the argument that the territorial agreement was needed to induce the introduction of Topco products would receive a hearing and would take the court to the qualifying clause of (c): whether the benefit to consumers from the reduction in rivalry substantially outweighed the harm.

The redraft plainly does not take the reader through the analysis needed to balance these benefits and harm, the analysis needed to apply the welfare tradeoff. It does take the reader to the starting point more quickly and directly than the mysticism of "restraint of trade."

Sometimes the need to reduce rivalry on certain dimensions in order to introduce a product appears more obvious than in *Topco*. For instance, the member teams in a sporting league may need to agree on a host of rules in order to introduce the sporting events that form the league's product. In theory, any two teams could compete with all the others by agreeing on different rules. This rivalry between small groups of teams based on different rules tends not to emerge in fact, of course, because the sporting events possess more appeal when they are part of the league events and when all league events are played under the same rules. Having different rules, event to event, would impair the fans' ability to compare teams and would diminish interest in the league race. The agreement on rules enhances efficiency both because it increases the value of the league's products and because it assists the introduction of a product, namely the league's sporting events. The second item in the three item series overlaps then with the first. Agreed upon restraints on rivalry that help the introduction of a product or service often do so because they increase the value of the product or service.

Once again, the greater problem with the italicized language is to keep it from being read so broadly as to permit agreements that are now, and should be, summarily condemned. Naked price-fixing erects an umbrella that helps to keep in business inefficient rivals who would more likely perish were rivalry unfettered. This

umbrella effect also assists new entrants. Thus, naked price-fixing can claim to "assist the introduction of a product or service." The parenthetical expression takes aim precisely at such a claim. It tries to signal the first-time reader immediately that the umbrella effect of an (a) agreement does not help to save it. More generally, no agreement that assists the introduction of a product or service, however indirectly, can invoke this subsection when the assistance stems merely from a decrease in the competitive pressure facing the entrant. Thus, the parenthetical expression reminds the court of its obligation to separate the naked restraint from the ancillary.

The parenthetical expression is reinforced on this score by the explicit requirement that the agreement seeking to be saved enhance productive efficiency ("or otherwise so enhances productive efficiency") and by the recognition that assistance to entrants is only relevant insofar as it benefits consumers ("so assists the introduction of a product . . . that the economic benefit to consumers . . . substantially outweighs the harm"). By definition naked agreements do not enhance productive efficiency. The primary benefits of the umbrella effect flow to the entering rival, not to consumers; as a result, this aid to entrants merits no consideration. Three different phrases, therefore, signal that the italicized language does not extend to agreements that merely aid entrants.

The fear that courts will nevertheless apply the italicized language too broadly has affected the language used in a minor way. Absent that fear, the word "introduction" (as in "so assists the introduction of a product or service") would be replaced with "maintenance," "preservation," or "success." The principle central to the proper analysis of *Topco* (and of vertical restraints), namely that restraints on intrabrand rivalry may be needed to induce value enhancing and economically desirable products or services, applies as much to an ongoing enterprise as to a new entrant. *Topco's* argument on behalf of its territorial restraint loses none of its force as the *Topco* joint venture ages. My fear was that use of a word like "maintenance" would dramatically increase the damage caused by a court who interpreted the subsection wrongly, even perhaps as a provision designed for the benefit of businesses and not consumers. Virtually every naked price-fixing agreement helps to "maintain" a product or service. Only a fraction help to introduce one. On balance, "introduction" seemed adequate to legitimate a claim like *Topco's* (which could in any event be asserted under "or otherwise so enhances productive

efficiency"), however old the Topco joint venture might be, while mitigating the damage that would result if the entire subsection were misinterpreted.

4. "Subsections (a) and (b) do not apply to an agreement that . . . *otherwise so enhances productive efficiency* that the economic benefit to consumers from the reduction in rivalry substantially outweighs the harm"

Explanation.—This third item in the series signals the reader to consider the wide variety of reasons that (a) agreements may enhance productive efficiency. Agreements may enhance efficiency for other reasons than because they increase the value of, or assist the introduction of, a new product or service. As already mentioned, these agreements can reduce costs, either transaction costs or more tangible production costs. In general, these agreements can reduce costs for the same reasons horizontal mergers can. They can avoid a need for duplicate facilities. They can take advantage of economies of scale or scope on certain aspects of marketing the product or service. The agreements can also enhance productive efficiency by helping to overcome market failures. The agreements may help to reduce externalities. They may help to mitigate the free rider and moral hazard problems. By doing so they may help to erect or restore appropriate incentives. Giving the relevant reasons in the case at hand amounts to telling an efficiency-enhancing story. And since the Chicago School's revolution, telling and disputing these stories has become the special expertise of the antitrust bar.

Most important, this language, and the three item series it anchors, signal the court to reject defenses plainly unrelated to efficiency. The language, therefore, rules out of order the arguments that agreements reducing rivalry are justified: (1) to keep prices and other terms to a fair or adequate level; (2) to offset the superior bargaining power of customers or suppliers; (3) to maintain the level of employment; (4) to shorten the working day or improve other conditions for the defendants' employees; (5) to keep small (or otherwise desirable) firms in business; and (6) to finance other desirable activities that might not survive in the market unassisted.

Less obviously, the language rules out of order certain other defenses. For example, the argument that price-fixing may make the future more predictable by reducing price fluctuations, thereby encouraging new investment, may sound like an argument

related to efficiency. The reduction in risk that accompanies stable prices may lower the firm's cost of attracting capital. By expressly referring to "productive efficiency," the redraft hopes to render this argument illegitimate. As others have pointed out, this misleading appearance of price stability is not socially desirable. It just delays the desired response to the underlying causes of fluctuating prices, namely changes in costs and demand. Accordingly, this argument should not satisfy (c) or even trigger a threshold inquiry of whether (c) applies.

Nor would the redraft resurrect other defenses that the current law dismisses. The defense that price-fixing may avoid the wasteful scrapping and rebuilding of an industry's capacity during a temporary recession contains some appeal, especially when hindsight shows that maintaining capacity was worthwhile. It is rejected largely because society can expect the members of an industry to avoid wasteful scrapping and rebuilding on their own, without price fixing.

Applying subsections (a) and (c) to the facts of familiar anti-trust cases will further clarify how the subsections operate. The redraft plainly condemns the conduct of the defendants in *United States v. Trans-Missouri Freight Association*,¹¹¹ *United States v. Joint Traffic Association*,¹¹² *United States v. Trenton Potteries Co.*,¹¹³ and the other cases establishing the rule against price fixing, at least as that conduct was reported in the Supreme Court opinions. None of the arguments advanced by defendants in those cases to justify their price fixing would raise a threshold question of whether (c) applies. The only issue for the factfinder would be whether defendants reached a meeting of the minds to reduce rivalry on any dimension of sale or purchase. That issue is identical to the issue currently put to the factfinder when the defendants are alleged to have agreed on price, namely, whether defendants have reached a meeting of minds to tamper with prices.

When price fixing takes the form of an agreement to limit output, the wording of (a) applies awkwardly. For it is not immediately obvious that output is a dimension of rivalry or that an agreement to limit output constitutes an agreement to reduce rivalry on output. By expressly condemning agreements about out-

111 166 U.S. 290 (1897).

112 171 U.S. 505 (1898).

113 273 U.S. 392 (1927).

put, the redraft, nevertheless, aims to make the sole issue for the factfinder in a naked output limitation case whether defendants reached a meeting of the minds to tamper with output. That was the key issue in *United States v. Socony-Vacuum Oil Co.*,¹¹⁴ for example.

The redraft would change the result of *Appalachian Coal*¹¹⁵ and *Chicago Board of Trade*¹¹⁶ because the defenses for price-fixing that prevailed in these cases were unrelated to efficiency. In *Appalachian Coals*, the Supreme Court permitted the defendants' joint sales agency based in part on the agency's tendency to preserve employment. The Court also identified as legitimate defenses the agency's tendency to keep failing firms in business. In sharp contrast to the redraft, the Court held that the government needed to show defendants' possessed sufficient power to fix, or at least affect, prices market wide.¹¹⁷ After upholding the district court's finding that the agency had no effect on prices, the Supreme Court formulated another question and reached an answer which differs sharply from that of the redraft's: "The question remains whether, despite the foregoing conclusions, the fact that the defendants' plan eliminates competition between themselves is alone sufficient to condemn it."¹¹⁸ Because other coal producers could check the power of the agency to raise prices, the Court's answer to that question was "no." The redraft answers "yes, provided the defendants' plan does not yield overriding efficiency enhancing benefits."

Similarly, in *Chicago Board of Trade*, Justice Brandeis accepted in defense of the agreement to impose the Call Rule a number of factors that the redraft would rule out of order.¹¹⁹ Justice Brandeis viewed the Call Rules' tendency to shorten the working day for traders as a factor in the Rule's favor. He also lauded the Rule's suppression of price negotiations after the close of the trading day on the ground that it would protect ignorant sellers from their own foolish price decisions.¹²⁰ Under the redraft, nei-

114 310 U.S. 150 (1940).

115 288 U.S. 344 (1933).

116 246 U.S. 231 (1918).

117 *Appalachian Coal*, 288 U.S. at 359.

118 *Id.* at 362.

119 The *Chicago Board of Trade* decision exemplifies a line of cases which have upheld agreements that the redraft would condemn. See, e.g., *Anderson v. United States*, 171 U.S. 604 (1898).

120 *Chicago Board of Trade*, 246 U.S. at 241.

ther factor would trigger a threshold inquiry into whether (c) applies.

In contrast the Call Rule's tendency to make the market during the day thicker by increasing the number of transactions occurring there is the very kind of argument that (c) invites. The greater the number of buy and sell offers that a trader can compare, the greater the number of pareto-superior transactions, and the closer price and output should approach the competitive level. On the facts of the actual case, however, that argument would not prevail. The commodities market, already more than adequately thick, was not made significantly thicker because of the Call Rule. On the other side of the ledger, the inability to negotiate prices from 2:00 p.m. until 9:00 a.m. the following day would likely reduce the gains from trade.

In short the redraft reflects the belief that *National Society of Professional Engineers*¹²¹ overruled *Appalachian Coal* and *Chicago Board of Trade* in substance, though not in name. Under *Professional Engineers* the only defense for a horizontal agreement reducing rivalry *inter se* is that the agreement improves efficiency.

As indicated before, the redraft would almost certainly tolerate the behavior condemned in *Topco*¹²² and *Sealy*.¹²³ The defense argument that the territorial and price restraints involved in those cases helped to overcome the free rider problem and thereby enhance the value and assist the introduction of the products in question squarely addresses (c). The defendants' modest market share limited the harm to consumers from any reduction of rivalry. Thus, these cases illustrate that in its attempt to calculate the welfare trade-off, a court may sometimes need to consider monopoly power. This is true despite the redraft's aim of minimizing the judicial attention devoted to "the relevant market" and to "monopoly power." As others have argued,¹²⁴ however, assessing monopoly power need not require defining the market. In both *Topco* and *Sealy* a court could undertake the welfare trade-off and see that the harm to consumers would be modest without an

121 435 U.S. 679 (1978).

122 405 U.S. 596 (1972). This is not to dispute Professor Liebler's claim that the territorial agreement in *Topco*, unlike that in *Sealy*, could have reduced output if the *Topco* members faced no rivalry from other brands. Although he sees *Topco* as a more difficult case, he would nevertheless agree that defendants should have prevailed. Liebler, *supra* note 12, at 38.

123 388 U.S. 350 (1967).

124 Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

elaborate inquiry into "the relevant market."

5. "Subsections (a) and (b) do not apply to an agreement that . . . otherwise so enhances productive efficiency *that the economic benefit to consumers from the reduction of actual or potential rivalry substantially outweighs the harm . . .*"

Explanation.—This language, the qualifying clause, aims to confirm the welfare tradeoff. It calls for balancing the gain to productive efficiency and the harm to allocative efficiency. The reference to consumers seeks to bar any concern for the benefits and harms to rivals or to employees.¹²⁵

By insisting that the benefits to consumers must come "from the reduction of actual or potential rivalry," the redraft strives to incorporate, to an appropriate extent, the so called "least restrictive alternative" requirement.¹²⁶ The redraft requires a court to find that the reduction in actual or potential rivalry contributes in some way, directly or indirectly, to the consumer benefits from the defendants' collaboration. In Professor Bork's words, is the reduction of rivalry "capable of adding to the efficiency of the integration it seemingly accompanies?"¹²⁷ If the benefits to consumers flow from aspects of the collaboration between the defendant rivals that are wholly unrelated to the reduction in rivalry, (c) would not apply.

In *NCAA v. Board of Regents*, the Supreme Court addressed this issue of the relation between the reduction in rivalry and the efficiency-enhancing aspect of defendants' collaboration. Nevertheless, the Court appears to have resolved it incorrectly.¹²⁸ The defendant members of the NCAA agreed to reduce rivalry among themselves in the sale of their broadcast rights to the television networks. The agreement required the networks to rotate television coverage among the NCAA schools. It prevented the networks from bargaining for broadcast rights with individual schools. As indicated before, the reduction in rivalry arguably enhanced the value of the NCAA's broadcast rights by helping to achieve parity among the member schools. That is, spreading tele-

125 Perhaps adding "to consumers" after "harm" would drive home even more unambiguously this exclusive concern with consumers. But the structure of the clause should imply that language clearly, making explicit reference unnecessary.

126 For a discussion of the least restrictive alternative requirement, see P. AREEDA, 7 ANTITRUST LAW § 1505, at 383-89 (1986).

127 Bork, *supra* note 12, at 411 (1966).

128 468 U.S. 85 (1984).

vision coverage among the schools spread the benefits of that coverage among the schools. One benefit of television coverage, for example, is better recruiting. More schools could assure recruits that the recruit would appear on television if he chose that school. The resulting parity among NCAA schools enhanced the appeal of the games to the television audience by increasing the chance that the games would be evenly matched and that the dominant schools would change from year to year. But the Supreme Court disagreed. Incredibly, the Court found no relation between the reduced rivalry on broadcast rights and the legitimate desire for parity.¹²⁹

In the language of the redraft, that dubious finding amounts to saying that the reduction of rivalry for broadcast rights did not contribute in any way to parity. Therefore, the value-enhancing benefits of parity would not help defendants invoke (c). Although the redraft does not help a court decide whether the reduction in rivalry contributed to the efficiency-enhancing benefits, its language does call upon the court to face that issue and directs the court to that issue in a quick and straightforward manner.

Often an agreed-upon reduction in rivalry appears at first wholly unrelated to any efficiency enhancing gain. But closer scrutiny reveals the reduction in rivalry to be an essential aspect of a collaboration that is, overall, efficiency enhancing. In *Topco*, for instance, the joint venture to introduce the Topco line of products, however clearly efficiency enhancing, may seem unrelated to the territorial restriction. Yet if the collaboration would never occur, or at least would face less promising prospects for success, were it not for the territorial restriction, then the restriction appears as an integral part of a positive collaboration. In general, as long as the collaboration enhances efficiency overall, and the restraint on rivalry contributes to the value of the collaboration, no further "less restrictive alternative" inquiry is appropriate.

The wording "less restrictive alternative" misleads as to the appropriate test. Courts should not speculate about whether the reduction in rivalry was absolutely necessary to achieve the efficiency enhancing gains. Nor should they compare defendants behavior to some counter-factual, untested alternative that plaintiff's attorney proposes. Concocting alternatives that seem to enhance efficiency to the same extent as defendants' practice is

far too easy. We know too little about why business practices succeed to launch into these comparisons. These more pro-plaintiff speculations improperly thrust on defendants the burden of our uncertainty about the benefits and harms of their agreement.

6. "Subsections (a) and (b) do not apply to any agreement that . . . so enhances productive efficiency that the economic benefit to consumers . . . substantially outweighs the harm. *Evidence supporting the application of this subsection may not be received unless the court finds a reasonable basis for believing that the agreement yields these economic benefits to consumers in significant magnitude.*"

Explanation.—This language aims to retain a key benefit of the per se label, namely, the simplification of litigation. It encourages courts to identify agreements that warrant summary condemnation by the *absence* of a contract integration or efficiency-creating relationship. Like the per se label, this language allows naked agreements to be condemned without evidence concerning their purpose, effect, their noneconomic justifications, or the reasonableness of their terms. The language strives to reduce the expense and length of proceeding against a naked agreement by excluding evidence offered to prove that subsection (c) applies.

The dignity given (c) does not mean that fewer agreements will be condemned summarily than is currently the case. The redraft is unlikely to call for an inquiry into whether subsection (c) applies unless, under the current section, a similar inquiry (whether called a quick look rule of reason, a truncated rule of reason, or a full blown rule of reason) would be warranted. If anything, the redraft broadens the range of agreements condemned summarily by extending this treatment to naked agreements to reduce rivalry on non-price dimensions of sale or purchase.¹³⁰

The language also continues what I believe to be the current practice whereby defendants seeking to avoid immediate condemnation must make a threshold argument indicating why the agreement benefits efficiency *before the trial*.¹³¹ Often that argument is

130 Currently agreements on non-price dimensions of rivalry receive different, and less summary, treatment than agreements on prices. See *supra* text accompanying notes 70-73.

131 See generally Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: The Burger Court and the Per Se-Rule of Reason Distinction*, 60 WASH. L. REV. 1 (1984) (the Court increasingly invites evaluation of a restraint's effect on efficiency well before trial and often on motion); see also Brunet & Sweeny, *Integrating Antitrust Proce-*

made in trial briefs; sometimes it is made during earlier pretrial motions. Whatever the timing, this language signals that cases involving what are arguably naked agreements ought not be prolonged by any inquiry into whether subsection (c) applies unless the court makes a threshold determination that defendants efficiency enhancing stories are plausible and weighty.

The language requiring that the benefits be of "significant magnitude" takes account of the fact that all collusion reduces the cost to the conspirators by at least some modest amount. Bid rigging, for instance, saves each conspirator some of the costs that preparing an honest bid would entail. When bids are not rigged, figuring out how much to bid, especially when many products are involved, can involve a good deal of planning, foresight and acumen. Although preparing a phony bid that one knows will not win entails some effort to make the bid look honest, it must nevertheless be easier and cheaper than preparing an honest bid. The "significant magnitude" language should assure that this inevitable *de minimis* saving from naked restraints will not trigger an inquiry into whether subsection (c) applies.

D. Subsection (d)

"Subsections (a) and (b) do not apply to any transaction governed by section 18 of this title."¹³²

Explanation.—The redraft seeks to affect merger law as little as possible. The role that the current section 1 plays in merger law is to be eliminated.¹³³ Mergers are to be governed by section 7 of the Clayton Act exclusively. This change is not intended to inspire any new arguments supporting or opposing mergers, let alone any changes in the legal standards that govern mergers.

The question is whether this can be done. Literally, horizontal mergers plainly include an implicit agreement among rivals to reduce rivalry among them. These mergers differ from section 1 agreements only because the merger's efficiency-enhancing poten-

ture and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts, 72 VA. L. REV. 1015 (1986).

¹³² "[S]ection 18 of this title" refers to § 7 of the Clayton Act, presently codified at 15 U.S.C. § 18 (1988).

¹³³ *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904). Other famous examples of the overlap between Sherman Act § 1 and Clayton Act § 7 include *Penn-Olin Chemical Co. v. United States*, 378 U.S. 158 (1964) and *United States v. First Nat'l Bank and Trust Co.*, 376 U.S. 665 (1964).

tial is relatively more visible. Thus courts will need to separate the joint ventures, joint buying and selling agencies, trade associations and other partial integrations that are to be the grist of section 1 from the more complete integrations that are to be governed by section 7 alone. Unfortunately, this presents another issue of characterization, with the undesirable formalism that the process of characterization usually entails.

Beyond that, one fears that partial integrations condemned by (a) of the redraft may be restructured formally to look like mergers in order to escape (a). After all, most partial integrations are much more likely to survive antitrust scrutiny (and with far less need to show efficiency enhancing features) under section 7 than under either the current or redrafted section 1.

E. Subsection (e): Penalties

(1) A person who attempts to agree with a rival in violation of (a) shall be fined not more than \$5,000,000 if a corporation, or, if any other person, \$175,000 or shall be imprisoned for not more than two years or both.

(2) A person who agrees with the rival in violation of (a) is guilty of conspiracy and shall be fined not more than \$1,000,000 if a corporation, or, if any other person \$350,000 or shall be imprisoned for not more than three years or both.

(3) A person who violates (a) or (b) is subject to civil liability for damages to persons injured in their business or property as provided in section 15 of this title, and to the government under section 15a of this title, and is also subject to equitable remedies in a suit brought by the government under section 4 of this title.¹³⁴

Explanation.—This penalty section continues the current criminal and civil sanctions for most violations of section 1. The only change is that agreements to adopt facilitating practices in violation of (b) subject defendants to civil exposure only, as provided in (e)(3). As indicated, many agreements that violate (b) will also violate (a).

Paragraph (e)(1) provides a reduced criminal penalty for the

134 "[S]ection 15 of this title" refers to § 4 of the Clayton Act, presently codified at 15 U.S.C. § 15 (1988). "[S]ection 15a of this title" refers to § 4A of the Clayton Act, presently codified at 15 U.S.C. § 15A (1988). "[S]ection 4 of this title" refers to § 4 of the Sherman Act, presently codified at 15 U.S.C. § 4 (1988).

new attempt offense. Although private plaintiffs should rarely, if ever, be able to show damages for a mere attempt, treble damage exposure is provided under (e)(3).

Under paragraph (e)(3) the government remains entitled to its current remedies and civil actions. It remains entitled to double damages when government purchasers or sellers are injured. It also remains entitled to its equitable remedies.

V. CONCLUSION

This stab at a more helpful wording of section 1 revisits the debate between a jurisprudence based on common law and one based on statutes. The current version of section 1 amounts to an underhanded lob to the judiciary to fashion a common law that identifies unlawful agreements. That approach minimizes formalism but maximizes the reader's mystification.

The redraft strives to assist antitrust law the way the restatements of torts, contracts and other common law areas assisted those areas. Admittedly, its approach flattens out the richness of the common law and increases formalism. The significance of these disadvantages diminishes once the reader understands that the redraft, like the restatements but unlike an actual statute, lacks authority itself and serves only as a prelude to the case law which it strives to summarize. So understood, the redraft gives the first-time reader a more pointed and intelligible, if superficial, notion of what section 1 forbids.

