Viewpoint

Frank H. Easterbrook

On Not Enforcing the Law

IF ANYTHING CAN BE counted on for a headline, it is the claim that the Department of Justice is "not enforcing the law." During the Carter administration the attack came from the right. Critics pointed out, among other things, that in order to promote litigation by favored liberal groups, the department was waiving defenses it could have used (such as the sovereign immunity that bars attorneys' fee awards in many suits and all relief in others) and sometimes even blinking at jurisdictional defects (such as want of standing).

Now the attack is from the left. It is represented by a front-page article carried in the *Washington Post* last August under the banner "Justice Allows Illegal Pricing." The reporter quoted members of Congress, prominent lawyers, and a professor of law, all arguing that the Department of Justice is ignoring the law. Although a number of cases hold that a manufacturer may not set the prices at which wholesalers and retailers sell its products, the Antitrust Division is not prosecuting manufacturers that try to influence resale prices unless it is first convinced that this influence is harmful to consumers. William Baxter, the assistant attorney general for antitrust, has suggested that such baleful influence is rare, perhaps nonexistent. His predecessor had thought all attempts to influence resale price to be unlawful without regard to proof of effects. So a change of course is apparent. But antitrust is not the only subject the Department of Justice has reexamined lately. Complaints have also been voiced about changes in the department's policies concerning remedies for racial discrimination and many other subjects.

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These attacks all take a similar form: some rule is "the law," it has been enforced as the law in the past, so how dare today's law-enforcement officials not enforce it? Such nonenforcement must be caused, as Senator Howard Metzenbaum (Democrat, Ohio) put it, by the "personal economic theories" of the officeholders. Personal beliefs, like personal computers, are apparently items used or held by one person only—the sort of eccentric notions likely to result from the dulling of higher mental faculties by air pollution. Other than the thrill of contumacious behavior, what else could account for such an aberrational refusal to carry out "the law"? Metzenbaum wants Baxter impeached; others would settle for a lesser sanction.

The officeholder's response to the charge usually is pallid compared to the colorful, newsworthy attack. He may offer as an explanation of his conduct some detailed version of his "personal economic theories" or other beliefs. But the explanation, usually too detailed to be compressed into a brief news item, is shortened to "Baxter favors price fixers" or "Reynolds opposes integration" and does not do much to defend the position. The tender of the explanation does, however, convey the proposition that, as the official sees things, there is some problem in "the law." This sets up the victim for the knockout punch. If something ails "the law," why is not Congress rather than the Department of Justice the appropriate physician?

There are in fact two answers to that question, answers little heard in the public debate but that flow from the structure and operation of a government with three branches. They are so simple that they sound like elementary civics, but it is worth recalling civics lessons once in a while, if only to reassure oneself that the

apparently complex political issues of the day sometimes have disarmingly simple answers.

I

The first answer is that "the law" is much more complex than the substantive rules (such as "Don't conspire to fix prices") held up by the department's critics. "The law" contains procedural rules as well as substantive ones, and the procedural rules often make the substantive rules much more flexible than they appear to be at first reading.

For example, Congress does not just pass a rule; it also gives the Department of Justice a budget with which to enforce the rules. When the Antitrust Division stops filing prosecutions against manufacturers that suggest dealers' resale prices, it does not send its staff away to take knitting lessons. It puts the lawyers to work on other cases. A conscientious department keeps changing its enforcement decisions until it gets the most benefit it can out of them.

To say that the Antitrust Division no longer seeks to enforce judicial decisions concerning resale price maintenance is not to say that it refuses to enforce the Sherman Antitrust Act. That statute has bred dozens of subsidiary legal commands, and one cannot enforce each of them fully. To enforce one means sacrificing something somewhere else. Effective enforcement of the most important rules usually entails reducing the number of prosecutions of some offenses by a very great deal. For years—since the Johnson administration at least—the Antitrust Division has filed few or no cases alleging that a manufacturer has engaged in "price discrimination," that is, in selling a product to different buyers for different prices. It has done this because many, many assistant attorneys general have been convinced that they could do more for the public welfare by concentrating their limited energies on large mergers and price agreements among manufacturers.

Indeed, the ability of prosecutors to pick and choose among offenses is part of the constitutional structure of our government, as the Supreme Court has held too many times to recount. President Jefferson refused to enforce the Alien and Sedition Acts because he was convinced that they were unjust, and unconstitutional to boot. (In 1964 the Supreme Court vindicated him.) President Carter pardoned most selective service violators and halted further prosecutions. President Johnson's Antitrust Division published antitrust guidelines that proclaimed a policy of not bringing suit against small mergers, even though the Supreme Court had held repeatedly that similar mergers were unlawful. Many state and local governments decline to prosecute small drug offenses, saving resources for bigger game. The list could go on and on. Prosecutorial discretion is as much part of "the law" as any other rule.

These examples of prosecutorial discretion are, if anything, more questionable than the Antitrust Division's current position concerning resale pricing. Buyers may bring their own suits complaining of manufacturers' influence over pricing. Under the antitrust laws, anyone injured by paying overcharges may recover treble his loss; retailers who lose business because of resale price maintenance also may be able to recover damages. There is no similar private enforcement of the laws concerning sedition, selective service, drugs, and mergers.

Making the most of a budget sometimes requires enforcers to make selective changes in the contours of the legal rules they have been handed by Congress. The National Labor Relations Board has legal jurisdiction over the affairs of all employers that affect interstate commerce. But if it tried to police the labor relations of all employers, it would stretch beyond the breaking point its ability to handle cases involving the larger (and hence, in terms of the number of people affected, more important) employers. Thus the board "declines jurisdiction" of cases involving many categories of small employers. These decisions change the effective legal obligations of the smaller employers, a change necessary if the law is to be soundly administered for the rest.

Similarly, for a long time the old Department of Health, Education, and Welfare (HEW) refused to investigate—for the purpose of deciding whether to cut off federal funds to institutions engaged in racial discrimination—complaints from people who saw themselves as victims of isolated occurrences of discrimination. The department wanted to concentrate, instead, on "pattern or practice" cases. In the early 1970s federal courts ordered HEW to investigate the individual complaints, and one court in the District of Columbia also required HEW

to compile voluminous reports documenting its dedication to this task. The litigation has continued on and off ever since, with the plaintiffs periodically charging inadequate effort and enforcement officials countercharging that the decrees are reducing enforcement by causing the officials to fritter time away on trivial cases. (The decrees are based on the supposedly unique history and language of Title VI, which is why, the courts said, the usual prosecutorial discretion is not honored.) Whatever one makes of the dispute, there is no way around this fact: sometimes the best, or even the only, way to achieve compliance with the central feature of a law is to deny some people an "entitlement" they possess on paper, because enforcing the "entitlement" of one will mean deferring, and thus denying for a time or forever, the claims of others.

II

The second answer to the knockout question posed above—if something is wrong with "the law," why not leave the remedy to Congress?—is that "the law" is not an unchanging legacy handed down from generation to generation by judges and altered only by Congress. Statutes leave many questions unanswered, and when questions raising these questions arise the answers are created, not found, by judges. The Sherman Act, passed in 1890, says that "contracts and combinations in restraint of trade" are unlawful. But every contract restrains in some respect; people must carry out their contracts or pay penalties. Thus determining the substance of antitrust law is a matter of drawing a line, not of implementing a clear command. And anyone engaged in drawing lines can err, if only because of inadequate information or the undeveloped state of legal and economic theory.

In 1911 the Supreme Court made manufacturers' control of resale prices illegal, reasoning that such control is deleterious to consumers. In 1967 it extended this reasoning to hold that manufacturers' control of resale territories also is always unlawful. In 1977 it overruled its 1967 decision, pointing out that in the interval we had learned much about the real consequences of such practices. Some of the learning was possible because the Miller-Tydings Act, in force between 1937 and 1975, allowed states to opt out of the 1911 decision. In 1975 Congress returned the subject to the control of uniform federal law. Now the Antitrust Division would like the Court to repudiate the 1911 decision too, as it has overruled at least five decisions in antitrust and more than 230 in other fields.

This is all an ordinary part of the continuing evolution of legal principles. The law changes as learning grows. We do not design airplanes on the basis of the best engineering available in 1911. Why design the antitrust laws on the basis of yesterday's wisdom? The department may be right or wrong in thinking that the antitrust law should change, but the dispute properly turns on the merits. That the department attempts to influence the law is just a sidelight.

We think nothing of the Department of Justice's filing new "test" cases, ever trying to extend the law's reach. But there is no ratchet in the law. Changes can go in both directions. Just as things once accepted can be declared illegal, so things declared illegal can be restored to legitimacy.

Of course the Antitrust Division could give the appearance of being a more active prosecutor by filing suits and contriving ways to lose them, all with the aim of changing the law. Similarly, the Civil Rights Division, convinced that some of the usual remedies for racial discrimination are counterproductive, could purport to seek such remedies while building records damning them on the facts. Such tactics impose needless costs on defendants and lack candor to boot. Far better for the department to be above board and cease prosecutions while presenting its views in private cases—those that will be litigated anyway.

I HAVE CONCENTRATED on antitrust, but the principles apply to every agency with enforcement powers. With very few exceptions "the law" is subject to alteration by courts and the executive branch acting together—especially when the initial judicial decisions not only are outdated but also were wrong at the time they were rendered. When the Department of Justice's critics claim that all alterations in legal rules or prosecutorial policy are committed to Congress, they are diverting attention from the real issues. ■