MORALITY AND ANTITRUST

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I. INTRODUCTION

Unlike many other crimes involving wealth transfers, such as theft or fraud, there is no consensus on the morality of antitrust offenses. Some opine that antitrust offenses are: (i) immoral,[1] (ii) amoral (being *mala prohibitum* rather than

[1] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004) (Scalia, J.) (characterizing collusion as "supreme evil of antitrust"); United States v. Alton Box Bd. Co., No. 76 CR 199, 1977 WL 1374, at *4 (N.D. Ill. March 4, 1977) (noting the Department of Justice

mala in se),[2] or (iii) moral and consistent with natural human behavior so it is the federal antitrust laws that are immoral.[3] But these differing viewpoints have not sparked any debate over the morality of antitrust violations. Under the continued influence of the Chicago-school's neoclassical economic theories, antitrust analysis is primarily concerned

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view that the price-fixing violation before the court "represents immoral, antisocial, and calculated conduct that should be punished as such"); Memorandum of Understanding Between the Antitrust Div. and The Immigration and Naturalization Serv. (May 15, 1996) ("Whereas INS considers criminal violations of the Sherman Antitrust Act, 15 U.S.C. § 1, to be crimes involving moral turpitude, which may subject an alien to exclusion or deportation from the United States"), *available at* http://www.usdoj.gov/atr/public/criminal/9951.htm; R. Hewitt Pate, Acting Assistant Attorney Gen., Antitrust Div., Speech Before the British Institute of International and Comparative Law: Anti-Cartel Enforcement: The Core Antitrust Mission (May 16, 2003) [hereinafter *2003 Pate Speech*] ("Since 1890, the Sherman Act has reflected the United States' 'abiding faith that the elimination of competition [is] morally and economically wrong.'") (quoting THURMAN ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE, 121 (1951)), (transcript available at http://www.usdoj.gov/atr/public/speeches/201199.htm).

[2] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 345 (D. Mass. 1953) ("The violation with which United is now charged depends not on moral considerations, but on solely economic considerations."), *aff'd per curiam*, 347 U.S. 521 (1954); United States v. Safeway Stores, 20 F.R.D. 451, 454-55 (N.D.Tex. 1957) (noting that in many situations the antitrust offense is considered *malum prohibitum* rather than *malum in se*); Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 IOWA J. CORP. L. 607, 609 (2003) ("[A]ntitrust has no moral content and is unconcerned about the distribution of wealth").

[3] Jeffrey Tucker, *Controversy: Are Antitrust Laws Immoral?*, 1 J. MARKETS & MORALITY 75, 79-80 (1998). Others question the need for antitrust laws, arguing "a paucity of empirical evidence that more than a century of antitrust enforcement has provided benefits to U.S. consumers." Robert W. Crandall & Clifford Winston, *The Breakdown of 'Breakup'*, WALL ST. J. March 9, 2006, at A14; *see also* Robert W. Crandall & Clifford Winston, *Does Antitrust Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 3, 3-26 (2003). Others have questioned Crandall & Winston's conclusion and the studies they relied upon. *See* John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 526-29 (2005).

with economic efficiency.[4] Since terms like "morality" and "evil" are judgmental, not descriptive, they are deemed outside the discourse of economic theory's self-described positivism. Reducing antitrust to normative morality judgments would represent, for Richard Posner and others, antitrust's descent into "a weak field, a field in disarray, a field in which consensus is impossible to achieve in our society."[5]

But antitrust analysis is not beyond the judgmental. Behind allocative efficiency's façade of positivism lie such moral issues as:

- Is economic efficiency the just outcome?
- What is a competitive market system, and is a competitive market an end or the means to a higher end?
- Is a vibrant market economy antagonistic or conducive to society's moral progress, as measured by its tolerance, support of the poor, etc.?[6]

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[4] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91-92 (1993); Herbert Hovenkamp, *Distributive Justice And The Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979). Maximizing economic efficiency, which is the maximization of aggregate consumer and producer surplus, requires the maximization of both (i) allocative (Pareto) efficiency—allocating resources to their highest valued use, such that it is not possible to make anyone better off without making someone worse off—and (ii) productive (technological) efficiency—producing the products or services at the lowest possible cost. Organization for Economic Co-operation and Development, *Glossary of Industrial Organisation Economics and Competition Law* 41, 65 (1993), http://www.oecd.org/dataoecd/8/61/2376087.pdf [hereinafter *OECD Glossary*]; Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada, and the European Union*, 72 ANTITRUST L.J. 423, 428 (2005).

[5] Richard A. Posner, *Law and Economics* Is *Moral*, 24 VAL. U. L. REV. 163, 166 (1990).

[6] Benjamin M. Friedman, for example, outlines how economic growth renders a society more inclined toward many of the Enlightenment's conception of moral progress, through greater openness, tolerance, mobility and democracy. BENJAMIN M. FRIEDMAN, THE MORAL CONSEQUENCES OF ECONOMIC GROWTH (Alfred A. Knopf 2005).

- Is the market's socio-political function to minimize "the necessity of resorting to internal ethical constraints on human behavior and/or external legal-governmental-political restrictions?"[7]
- Is there a "social mortgage" on private property, in that the very existence of the institution of private property is to ensure that the basic needs of every individual are met and sustained?[8]
- Is charging supracompetitive prices immoral?
- Is wealth maximization descriptive or normative, and what role should the government play in fostering wealth maximization?

One may question the need to address these moral issues. By focusing antitrust analysis on allocative efficiency, an economist may reach the same conclusion as a moralist, without the baggage of these normative judgments. Even if different conclusions are reached, the economist may argue that Congress can deal more effectively with these normative judgments than enforcers or the courts.[9]

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[7] James M. Buchanan, *Good Economics—Bad Law*, 60 VA. L. REV. 483, 486 (1974).

[8] Letter presenting the Holy See's position concerning the pharmaceutical industry's obligation to offer medicines at affordable prices in *Ethics Cannot Justify Fixing the Highest Prices for Medicine*, L'OSSERVATORE ROMANO, July 11, 2001, *available at* http://www.catholicculture.org/docs/doc_view.cfm?recnum=3966&long desc.

[9] *See, e.g.*, Hovenkamp, *Distributive Justice*, *supra* note 4, at 2 n.12, noting an antitrust commentator's argument that:

> Before one becomes an absolute skeptic about the morality of an antitrust policy of encouraging efficiency, however, it is important to note that in antitrust one can avoid the question of the fairness of the starting point simply by asserting that areas of law other than antitrust are better designed to take care of distributive questions of fairness or justness. That is, it is quite plausible that antitrust policy ought to take the existing distribution of wealth as a given and seek to improve allocative efficiency from that starting point, and to leave to other areas of law such as taxation, civil rights, or labor law the task of adjusting wealth distributions according to some notion of fairness.

If indeed the field of antitrust was limited to civil remedies, and promoting efficiency was the singular goal of antitrust law, then avoiding such moral issues might have merit. But over the past thirty years, while antitrust's civil remedies have remained relatively unchanged, the criminal penalties for price fixing, bid rigging, and other Sherman Act antitrust violations have soared—from a misdemeanor to a felony punishable by up to ten years imprisonment.[10] If the criminal laws reflect society's moral judgments, then antitrust and morality ultimately are intertwined. Even if a utilitarian sought to divorce morality from antitrust, in asserting that antitrust's criminal penalties have increased to ensure optimal deterrence, morality resurfaces in addressing the means of deterring such behavior and the degree to which criminal sanctions are employed.

Although the Sherman Act was enacted over a century ago, antitrust enforcers, policy makers, and scholars have largely circumvented the morality of antitrust crimes. Its absence is remarkable given the vigorous debate over the appropriate civil and criminal penalties for antitrust violations. In this article, Part I provides a background of antitrust violations and the economic theory of optimal deterrence that has played a critical role in shaping the criminal sanctions for Sherman Act violations. The assumption underlying the optimal deterrence theory is that "rational" profit maximizers will weigh the magnitude of the likely penalty and the probability of being detected against the gain from the violation. Part I next describes the escalation of antitrust's criminal penalties in the United States, prodded by the belief that the existing criminal penalties were suboptimal in deterring profit maximizers from violating the antitrust laws, and so only by increasing the criminal sanctions will such cartel behavior be generally deterred. Despite the escalation in criminal penalties, there is no clear evidence that optimal deterrence has been achieved. Although optimal deterrence is generally accepted

[10] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004).

policy for determining the appropriate antitrust penalties, Part I concludes with the many shortcomings of this economic theory.

Part II introduces morality and asks what role morality could play in the field of antitrust, if optimal deterrence alone is insufficient to effectively deter violations. After examining under a three-part standard whether antitrust crimes can indeed be deemed immoral, Part III weighs some of the benefits and risks of supplementing antitrust crimes with a moral component and the risks of the current course—namely, ignoring morality.

Inevitably moral issues will surface as the Sherman Act's criminal penalties continue to escalate. A broader implication is that antitrust policy, to borrow Robert Bork's phrase, may be at war with itself.[11] If policy makers assume that the federal antitrust laws are concerned solely with allocative efficiency and are essentially amoral, then efforts to deter such conduct through criminal sanctions may be self-defeating. Criminal law, as many legal scholars have argued, reveals society's moral opprobrium to certain conduct. That moral component (through internalizing the standard of conduct and the attendant guilt or fear of shame) can be effective in deterring socially unacceptable conduct. But to harness that moral component, antitrust policy makers should re-examine certain policies underlying antitrust law. To date, antitrust policymakers, enforcers, and scholars have largely encamped in utilitarianism and the economic theory of optimal deterrence, whereby general deterrence is achieved through the right mixture of financial penalty and incarceration to offset the profit-maximizer's expected cartel gains. But it is unclear whether that alone will effectively deter cartel behavior. Instead, fostering a moral component to antitrust crimes may more effectively deter these violations at a lower social cost, encourage other nations to increase their prosecution of cartel behavior, and prevent antitrust from slipping into irrelevancy.

[11] BORK, *supra* note 4.

II. BACKGROUND

A. Hard-Core Cartels

Most antitrust violations fall under Sections 1 or 2 of the Sherman Act and by the terms of the statute can be prosecuted civilly or criminally.[12] The Sherman Act, however, does not delineate which conduct could or should be criminally or civilly prosecuted, and this has been left to the discretion of the United States Department of Justice.[13]

Many business activities potentially may be pro-competitive or competitively neutral, such as mergers or joint ventures, which the Department of Justice civilly investigates under a rule of reason standard. Certain antitrust offenses involving "hard-core cartels," so labeled because of their "pernicious effect on competition and lack of any redeeming virtue," are conclusively presumed to be unreasonable and therefore illegal.[14] Hard-core cartels, which are often characterized as "naked" restraints on competition, involve an agreement among competitors to fix prices,[15] restrict output,[16] allocate customers or markets,[17] or

[12] Section 1 of the Sherman Act, 15 U.S.C. § 1 (2004), outlaws every unreasonable "contract, combination . . . , or conspiracy, in restraint of trade." Section 2 of the Sherman Act, 15 U.S.C. § 2 (2004), makes it unlawful for a company to "monopolize, or attempt to monopolize" trade or commerce.

[13] See Donald I. Baker, *To Indict or Not to Indict—Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978), for background on the role of prosecutorial discretion in deciding which antitrust offenses to pursue criminally. Prosecuting crimes is an executive function; hence, only the Department of Justice can bring federal criminal actions. The Federal Trade Commission can bring civil or administrative proceedings, not criminal. Private parties, including states on behalf of their citizens, also can bring only civil actions under the federal antitrust laws. Many states, however, can bring criminal actions under their state laws.

[14] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

[15] Price fixing is an agreement or mutual understanding between two or more competitors to fix, control, raise, lower, maintain, or stabilize the prices charged or to be charged for products or services, and can include agreements to fix a minimum price, to eliminate discounts, or to adopt a

rig bids.[18] The Department of Justice often, but not always, prosecutes such "hard-core cartels" criminally. These cartels are generally condemned as *per se* illegal, namely "without elaborate inquiry as to the precise harm they have caused[,] the business excuse for their use"[19] (such as to avoid "ruinous competition"), the fairness of the prices charged, or other reasons for entering into the cartel.[20] At one time, the Department of Justice criminally prosecuted other anticompetitive behavior, such as resale price maintenance[21]

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standard formula for fixing price. INT'L COMPETITION NETWORK WORKING GROUP ON CARTELS, DEFINING HARD-CORE CARTEL CONDUCT: EFFECTIVE INSTITUTIONS, EFFECTIVE PENALTIES 10 (2005) [hereinafter *ICN Report*], http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG1_General_Framework/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf; *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

[16] Output restrictions can involve agreements on production volumes, sales volumes, or percentages of market growth. ICN Report, *supra* note 15, at 10.

[17] *See, e.g.,* United States v. Andreas, 216 F.3d 645, 666-67 (7th Cir. 2000); United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991); United States v. Suntar Roofing, Inc., 897 F.2d 469, 473 (10th Cir. 1990); United States v. Coop. Theatres of Ohio, Inc., 845 F.2d 1367, 1371 (6th Cir. 1988).

[18] ICN Report, *supra* note 15, at 2, 10; United States v. Hefferman, 43 F.3d 1144, 1145-46, 1149-50 (7th Cir. 1994).

[19] *N. Pac. Ry.*, 356 U.S. at 5.

[20] *See, e.g., Socony-Vacuum Oil Co.*, 310 U.S. at 221-22 ("Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination."). The mere coordination of decisions on price, output, customers, territories, and the like then is not integration, and cost savings without integration are not a basis for avoiding *per se* condemnation. U.S. Dep't of Justice & Federal Trade Commission, Antitrust Guidelines for Collaborations Among Competitors § 3.2 (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

[21] Sanford M. Litvak, Assistant Attorney Gen., Antitrust Div., Speech before the Annual Antitrust Institute: Antitrust Division Criminal Enforcement Policy: The View from Washington (Nov. 7, 1980) (noting that Department of Justice regarded resale price maintenance as criminal

or egregious anticompetitive behavior by monopolists.[22] Since the Reagan Administration, however, the Department of Justice has limited its criminal investigations to these hard-core cartels.[23]

B. Difficulties in Detecting and Prosecuting Hard-Core Cartels

The first difficulty in detecting and prosecuting hard-core cartels is distinguishing between legal unilateral conduct and illegal collusion, whereby the competitors *agree* to

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violation), *reprinted in* II JAMES M. CLABAULT & MICHAEL K. BLOCK, SHERMAN ACT INDICTMENTS: 1955-1980, at 635 (1981).

[22] Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 429 (1963) (citing Statement of Antitrust Division's Assistant Attorney General in Att'y Gen. Nat'l Comm, Antitrust Rep. 350 (1955)) ("[There is the policy of instituting] criminal prosecutions for Sherman Act violations only where there is a *per se* violation, such as price fixing, a violation accompanied by a specific intent to restrain competition or monopolize, the use of predatory practices, or where defendant previously convicted of Sherman Act violation."). For examples of earlier criminal monopolization cases, *see, e.g.,* American Tobacco v. United States, 328 U.S. 781 (1946); Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957).

[23] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, ch. III, § C.5 (3d ed. 1998) [hereinafter ANTITRUST DIVISION MANUAL] ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, *per se* unlawful agreements such as price fixing, bid rigging and horizontal customer and territorial allocations."), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/ch3.htm#c5. Moreover, even for antitrust offenses that courts have recognized as *per se* illegal, the Division would not prosecute the offense criminally, if inappropriate.

> These situations may include cases in which: (1) there is confusion in the law; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.

Id.

restrain competition.[24] Few markets, if any, approach the theoretical model of perfect competition.[25] In many markets, through branding and other product or service differentiation, companies can exercise a degree of market power for their products or services.[26] Consequently, supracompetitive pricing is not a telltale sign of cartel behavior, because higher prices may be the result of imperfect, albeit lawful, competition. Similarly, in concentrated industries, parallel behavior by competitors is not necessarily cartel behavior. On the contrary, it could be the result of each company setting its price based on strategic considerations regarding its competitors' behavior.[27] For example, in a small town with two gasoline stations, the owners, in considering the other's likely response to a price increase or decrease, may settle on a supracompetitive price without any actual discussion. Each morning, because Owner A is able to see what her competitor is charging, she may unilaterally decide to follow Owner B's price increase or decrease. As a result, Owner A and Owner B might set their

[24] *See, e.g.*, In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999) (stating that the existence of agreement is a "hallmark" of Section 1 claim, and finding no civil violation where evidence insufficient to show conspiracy).

[25] A model of perfect competition generally assumes homogenous products, transparent prices, highly elastic demand curves, easy entry and exit, and informed profit-maximizing producers and consumers. Price equals marginal cost, and the market will produce the efficient level of outputs with the most efficient techniques and using the minimum quantity of inputs. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 43 (13th ed. 1989); OECD Glossary, *supra* note 4, at 66.

[26] The Department of Justice and FTC define market power for a seller as the ability to profitably maintain prices above competitive levels for a significant period of time. U.S. Dep't of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 0.1. (1992, revised 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm. Moreover, sellers with market power also may also lessen competition on dimensions other than price, such as product quality, service or innovation. *Id.* at § 0.1 n.6.

[27] *See, e.g.*, Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 483-84 (1st Cir. 1988); ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 431 (2d ed. 1992).

prices at "a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."[28] Even in competitive markets, this parallel conduct may occur because all competitors are price-takers.[29] Because the anticompetitive effects of supra-competitive prices and deadweight welfare loss may occur absent an illegal cartel and because cartels rarely formalize their illegal agreement in writing, it is difficult for prosecutors to uncover evidence of an illegal agreement.

A second difficulty in criminally prosecuting cartels is that, unlike other victims of theft, cartel victims may not know when, and to what degree, they are being victimized. For example, cartel members may justify a price increase to customers by citing capacity constraints or an increase in costs. A cartel also may be highly successful with only modest price increases. In a market with only a ten percent profit margin, for example, a ten percent price increase may double profits per sale. So an increase in price due to cartel behavior is not necessarily visible to customers.

The third difficulty in prosecution is that collusion is often hidden from view. The nature of an antitrust crime is not as obvious as an armed bank robbery, where the prosecutor can show the jury the weapons used and the videotaped footage of the robbery. It is rare to obtain videotaped footage of an international cartel in the act of

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[28] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) (citation omitted).

[29] For example, bidders with similar cost structures for homogeneous goods may submit identical bids. RICHARD A. POSNER, ANTITRUST LAW 87 (2d ed. 2001). Both the Department of Justice's and American Bar Association's recent amicus briefs state that such parallel conduct occurs in competitive markets, and pleading that by itself (with a conclusory allegation of conspiracy) is insufficient to state a claim under Section 1 of the Sherman Act. *See* Brief of the American Bar Association as Amicus Curiae in Support of Neither Petitioners Nor Respondents, 2006 WL 2503551 (Aug. 25, 2006); Brief for the United States as Amicus Curiae Supporting Petitioners, 2006 WL 2482696 (Aug. 25, 2006), filed in Bell Atlantic Corp. v. Twombly, 126 S.Ct. 2965 (U.S. Jun 26, 2006) (No. 05-1126).

fixing prices and carving up the worldwide market, as was the case in the Lysine conspiracy.[30] The wrongdoers often take steps to conceal the existence of their collusion and avoid creating incriminating documents.[31] One Department of Justice official recently noted that due to the high stakes of a criminal antitrust prosecution, there is "high incidence" of document destruction, false statements, and witness tampering by cartel participants.[32] The executives may meet abroad (under the false impression that their foreign activity is somehow sheltered from Sherman Act liability), or the companies may be based abroad; in either case, obtaining evidence in a foreign country presents additional issues.

Fourth, unlike other white-collar criminals, corporate executives that violate the antitrust laws may not directly pocket the ill-gotten proceeds from their collusion. For

[30] For a description of this cartel, see Scott D. Hammond, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Caught in the Act: Inside an International Cartel, Speech before OECD Competition Committee, Working Party No. 3, Public Prosecutors Program (Oct. 18, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/212266.pdf. Transcripts and copies of the undercover audio and video tapes recorded by U.S. Federal Bureau of Investigation agents with the help of a cooperating witness are also available through the Freedom of Information Act Unit of the Department of Justice's Antitrust Division, 325 7th Street, NW, Suite 200, Washington, D.C. 20530.

[31] For example, in one of the electrical equipment conspiracies, a General Electric executive had retained some of the ground rules for the cartel's meetings: "no breakfasting together, no registering at the hotel with company names, no calls to the office, no papers to be left in hotel-room wastebaskets." Richard Austin Smith, *The Incredible Electrical Conspiracy* (Part II) FORTUNE, May 1961, 161, at 210 [hereinafter *Electrical Conspiracy (Part II)*].

[32] Speech by Scott D. Hammond, Ten Strategies for Winning the Fight Against Hardcore Cartels, before OECD Competition Committee, Working Party No. 3 Prosecutors Program Oct. 18, 2005, *available at* http://www.usdoj.gov/atr/public/speeches/212270.pdf; *see also* OECD, *Hard-Core Cartels: Third Report on the Implementation of the 1998 Recommendation* 15 (2005), *available at* http://www.oecd.org/dataoecd/30/2/36600303.pdf [hereinafter *OECD 3rd Report*]; 2003 Pate Speech, *supra* note 1, at 4 (describing how one conspirator provided its co-conspirator with scripted answers with false information for upcoming interview with Department of Justice).

example, a thieving bank teller acts in a manner contrary to the bank's interests, and the bank, through its internal policing functions, has every interest to deter such behavior. In contrast, corporate executives collude to increase corporate profits, the goal of any profit-maximizing firm. The executives may benefit indirectly, through higher bonuses and promotions, while their employers benefit directly, and in the short term. The end of price-fixing is highly desirable from the perspective of the corporation—namely, increased profitability—but it is only when the means are exposed that the interests of the corporation may conflict with those of its executives.[33]

A fifth difficulty is that the executives are often not the downtrodden souls upon whom society readily turns its back, but the leaders of the business world. Getting executives to inform on their corporate family and risk being ostracized from the industry can be very difficult. Moreover, the federal courts historically have been reluctant to incarcerate the individual wrongdoers who have the earmarks of respectable business executives.[34]

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[33] Of course, senior corporate executives may state that even in the short-term such hard-core behavior is against corporate interests, as it dulls the incentive to innovate and compete, hampers relations with consumers, and harms the corporation's public image. Senior General Electric executives in the 1950s propagated this message, but collusion, nonetheless, was rampant. *See* Richard Austin Smith, *The Incredible Electrical Conspiracy* (Part I), FORTUNE, Apr. 1961, 132 [hereinafter *Electrical Conspiracy (Part I)*]; Smith, *Electrical Conspiracy (Part II)*, *supra* note 31; Gilbert Geis, *The Heavy Electrical Equipment Antitrust Cases of 1961*, *in* MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS (1967).

[34] Speech by Assistant Attorney Gen. Stanley N. Barnes, Promoting Competition: Current Antitrust Problems and Policies, delivered before the Metropolitan Economic Association, New York (Oct. 25, 1954) [hereinafter *1954 Barnes Speech*]; *see, e.g.*, Charles B. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 592 (1977) (describing how one judge finds it "extremely difficult" to sentence antitrust offenders who were "community leaders of previously unsullied reputation"); *Alton Box Board*, 1977 WL 1374 (N.D. Ill. Mar. 4, 1977). One of the Westinghouse executives convicted in the notorious electrical equipment price-fixing conspiracy, for example, was a vestryman of the local

Given the difficulties in detecting and prosecuting cartels, there is no reliable estimate of the number of illegal cartels that have existed or currently exist today. The number of cartels prosecuted annually could represent ten percent of all cartels operating today or ninety percent—nobody knows.[35]

C. Assumption that Goal of Prosecuting Cartels is Deterrence

However, once prosecutors detect and prosecute cartels, they have an arsenal of weapons at their disposal, including civil remedies (e.g., structural and injunctive relief,[36] forfeiture of property,[37] trebled monetary damages that the government as a purchaser may have suffered[38]) and criminal remedies (e.g., fines against the individuals and/or corporation, and incarceration). As an additional deterrent,

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Episcopal Church. Smith, *Electrical Conspiracy (Part I)*, *supra* note 33, at 132-33.

[35] The former Assistant Attorney General Douglas Ginsburg estimated that antitrust enforcers detected no more than ten percent of all cartels. *Sentencing Options: Hearing Before the United States Sentencing Commission* (July 15, 1986), *available in* United States Sentencing Commission: Unpublished Public Hearings 1986, at 15 (1988). Other estimates are one in six or seven cartels are detected and prosecuted. OECD Directorate for Financial, Fiscal and Enterprise Affairs, Competition Committee, Report on the Nature and Impact of Hard Core Cartels and Sanctions Against Cartels Under National Competition Laws 3, 13 (Apr. 9, 2002), *available at* http://www.oecd.org/dataoecd/16/20/2081831.pdf [hereinafter *OECD Cartel Report*] (citing Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 REV. OF ECON. & STAT. 531 (1991)).

[36] Under Section 4 of the Sherman Act and Section 15 of the Clayton Act, the Department of Justice, in addition to injunctive relief, can seek broad equitable relief, including contract reformation, dissolution, recession, and notice to victims. *See, e.g.*, Final Judgments entered in United States v. Kentucky Real Estate Comm'n, Civ. Act. No. 3:05-cv-188-S (W.D. Ky. 2005), *available at* http://www.usdoj.gov/atr/cases/f210100/210142.htm; United States v. Village Voice Media, Civ. Act. No. 1:03-CV-0164 (N.D. Oh. 2003), *available at* http://www.usdoj.gov/atr/cases/f201100/201100.htm.

[37] 15 U.S.C. § 6 (2001).

[38] 15 U.S.C. § 15a (2001).

a cartel member faces a trebled damages claim by direct purchasers,[39] damages claims by indirect purchasers in certain states,[40] equitable relief, and civil and criminal actions by the various state attorneys general.

Given the difficulties in detecting hard-core cartels, the stated aim of antitrust's criminal penalties is promoting general deterrence.[41] Consequently, the "generally accepted approach"[42] today is that companies and their executives behave as "rational" profit maximizers[43] in conducting "a cost-benefit analysis in order to see if the benefit is worth taking the risk of being caught and punished."[44] The executives weigh "the expected gains from the cartel times

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[39] 15 U.S.C. § 15 (2001).

[40] Seventeen states have statutes that allow indirect purchasers to recover in state courts for federal price-fixing violations. Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 703 n.51 (2001).

[41] ICN Report, *supra* note 15, at 51-53; Testimony of Deputy Assistant Attorney General Scott Hammond, U.S. Dep't of Justice, Antitrust Div., before the Antitrust Modernization Commission, Nov. 3, 2005, at 37-38 ("The singular goal is general deterrence.") [hereinafter *2005 Hammond AMC Testimony*]; Written Statement of Scott D. Hammond on Behalf of the United States Department of Justice before the Antitrust Modernization Commission Hearings on Criminal Remedies, Nov. 3, 2005, at 6-7 ("controlling factor underlying the [Sentencing Commission's] antitrust guideline is general deterrence.") [hereinafter *2005 Hammond Written Statement*], both *available at* http://www.amc.gov/commission_hearings/criminal_remedies.htm.

[42] Connor & Lande, *supra* note 3, at 516.

[43] Harry S. Gerla, *A Micro-Microeconomic Approach To Antitrust Law: Games Managers Play*, 86 MICH. L. REV. 892, 893 (1988) ("[T]he essential reasoning of modern microeconomics . . . begins with the assumptions that firms have as their prime goal the maximization of profits and that they will act rationally in pursuit of that goal.").

[44] ICN Report, *supra* note 15, at 51-52; *see also* Steven Shavell, *Law Versus Morality as Regulators of Conduct*, *in* THE ORIGINS OF LAW & ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 398 (Francesco Parisi & Charles K. Rowley eds., 2005); *see also* Org. for Econ. Co-operation and Dev.'s Directorate for Fin., Fiscal and Enter. Affairs, Competition Comm., *Cartels: Sanctions Against Individuals* 19 (Jan. 10, 2005) [hereinafter *OECD Cartel Sanction Report*].

the probability of cartel detection."[45] To achieve optimal deterrence, the total penalty (which includes civil damages and criminal penalties) levied against a cartel should equal the violation's expected net harm to others (plus enforcement costs) divided by the probability of detection and proof of the violation.[46]

As a Department of Justice official told the U.S. Sentencing Commission, setting the antitrust fine at this formula's optimal level (damages caused by the cartel divided by probability of conviction) "would result in the socially optimal, i.e., zero level of price-fixing."[47] The Department of Justice official estimated that the probability of detection was less than ten percent and that price fixing typically results in price increases of at least ten percent, which the Sentencing Commission adopted in deriving its fine levels.[48] The Sentencing Commission recognized the underlying principle of optimal deterrence theory that the

[45] ICN Report, *supra* note 15, at 53.

[46] For example, if the net harm (plus enforcement costs) is $1,000 and the probability of detection is fifty percent, the optimal fine would be $2,000. William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656, 666-68 (1983); *see also* Connor & Lande, *supra* note 3, at 516-17 (noting that both Chicago and post-Chicago schools of antitrust have adopted optimal deterrence theory); *see also* Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 731 (2001) (observing that "optimal-penalties theory" requires fines to be large enough to force violators to fully internalize all the costs of their crimes); Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. OF ECON. PERSP. 43, 46 (1996) (discussing more complex variations of this formula, which include an individual's taste (or distaste) for crime, which includes the individual's moral values, proclivity for violence, and preference for risk).

[47] Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 AM. CRIM. L. REV. 331, 342 (1989) (quoting *U.S. Sentencing Comm'n: Hearing on Sentencing Options* 14 (July 15, 1986) (statement of Douglas H. Ginsburg, Assistant Att'y Gen., Dep't of Justice, Antitrust Div.)).

[48] Cohen & Scheffman, *supra* note 47, at 342 (quoting Ginsburg). The empirical basis for these estimates has been later questioned, and one survey of cartel overcharges has found ten percent as too low. Connor & Lande, *supra* note 3.

fine should be based on considerations of the gains to, and losses caused by, the antitrust violators.[49] But since it is "difficult and time consuming to establish"[50] the damages caused, or profits made, by the cartel members and to "avoid the time and expense that would be required for the court to determine the actual gain or loss,"[51] the Sentencing Commission instead adopted the following shorthand for calculating the optimal fine: the base corporate fine level for antitrust violations is generally set at twenty percent of the volume of affected commerce, which is then adjusted based on other mitigating factors.[52] Basing the fine on a percentage of affected commerce represented "an acceptable and more readily measurable substitute."[53]

D. Optimal Deterrence Theory at Work—Escalation of Antitrust's Criminal Penalties

Over the past fifty years, Congress has increased the maximum monetary fines and term of incarceration for criminal violations of the Sherman Act. From a misdemeanor, the criminal penalties now stand as a felony with up to ten years imprisonment and a fine up to $100 million for corporations and $1 million for individuals.[54] Underlying these amendments is the assumption that the

[49] U.S. SENTENCING GUIDELINES MANUAL § 2R1.1, cmt. n.3 (2004).

[50] *Id.*, cmt. background ("The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute.").

[51] *Id.*, cmt. n.3.

[52] *Id.* at (d)(1).

[53] United States v. Hayter Oil Co., 51 F.3d 1265, 1276 (6th Cir. 1995) (quoting U.S.S.G. §2R1.1 commentary). For a further discussion on how the Sentencing Commission arrived at the 20% figure, and the shortcomings of this percentage to optimally deter price fixing, *see* Connor & Lande, *supra* note 3.

[54] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004). The maximum fines could be even larger under 18 U.S.C. § 3571(d) (2000) (providing alternative fine of twice the loss suffered by victims or twice the gain realized by the offender).

prevailing criminal penalties were sub-optimal in generally deterring such hard-core antitrust crimes, thereby necessitating greater penalties.[55]

When the Sherman Act was enacted in 1890, violations were misdemeanors with a maximum fine of $5,000 and up to one year incarceration.[56] Other than socialists and union officials, not many antitrust offenders were criminally prosecuted.[57] "[I]t has been found in practice," one early antitrust commentator observed, "that it is a very difficult thing to secure a criminal conviction from a jury for an offense so general, so abstract, so little tainted with a general and customary imputation of immorality as 'restraint of trade' or 'monopolizing.'"[58]

By 1954, the then head of Department of Justice's Antitrust Division observed that "over the years a precedent has been established: almost never has anyone been

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[55] ROBERT E. HAUBERG, AMERICAN BAR ASSOCIATION, SENTENCING GUIDELINES IN ANTITRUST: A PRACTITIONER'S HANDBOOK 9 (1999).

[56] Sherman Act, ch. 647, §§ 1-2, 26 Stat. 209 (1890). Earlier versions of the Sherman Act bill had higher penalties, namely, a $10,000 fine and up to five years incarceration. PAUL E. HADLICK, CRIMINAL PROSECUTIONS UNDER SHERMAN ANTI-TRUST ACT 13-14 (1939) (citing 50 Cong. Rec., 1st Sess. 7512-13).

[57] The government lost (or dismissed) twenty-three of the thirty-six criminal antitrust cases brought between 1890 and 1910. Hadlick, *supra* note 56, at 26. Hadlick also notes that the "first persons to serve jail sentences resulting from the Sherman Act were Eugene V. Debs and others, growing out of the Pullman strike of 1894." *Id.* at 140; *see also* CCH, THE FEDERAL ANTITRUST LAWS: WITH SUMMARY OF CASES INSTITUTED BY THE U.S. 1890-1951, 459-60 (1952) (index of cases against unions).

[58] Allyn A. Young, *The Sherman Act & the New Anti-trust Legislation*, 23 J. POL. ECON. 201, 218 (1915). Finding that the Sherman Act provided merely an indirect and uncertain way of penalizing unfair competition methods, Young saw no reason why the statute's criminal remedies should be retained. *Id.* at 219. Similarly, some Attorneys General opposed criminal prosecutions of antitrust violations given their lack of sympathy with the purpose of the Sherman Act, adverse decisions by the courts, and lack of appropriations. Hadlick, *supra* note 56, at 23. For example, Attorney General Richard Olney wrote in 1895 that he had "taken the responsibility of not prosecuting under a law I believe to be no good." *Id.* at 25-26.

committed to jail for a Sherman Act offense."[59] The Sherman Act's $5000 penalty represented "a very modest license fee for most offenses under it."[60] But with federal antitrust enforcement on the rise after World War II, the Sherman Act's criminal penalties were amended in 1955 to increase the maximum fine to $50,000.[61] By the mid-1950s, the federal judges also began sentencing a few corporate executives to jail.[62] After the imprisonment of several high-

[59] 1954 Barnes Speech, *supra* note 34.

[60] *Id.* Assistant Att'y Gen. Stanley Barnes was also at the time the co-chairman of the Attorney General's National Committee to Study the Antitrust Laws. Two unidentified members of that 61-member Committee believed that the criminalization of the antitrust laws was a "gross injustice". REPORT OF THE ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 352-53 (U.S. Government Printing Office 1955). They cited the vagueness of the federal antitrust laws and the uncertainty as to what business conduct would be deemed unlawful. Thus, to "impute criminality in the face of such uncertainty is a violation of fundamental principles of justice." *Id.* at 353. The two members recommended that the law be amended so as to make criminal only "acts of clear, certain and predatory violations of law, and that the balance be left to civil relief, governmental and private." *Id.* The majority of Committee members, however, did not endorse this view and recommended that the maximum criminal fine be increased from $5000 to $10,000. *Id.* at 352.

[61] Pub. L. No. 135, 69 Stat. 282, (codified as amended at 15 U.S.C. § 1 (1958)). The average fine imposed under the Sherman Act between 1946 and 1953 was reportedly $2600. Victor H. Kramer, Comment, *Criminal Prosecutions for Violations of the Sherman Act: In Search of A Policy*, 48 GEO. L. J. 530, 532 n.9 (1960).

[62] Kramer, Comment, *supra* note 61, at 530 n. 1-2 (citing United States v. McDonough Co., CCH Trade Reg. Rep. (1959 Cas.) ¶ 69,482 (Four corporate executives sentenced to ninety days in jail); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954)). For instances of jail sentences for Sherman Act violations between 1890 and 1946, *see* STAFF OF H.R. COMM. ON SMALL BUSINESS, 79TH CONG., 2D SESS., UNITED STATES VERSUS ECONOMIC CONCENTRATION AND MONOPOLY, STAFF REPORT TO THE MONOPOLY SUBCOMMITTEE, PURSUANT TO H. RES. 64 257 (Committee Print 1946). In United States v. McDonough Co., 1959 Trade Cas. ¶ 75,882 (S.D. Ohio), several executives of a small garden tool manufacturing company argued against a jail sentence, noting that during the then fifty-nine-year life of the Sherman Act, no jail sentences were imposed upon executives who entered pleas of *nolo contendere*. The court

ranking officials in the infamous electrical equipment conspiracy, a Department of Justice official optimistically predicted that "similar sentences in a few cases each decade would almost completely cleanse our economy of the cancer of collusive price fixing and the mere prospect of such sentences is itself the strongest available deterrent to such activities."[63]

By the 80th anniversary of the Sherman Act in 1970, however, "only 19 individuals were actually sentenced to jail for pure antitrust offenses (not involving labor or violence) for a total of only twenty-eight months."[64] With no significant abatement in cartel behavior, Congress in 1974 made Sherman Act violations felonies with prison terms of up to three years and increased the maximum criminal fines to $1,000,000 for corporations and $100,000 for individuals.[65]

But antitrust violators still spent little time in jail. For fiscal 1976, the *total sum* of incarceration for all seventy-five defendants convicted solely of antitrust violations was two and a half months (compared to the average sentence *per defendant* of 45.7 months for securities fraud, 22.6 months for bank embezzlement, and 15.4 months for tax fraud).[66] The head of Department of Justice's Antitrust Division in 1976 observed that a higher percentage of persons convicted of violating the migratory bird laws were sentenced to

rejected the defendants' argument, sentencing the executives to 90-day jail sentences.

[63] Spivack quoted in DONALD R. CRESSEY & DAVID A. WARD, DELINQUENCY, CRIME, AND SOCIAL PROCESS 210 (1969).

[64] Joe Sims, Deputy Assistant Att'y Gen., Dep't of Justice, Antitrust Div., Speech before the Reg'l Conference on White Collar Crime: Price Fixing—Felony or Formality? Sentencing in Criminal Antitrust Cases (Feb. 15, 1977), *in* II CLABAULT & BLOCK, *supra* note 21, at 569. Despite the notoriety of the electrical equipment price fixing conspiracy, no one convicted of antitrust violations in the seven years thereafter (1962-68) received prison sentences. Donald I. Baker & Barbara A. Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 623 n.16 (1977).

[65] Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974).

[66] *See* Baker, *supra* note 13, at 532; *see also* Alan B. Morrison, *Sentencing in Criminal Antitrust Cases*, 46 ANTITRUST L.J. 528, 530 (1977).

prison, and for longer terms, than antitrust offenders.[67] Despite the newly created felony, hard-core cartels were still not deterred: "As we look harder for criminal antitrust violations, we find more and more."[68]

In 1977, to combat the rising number of price fixing cartels detected, the Department of Justice issued policy directives to its attorneys regarding sentencing recommendations for such hard-core cartel behavior: "Fines are usually poor alternatives to prison sentences and should be used and viewed only as a second choice. Accordingly, we would prefer to recommend a fine only in those circumstances where we conclude that a prison sentence is not appropriate."[69] These policy guidelines were "an effort to increase the risks for price-fixing. They make clear to price-fixers that the Antitrust Division will move against them individually (and not just against their corporations) and that the Division will recommend stiff prison sentences upon securing convictions."[70] But, as one former Department of Justice official observed, "federal judges were reluctant to sentence price fixers to jail and tended to attempt to come up with alternative 'public service' type sentences."[71] The former Assistant Attorney General believed the reason for this reluctance was "that antitrust price fixers were often pillars of the community, supporters of charity, and posed no physical danger to other members of society."[72]

In its fiscal year of 1980, the Department of Justice's Antitrust Division filed fifty-five criminal cases (about four

[67] Baker, *supra* note 13, at 532.

[68] *Id.* at 530.

[69] Memorandum from U.S. Dep't of Justice Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act (Feb. 24, 1977) (reprinted in II CLABAULT & BLOCK, *supra* note 21, at 563).

[70] Att'y Gen. Griffin B. Bell, Address at the Harvard Law Review Annual Banquet (Mar. 19, 1977), *in* 806 ANTITRUST & TRADE REG. REP. (BNA), at F-1 (Mar. 22, 1977).

[71] Baker, *Use of Criminal Law Remedies*, *supra* note 40, at 706.

[72] *Id.*

times the 1972 level, and the highest since World War II), with the average jail sentence now up to three months.[73]

In 1984, the Criminal Fine Enforcement Act and Sentencing Reform Act raised fines for all federal crimes, thereby increasing the maximum fine for individuals convicted of an antitrust violation to $250,000. Congress, in the Criminal Fine Enforcement Act, also created an alternative for the agencies to calculate the maximum fine for corporations or individuals as twice the loss suffered by victims or twice the gain realized by the offender.[74] The purpose of increasing the fine levels was to make criminal fines a significant and more severe punishment and thereby to foster fines as an alternative or supplement to incarceration.[75]

In 1987, the U.S. Sentencing Commission noted when its Guidelines went into effect that antitrust crimes would be treated more severely. Under the pre-Guidelines practice, only thirty-nine percent of individual antitrust offenders were incarcerated, and the average length of incarceration was only forty-five days.[76] The Commission believed at the time that the most effective means to deter individuals from committing antitrust crimes was "through imposing short prison sentences coupled with large fines."[77]

By 1990, some antitrust commentators argued that the prevailing exposure under the Sentencing Guidelines for antitrust violations along with other legal and marketplace sanctions was "likely to be so large that it will cause a

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[73] Sanford M. Litvak, Asst. Att'y Gen., Dep't of Justice, Antitrust Div., Speech before the Annual Antitrust Institute: Antitrust Division Criminal Enforcement Policy: The View from Washington (Nov. 7, 1980), *in* II CLABAULT & BLOCK, *supra* note 21, at 632.

[74] Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3143, *reenacted in* Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, 100 Stat. 1279 (codified as amended at 18 U.S.C. § 3571(d) (2000)).

[75] SENTENCING GUIDELINES IN ANTITRUST, *supra* note 55, at 10 (citing H.R. REP. NO. 98-906 (1984)).

[76] *Id.* at 13 (citing U.S. SENTENCING GUIDELINES MANUAL § 2R1.1, cmt. (1987)).

[77] U.S. SENTENCING GUIDELINES MANUAL § 2R1.1, cmt. (1987).

serious overdeterrence problem."[78] Congress disagreed. Still finding the prevailing criminal fine provisions inadequate to deter price fixing, Congress increased the maximum criminal fines to $10 million for corporations and $350,000 for individuals.[79] Despite the Department of Justice's efforts to improve its criminal antitrust record, Congress felt that this emphasis had "done little to stem the tide of illegal price fixing, procurement fraud, and bid rigging conspiracies."[80] Fine levels were too low to effectively deter these conspiracies, and Congress felt that courts were "reluctant to impose maximum fines, even for willful [antitrust] violations."[81] This proposed tenfold increase in corporate fines was meant to "signal to businesses and courts that penalties imposed should be higher in order to improve compliance with the antitrust laws."[82]

Convinced in 1991 that imprisonment was a more effective deterrent than fines, the Sentencing Commission increased the potential incarceration range for antitrust offenders while reducing the fine range for individuals in its sentencing guidelines for antitrust violations.[83] Calculating fines for corporate offenders underwent a "dramatic departure" from the 1987 Guidelines as it became more complicated, with a "resulting fine [that could] be much higher than under the 1987 Guidelines."[84] Before 1995 the largest criminal fine imposed against a criminal antitrust defendant was $6 million; for corporations sentenced for antitrust violations in fiscal years 1997, 1998, and 1999, the

[78] Cohen & Scheffman, *supra* note 47, at 334.

[79] Antitrust Amendments Act of 1990, Pub. L. No. 101-588, § 4, 104 Stat. 2879, 2880 (codified as amended at 15 U.S.C. §§1-3 (2004)); *see also* S. REP. No. 101-287, *as reprinted in* 1990 U.S.C.C.A.N. 4108 (May 14, 1990).

[80] S. Rep. No. 101-287 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4108, 4111.

[81] *Id.*

[82] *Id.*

[83] SENTENCING GUIDELINES IN ANTITRUST, *supra* note 55, at 31 (citing U.S.S.G., Amendment 377).

[84] *Id.* at 41.

average criminal fine far exceeded $6 million.[85] The fines imposed on corporate antitrust offenders in 1997 and 1998 were virtually identical to the *total* fines that the Department of Justice imposed in the twenty year period between 1976 and 1995.[86] In the 1990s, the average jail time for antitrust offenders also increased to eight months.[87] In 1999, the Department of Justice secured an antitrust fine of $500 million against F. Hoffman-LaRoche, Ltd., which represented "the largest criminal fine ever imposed in the United States under any federal criminal statute."[88]

Between 2000 and 2004, more than "80 years of imprisonment [were] imposed on antitrust offenders, with more than 30 defendants receiving jail sentences of one year or longer."[89] In 2002, courts sentenced antitrust offenders prosecuted by the Department of Justice "to a record number of jail days, more than 10,000 in all."[90] The average jail sentence for antitrust offenders increased to eighteen months in 2002[91] and reached a then record of twenty-one months in 2003.[92]

But feeling that the criminal penalties were still sub-optimal, in 2004 Congress again increased the maximum

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[85] Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 715 (2001).

[86] *Id.*

[87] 2005 Hammond AMC Testimony, *supra* note 41, at 54.

[88] *Id.* at 68-69.

[89] U.S. DEP'T OF JUSTICE, ANTITRUST DIV., STATUS REPORT: AN OVERVIEW OF RECENT DEVELOPMENTS IN THE ANTITRUST DIVISION'S CRIMINAL ENFORCEMENT PROGRAM 3 (2004) [hereinafter ANTITRUST STATUS REPORT], *available at* http://www.usdoj.gov/atr/public/guidelines/202531.htm.

[90] *Id.* One issue is that the Department of Justice's Antitrust Division can prosecute other crimes when they occur in connection with an anticompetitive scheme, such as mail fraud, or "affect the integrity of the investigatory process" (such as obstruction of justice). ANTITRUST DIVISION MANUAL, *supra* note 23, at ch. III, § F.12. Thus, it may be that the terms of incarceration cited herein include sentences for these other related criminal offenses.

[91] 2005 Hammond AMC Testimony, *supra* note 41, at 54.

[92] ANTITRUST STATUS REPORT, *supra* note 89, at 1.

Sherman Act fines for corporations tenfold, from $10 million to $100 million and increased the maximum fine for individuals from $350,000 to $1 million.[93] Congress also more than tripled the maximum incarceration period from three years to ten years.[94] Congress intended to signal through these increased penalties that "criminal antitrust violations are serious white collar crimes that should be punished in a manner commensurate with other felonies."[95]

The Sentencing Commission thereafter amended its antitrust guidelines in three significant ways by:

- raising the base offense level for individual defendants two levels, such that an executive (with no or minimal prior criminal history) convicted of an antitrust offense would face a sentence of ten to sixteen months imprisonment before other mitigating or aggravating factors are taken into account;[96]
- amending the commentary accompanying the Guidelines "to ensure that courts consider a defendant's particular role in the antitrust offense";[97] and
- amending the "volume of commerce" table, which increased the fine levels. This was done in

[93] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (codified as amended at 15 U.S.C. §§ 1-3 (2006)).

[94] *Id.*

[95] 150 Cong Rec. H3654, 3658 (daily ed. June 2, 2004) (supplemental legislative history by Reps. Sensenbrenner and Conyers).

[96] U.S.S.G. § 2R1.1(a); Written Statement of the U.S. Sentencing Commission before the Antitrust Modernization Commission, Nov. 3, 2005, at 5-6, *available at* http://www.amc.gov/commission_hearings/criminal_remedies.htm.

[97] *Id.* at 6. One example is a four level enhancement if a sales manager organizes or leads the price-fixing activity of five or more participants to reflect her or his role in the offense. *Id.* The commentary also suggests that when setting a fine under the antitrust guidelines, "courts consider the extent of the defendant's participation in the offense, the defendant's role in the offense, and the degree to which the defendant personally profited from the offense (including salary, bonuses, and career enhancement)." *Id.* at 6-7.

response to data indicating that the financial magnitude of antitrust offenses has increased significantly and to provide "greater deterrence for large-scale price-fixing crimes."[98]

In its 2004-2005 fiscal year, the Department of Justice secured sentences for antitrust convictions of over 13,000 jail days, with the average jail sentence being twenty-four months, both of which were records in the history of the Department of Justice's Antitrust Division.[99] The eleven longest jail sentences in the Antitrust Division's history were imposed in the past six years.[100] The United States today is by far the worldwide leader in imposing jail sentences for antitrust crimes.[101]

As one Department of Justice official recently told the Antitrust Modernization Commission, "[w]e expect these changes to induce more cartel participants to break the code of silence and come forward, and ultimately to make more potential violators think twice before forming cartels."[102] On the other hand, when asked about further raising the maximum fine levels to $200 million, another Department of Justice official responded that he "wouldn't have any problem with that."[103]

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[98] U.S.S.G. § 2R1.1(b)(2); Written Statement of the U.S. Sentencing Commission before the Antitrust Modernization Commission, *supra* note 96, at 6.

[99] 2005 Hammond AMC Testimony, *supra* note 41, at 53.

[100] 2005 Hammond Written Statement, *supra* note 41, at 1.

[101] OECD Cartel Report, *supra* note 35, at 4, 11 (noting that only the United States and Canada imposed sentences of imprisonment for antitrust crimes during OECD survey period of 1996-2000; Canada reported three such sentences, while the United States reported twenty-eight sentences in 1999 alone).

[102] *International Antitrust Issues: Hearing Before the Antitrust Modernization Commission*, 3 (Feb. 15, 2006) (statement of Gerald F. Masoudi), *available at* http://www.amc.gov/commission_hearings/pdf/Statement_Masoudi.pdf.

[103] 2005 Hammond AMC Testimony, *supra* note 41, at 78. The Division, as Hammond noted, under the Alternative Fine Statute, had secured fines in excess of $200 million on several occasions.

E. No Clear Evidence that Optimal Deterrence Has Been Achieved

It is unknown, however, whether the significant increases in maximum fines and terms of incarceration have significantly reduced the number of illegal cartels.[104] Given the difficulty in detecting cartel behavior, it is impossible to give any accurate accounting of the number of hard-core cartels. Also, besides the deterrent effects of criminal and civil penalties, other factors, such as industry conditions (high entry barriers, market demand, and capacity restraints on fringe participants) and the active antitrust enforcement of anticompetitive mergers (to prevent the increased likelihood of tacit or express collusion) may deter a cartel's formation and success. Thus, it may be difficult to measure what impact, if any, the prevailing criminal and civil penalties have had in deterring cartel behavior.

One could point to some anecdotal evidence that cartel members are reluctant to meet in the United States for fear of criminal prosecution.[105] But this does not necessarily mean that the U.S. penalties have effectively deterred the cartel's formation, only that the venue for the illicit meeting has changed.[106] More promising, as the Organization for Economic Co-operation and Development ("OECD") noted, are some recent examples where cartels carved out the

[104] As Kahan and others have observed, the national crime rate rose in the 1960s and persisted at this level through the early 1990s, even though society's reliance on incarceration increased during the 1980s. The economic theory of optimal deterrence cannot explain why this increase in expected punishment did not successfully reduce crime rates to their earlier levels. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 361 (1997).

[105] *See, e.g.*, Telephone Call from ADM Headquarters (July 13, 1993), *available at* http://www.usdoj.gov/atr/public/speeches/4489-2.pdf.

[106] This mistaken assumption that fixing prices outside the United States offers a shield from antitrust prosecution also draws into question how rational these rational profit-maximizers are.

United States from their operations to avoid the risk of criminal sanctions.[107]

The annual number of criminal antitrust cases has not changed dramatically. Between 1947 and 1962, the number of criminal antitrust cases fluctuated between six and thirty-four.[108] Between 1996 and 2005, the number fluctuated between twenty-three and fifty-seven.[109] Reliance on the annual number of criminal antitrust prosecutions, however, can be misleading. Different administrations may have different antitrust priorities. During the 1980s under the Reagan and Bush Administrations, for example, the Department of Justice filed 623 criminal antitrust cases, which is significantly more than in any other decade since the Sherman Act's enactment.[110] But during this time, the Department of Justice's Antitrust Division lost nearly half its attorneys, and the balance prosecuted mostly localized bid-rigging cartels.[111] Since the mid-1990s, the Department

[107] OECD 3rd Report, *supra* note 32, at 27. The OECD does not elaborate on the number of these cartels or the amount of commerce in the United States relative to the rest of the world. Another promising study found that the vitamin cartels raised prices more in those Asian, Western European, and Latin American economies that do not have active cartel enforcement regimes than in nations with strong enforcement regimes. Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel*, ANTITRUST BULLETIN 689, 718 (2003).

[108] Note, *The Frequency of Price Fixing: An Indication*, 57 NW. U. L. REV. 151, 154 (1963).

[109] DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1996-2005, *available at* http://www.usdoj.gov/atr/public/workstats.pdf.

[110] POSNER, ANTITRUST LAW, *supra* note 29, at 36.

[111] The number of Department of Justice attorneys in the Antitrust Division declined from 456 in fiscal year 1980 to 229 in 1989. U.S. Dep't of Justice, Antitrust Div., *Opening Markets and Protecting Competition for America's Businesses And Consumers* 38 (Apr. 7, 1995), *available at* http://www.usdoj.gov/atr/public/div_stats/0172.htm [hereinafter *DOJ Opening Markets Report*]. Of the 521 restraint of trade cases brought by the Department of Justice between fiscal years 1982 and 1988, 245 involved price fixing or bid rigging in road construction and forty-three involved government procurement. U.S. Gov't Accountability Off., Report to the Chairman, U.S. House of Representatives Committee on the Judiciary, *Justice Department: Changes in Antitrust Enforcement Policies*

of Justice has focused more on prosecuting international cartels, which, though fewer in number, involve a greater amount of commerce.[112] Moreover, the Department of Justice at times may devote more resources to investigating other civil antitrust violations, such as monopolistic anti-competitive practices. One cannot simply conclude then that because 416 criminal antitrust cases were prosecuted in the 1990s, as opposed to 623 cases in the 1980s, that price-fixing is being effectively deterred, as 416 is still much higher than in any other decade since the 1890s.[113] Likewise, a survey of

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& Activities, GAO/GGD-91-2 43, Oct. 29, 1990 at 43. On the other hand, between 1981 and 1988, the federal antitrust agencies initiated three Section 2 cases to target anticompetitive monopolistic practices, the lowest in any eight-year period since 1900. Moreover, the number of antitrust cases involving Fortune 500 firms dwindled, leaving some to argue that the Reagan administration pursued an "aggressive campaign to collar a hapless, economically trivial parade of asphalt suppliers, lawyers for indigent criminal defendants, moving and storage firms, bakeries, individual physicians, obscure trade associations and a host of other commercial pygmies." William E. Kovacic, *Steady Reliever at Antitrust*, WALL ST. J., Oct. 10, 1989, at A18.

[112] *See* U.S. DEP'T OF JUSTICE, STATUS REPORT: INTERNATIONAL CARTEL ENFORCEMENT (2001), *available at* http://149.101.1.32/atr/public/criminal/8279.pdf. *See also* Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798 (2001) (examining the ways in which the Department of Justice enforces antitrust regulations against international cartels). Since its fiscal year 1997, the Department of Justice's Antitrust Division has obtained nearly $3 billion in criminal fines, of which over ninety percent was in connection with the prosecution of international cartel activity. 2005 Hammond AMC Statement, *supra* note 41, at 1.

[113] Moreover, the 416 cases prosecuted in the 1990s, which occurred after antitrust violations became felonies, are a significantly higher tally than for any decade between the 1890 and 1970, when such violations were misdemeanors. *See* POSNER, ANTITRUST LAW, *supra* note 29, at 36. Numbers alone, however, may be misleading for several reasons. First, the total number of criminal cases brought by the Department of Justice's Antitrust Division is typically greater than the number of criminal cases in which primarily a Section 1 violation is alleged. At times, for example, prosecutors may elect to charge mail fraud rather than an antitrust violation. For example, according to its ten year workload statistics, fifty-two of sixty-three of the Department of Justice's Antitrust Division criminal cases filed in 2000 involved a Section 1 claim; the eleven other

cartel overcharges does not demonstrate that cartel activity has been significantly deterred.[114]

Although antitrust officials in the past believed that increasing the criminal penalties would significantly deter cartel behavior, there is reason to believe that optimal deterrence is still elusive. Despite the sharp increase in penalties over the past three decades, many cartels involving multinational corporations are still being detected. The Department of Justice's Antitrust Division has far more attorneys now than it did when antitrust violations were misdemeanors, and each year these attorneys are busily prosecuting as many, if not more, cartels.[115]

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criminal cases charged primarily other federal crimes, such as perjury, mail fraud, contempt, obstruction of justice, or false statements. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 1996-2005 7-8, *available at* http://www.usdoj.gov/atr/public/workstats.pdf. Second, all the cartel members can be prosecuted in one case, with all the firms and executives indicted together, or separately, as individuals and corporations are picked off in plea agreements or separate prosecutions. Third, for comparisons in numbers to be meaningful, the probability of conviction, which is not readily quantifiable, would have to remain relatively constant. If the probability of conviction increases, then the number of convictions may increase (if the overall number of hard-core cartels remains constant) or decrease (if the overall number of cartels decreases as cartels members are more concerned about being caught). Similarly, if probability of conviction decreases (for example, due to a change in enforcement priorities), then the number of convictions may decline (if the overall number of cartels remain constant) or increase (as total cartel activity rapidly increases given that administration's lax antitrust enforcement). Thus, a low (or high) number of antitrust criminal prosecutions could reflect in theory either aggressive or lax antitrust enforcement.

[114] Connor and Lande looked at 845 estimates of cartel overcharges from 1780 onward found in nearly 200 publications. *See* Connor & Lande, *supra* note 3, at 535. These surveys, primarily published peer reviewed studies by economists, showed overall no strong trend in cartel markups over time. *Id.* at 540-41. For example, the estimated median average cartel markup between 1946 and 1973 (which was before antitrust violations were felonies) was fifteen percent compared to twenty-four percent for the periods of 1974-1990 and 1991-2004. *Id.* at 543.

[115] The number of Antitrust Division attorneys at the end of its 1970 fiscal year was 291 versus 364 in 2004. *DOJ Opening Markets Report*, *supra* note 111, at 40; Org. for Econ. Co-operation and Dev.'s Directorate

The predictable response under optimal deterrence theory would be to either: (i) increase the probability of detection (which is difficult given the nature of these hard-core cartels and the implementation of a generous corporate leniency program to attract cartel members to implicate their co-conspirators[116]) or (ii) increase the criminal (and/or civil) penalties, as they are presumably sub-optimal in deterring hard-core cartels.[117] Threatening price fixers with even more severe punishments, in theory, should reduce enforcement expenditures and deter such cartel activity.[118] Taking this idea to the extreme, society could lower its antitrust enforcement expenditures by hanging a price fixer now and then.[119]

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for Fin., Fiscal and Enter. Affairs, Competition Comm., *Annual Report of Competition Policy Developments in the United States 2003-2004* 6 (May 25, 2005), *available at* http://www.oecd.org/dataoecd/51/41/35111334.pdf versus 323 in 1994; *see also* 2003 Pate Speech, *supra* note 1, at 3 (noting that with one hundred grand juries investigating suspected cartel activity, "[t]oday, all aspects of our enforcement program against cartels are robust"). Moreover, the rate of amnesty applications in the first six months of fiscal year 2003 was three per month, "an all time high." *Id.* Under the Corporate Leniency (or Amnesty) Program, as revised in 1993, amnesty is automatic if there is no pre-existing investigation, and may be available if the company cooperates after the investigation is underway, and all officers, directors, and employees of a corporation qualifying for automatic amnesty are protected from criminal prosecution. U.S. DEP'T OF JUSTICE, STATUS REPORT: CORPORATE LENIENCY PROGRAM 1 (2001), http://149.101.1.32/atr/public/criminal/8278.pdf; Spratling, *supra* note 112, at 800. More information about the Department of Justice's leniency program is available at http://www.usdoj.gov/atr/public/guidelines/0091.htm. Similarly, the European Commission, which launched its leniency program in 2002, reportedly received 167 cartel confessions in the past three years. Alan Riley, *What Price a Jail Sentence?*, THE TIMES, Sept. 5, 2006, at 6.

[116] For information on the Department of Justice's leniency program, *see supra* note 115.

[117] Michael K. Block & Joseph Gregory Sidak, *The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131, 1131-32 (1980).

[118] *Id.* at 1132.

[119] *Id.* In fairness to the authors, they made this point only in jest and argued that in reality the "harshest feasible antitrust sanction would be a

F. Problems with Optimal Deterrence Theory

1. Difficulty in Empirically Measuring Deterrence

It can be difficult to measure deterrence empirically because there is "no reliable way to determine the causes of things that have not happened."[120] The OECD has addressed this difficulty:

> Anecdotal evidence exists that criminal sanctions against individuals can have deterrent effects. There is, however, no systematic empirical evidence available to prove such effects, and to assess whether the marginal benefit of introducing sanctions against individuals (in the form of less harm from cartel activity) exceeds the additional costs that in particular a system of criminal sanctions entails (including the costs of prosecution as well as of administering a prison system). There appears to be agreement that it would be virtually impossible to generate the relevant data.[121]

Thus, while there is reason to believe that criminal sanctions have had a deterrent effect in the area of antitrust law, it is difficult to confirm this hypothesis with empirical evidence.

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fine or damage award large enough to confiscate the offender's entire wealth." *Id.* at 1132 n.9. However, a former head of the Antitrust Division reported how seven merchants were charged with over pricing and attempting to create a scarcity in Ethiopia's grain and peppers market. After these merchants were summarily executed by Ethiopian military rulers, prices for these commodities in the following three weeks dropped by nearly sixty percent. Donald I. Baker, Assistant Att'y Gen., Antitrust Div., Dep't of Justice, *To Make the Penalty Fit the Crime: How to Sentence Antitrust Felons, Remarks before the Tenth New England Antitrust Conference* (Nov. 20, 1977), *in* 2 JAMES M. CLABAULT & MICHAEL K. BLOCK, SHERMAN ACT INDICTMENTS, 1955-1980 537 [hereinafter *Baker Speech*] (citing WASH. POST, Aug. 9, 1976, at A21).

[120] OECD Cartel Sanction Report, *supra* note 44, at 105.

[121] *Id.* at 7. *See also* OECD 3rd Report, *supra* note 32, at 27 (arguing that individual sanctions can be a valuable complement to corporate fines, which are rarely severe enough to impose an optimal deterrent).

2. Theory's Difficulties in Application

As the ICN[122] has reported, this "theoretically ideal way of setting a deterrent fine is somewhat difficult to apply in practice, since it is not easy to assess and prove the benefits derived from cartel activities and almost impossible to determine the probability of detection."[123] There is no uniformity across cartels in the amount of (i) overcharges, (ii) unlawful gains to cartels and to each cartel member in profits, or (iii) benefits that the individual participants obtained as a result of the cartel (such as salary increases, etc.). Nor is there any uniformity across cartels of the likelihood of being detected. As a result, none of the countries surveyed by the ICN can actually apply the optimal deterrent formula in practice.[124] Each cartel, under this economic formula, could have its own optimally deterring fine, which may fall above or below the average (or maximum) antitrust fines.

The optimal deterrence formula also raises an interesting issue of the net harm from a cartel. The scope of social costs that cartels impose is unclear. Since such hard-core cartel behavior is *per se* illegal, the Department of Justice, when

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[122] Formed in 2001 by antitrust agencies from fourteen jurisdictions, the International Competition Network ("ICN"), according to its website, is an "international body devoted exclusively to competition law enforcement." International Competition Network, http://international competitionnetwork.org/aboutus.html (last visited Sept. 28, 2006). Its membership is "open to any national or multinational competition authority entrusted with the enforcement of antitrust laws." *Id.* It currently has ninety-eight competition agency members, including the U.S. Department of Justice and the Federal Trade Commission, from eighty-five jurisdictions. International Competition Network, http://internationalcompetitionnetwork.org/icn_membership_list.pdf (last visited October 19, 2006).

[123] ICN Report, *supra* note 15, at 3, 59. The ICN reported that only two of the eighteen surveyed countries have used multiples of illegal gains to calculate the maximum fines. *Id.* at 59. In just fourteen (less than four percent of the total) cases brought between 2001 and 2003 did the antitrust enforcers take into account the estimates of the proceeds of the cartel. *Id.*

[124] ICN Report, *supra* note 15, at 3, 55.

prosecuting antitrust crimes, unlike other white collar federal offenses, need not prove the cartel's net harm to others.[125] The Chicago school of antitrust views a cartel's net harm narrowly—typically, its deadweight welfare loss.[126] Although others may view the wealth transfer from the consumers to the cartel members as theft, the Chicago school adherents view it agnostically as it does not lessen total wealth, so any inequities of such wealth transfers should be addressed by the legislature.[127] But the net harm from a

[125] Private plaintiffs and the United States (when seeking civil damages for overcharges under section 4A of the Clayton Act) must prove their damages. But because most private actions settle, final verdicts where the fact-finder actually calculated the cartel's overcharge are, as Connor and Lande found, "surprisingly rare." Connor & Lande, *supra* note 3, at 552, 556 (of all federal antitrust cases, authors found only twenty-five final verdicts in a collusion case where overcharge was calculated). Moreover, if the Guidelines fine is too low, the Department of Justice can seek twice the loss suffered by victims or twice the gain realized by the offender under 18 U.S.C. § 3571(d), which it has done but mostly in the context of a mutually agreed-upon fines negotiated with defendants in a plea agreement.

[126] Deadweight loss refers to the triangular area under a downward-sloping demand curve representing the purchases foregone as a result of the supracompetitive pricing. *See* BORK, *supra* note 4, at 111.

[127] BORK, *supra* note 4, at 111. *See also* Landes, *supra* note 46, at 653 (noting that the "standard economic rationale for making a cartel illegal is not that it charges too high a price or that it redistributes income from consumers to cartel members, but that it restricts output, causing a deadweight or efficiency loss . . . a loss to consumers without an offsetting gain to producers."); OECD Cartel Report, *supra* note 35, at 6 (noting economists' agnosticism about whether society is made worse off by a mere wealth transfer from consumers to cartel members). But a wealth transfer may not be costless. If I rob your home, for example, that may impose additional costs on you and your neighbors, such as in repairing the broken window, higher insurance premiums, cost of new alarm systems, more police, etc. Thus, aside from depriving those with a higher marginal utility of that extra dollar of consumer surplus, the wealth transfer may impose other costs. If the poor have to spend a higher percentage of their budget on a cartel's or monopolist's product, that might impose other costs, such as the increased use of federal aid and subsidies. Bork replies that these types of questions arguably veer antitrust toward social and policy issues, better left to the legislature. *See* BORK, *supra* note 4, at 114-15. But if one takes a total welfare approach, how accurate is it, and what

cartel may likely exceed this deadweight welfare loss and wealth transfer. A cartel can impose other social costs, such as poorer quality, fewer choices for consumers, and less innovation.[128] Moreover, the legislative history of the Sherman Act references other non-economic concerns about uncurbed market power, such as foreclosing opportunities to enter markets and the dangers to American democracy if such power were concentrated in the hands of the few.[129] As the Supreme Court wrote twenty-one years after the passage of the Sherman Act:

> [The debates] conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of

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basis exists to consider only certain costs (such as deadweight loss) while excluding others?

[128] OECD Cartel Report, *supra* note 35, at 6 (noting that sheltering cartel members from "full exposure of market forces" may reduce pressure to control costs and innovate).

[129] Republican Senator John Sherman identified the inequality of condition, wealth, and opportunity as the greatest threat in disturbing social order: this inequality "has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition." 21 CONG. REC. 2460 (1890). The increasing threat was not government-bestowed monopolies (although some expressed concern about import tariffs sheltering domestic trusts), but the emergence of the modern-day corporation and its offspring of monopolies and trusts. U.S. corporations, "which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters." Fourth Annual Message of President Grover Cleveland, dated Dec. 3, 1888, *reprinted in* 1 EARL W. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 58 (1978). If Congress did not heed this appeal, "there will soon be a trust for every production and a master to fix the price for every necessity of life." 21 CONG. REC. 2460 (1890). For further discussion of the Sherman Act legislative history, including Bork's interpretation and the criticisms thereto, see Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879 (1990); Robert H. Lande, *Wealth Transfers As The Original And Primary Concern Of Antitrust: The Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871 (1999). For the political dimensions of the Sherman Act, see Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

> corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally.[130]

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[130] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 50 (1911). Justice Harlan further expanded upon the public sentiment:

> All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. . . . Guided by these considerations, and to the end that the people, *so far as interstate commerce* was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the anti-trust act of 1890 . . . .

Id. at 83-84 (concurring and dissenting in part); *see also* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553-54 (1944) (arguing that trusts and monopolies "were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them."). Among the trusts Congress noted were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Steel Trust, the Cordage Trust, the Cotton-Seed Oil Trust, and the Whiskey Trust, and these trusts had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 319 (1897).

Even if economic efficiency was a proper goal of antitrust, the harms from cartels could encompass rent-seeking behavior.[131] Consequently, to apply the optimal deterrence theory, one must accurately assess the net harm, which under Oliver Williamson's famous trade-off calculus for weighing the effects on total welfare, would include, to the extent quantifiable: (i) the cost from slower (or the lack of) technological progress once a monopolist or cartel lays claims to a national market, or (ii) the other social costs imposed (or incurred) by the monopolist or cartel, such as the political implications of control over wealth, which are a matter for "serious" concern.[132]

3. Need Global Fine to Deter Global Harm

Even if the Department of Justice and federal courts calculated the cartel's net harm, the criminal fine is likely tied to the cartel's commerce in the United States. If a significant percentage of the cartel's sales are outside the United States, then as Connor and Lande noted, the foreign antitrust penalties coupled with the United States penalties are still likely to fall below the optimal deterrence level.[133] This is because cartel violations in Asia, Africa and South America have "gone virtually unpunished,"[134] and in Western Europe and Canada, the fines tend to be smaller than the U.S. fines for comparable situations.[135] Thus, to achieve optimal deterrence, the economic penalty must, at a minimum, capture the total global supracompetitive profits accrued to the cartel members, which is unlikely today. As

[131] Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

[132] Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968). With a powerful domestic producer, for example, the government may be swayed to erecting protectionist measures. *Id.* at 28. The political implications may be beyond quantification, but as Williamson recognized, the issue is nevertheless important, and cannot be ignored. *Id.*

[133] Connor & Lande, *supra* note 3, at 521.

[134] *Id.*

[135] *Id.*

the OECD reported, there is "ample empirical evidence that corporate sanctions in the form of fines are almost never sufficiently high to be an optimal deterrent, and in most cases are substantially below that level."[136]

4. Anticompetitive Consequences

Even if the statutory maximum fines reached the optimal deterrence level, it is unclear whether these maximum fines could be uniformly implemented. A fine set too high may cripple the corporation competitively, causing it to reduce investments in innovation, and if it cannot absorb or otherwise pass along the penalty, to reorganize under the bankruptcy laws or exit the market.[137] So paradoxically, even if the fine is below the optimal deterrent level, if it is too large, a corporate fine conceivably could further harm consumers with less innovation, and possibly fewer meaningful competitors and higher prices.

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[136] OECD Cartel Sanction Report, *supra* note 44, at 7; *see also* OECD Cartel Report, *supra* note 35, at 5 (identifying in a limited sample only four cases where fines exceeded 100% of the cartel's estimated financial gain, and no cases where the fine was two or three times the gain). Although price-fixers also face a likely private class action for trebled damages in the United States, it is unclear how effective such private actions are in deterring hard-core cartels. Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651 (2006) (arguing that private damages in the United States are insufficient to deter cartel behavior). Moreover, because civil damage cases are not common outside the United States, a multinational cartel may still be able to avoid a monetary sanction that exceeds its illegal gains. OECD Cartel Report, *supra* note 35, at 15.

[137] OECD Cartel Report, *supra* note 35 at 15; ICN Report, *supra* note 15, at 4. Thus, for example, in the graphite electrodes investigation, the last cartel member to come forward paid a higher fine than its co-conspirators, but below the maximum level under the Sentencing Guidelines given its inability to pay the higher fine. Spratling, *supra* note 112, at 805. A related issue for antitrust enforcers is when government agencies debar convicted bid riggers, and wind up with few bidders and supracompetitive bids.

5. Deterring Corporate Executives From Engaging In Hard-Core Cartel Behavior

If only the corporation is fined, then the individual wrongdoers are not directly held accountable for their actions. The conventional wisdom is that the company would invest in such antitrust compliance up to the level where such programs' marginal cost equals the marginal benefit. If too low, the antitrust penalties provide insufficient incentives for companies to monitor their agents.[138] If too high, the penalties, in theory, can deter socially beneficial behavior and induce corporations to overspend on avoidance of these penalties and detecting antitrust violations by their executives.[139] Failure to invest in antitrust compliance would, in theory, lead to shareholder revolt and management turnover. But it is an unresolved issue as to whether, and to what extent, such threats produce the optimal level of corporate antitrust monitoring programs. The ability of shareholders to effectively discipline corporate management is questionable.[140] Ownership may be widely dispersed, and the investments may be indirect and passive, such as through an index fund.[141] So, if the corporation alone were

[138] OECD Cartel Sanction Report, *supra* note 44, at 7.

[139] Kobayashi, *supra* note 46, at 732.

[140] OECD Cartel Sanction Report, *supra* note 44, at 17. It is unclear whether stockholders punish the firm by selling their shares. *See* Kobayashi, *supra* note 46, at 737 (concluding that little evidence exists that corporations suffer from stigma when convicted of antitrust crimes); Cindy R. Alexander, *On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J.L. & ECON. 489, 498-99 (1999). An earlier study found that the present value of a firm fell by about 6% when that firm was accused of an antitrust violation, but the greater the firm's financial resources (as indicated by a greater than average rate of return), the less the negative impact of the antitrust suit. *See* Kenneth D. Garbade, et al., *Market Reaction to the Filing of Antitrust Suits: An Aggregate and Cross-Sectional Analysis*, 64 REV. ECON. & STAT. 686, 690 (1982).

[141] OECD Cartel Sanction Report, *supra* note 44,at 17. Ironically, federal government employees including those at the Department of Justice may invest indirectly in companies criminally prosecuted for price-fixing. The federal government's Thrift Saving Program's popular C Fund,

fined, it is unclear whether it could or would effectively monitor and deter its employees from such price-fixing.

To achieve optimal deterrence then, personal liability may be required.[142] Few countries historically have imposed antitrust fines on individual wrongdoers. Even if other nations followed the United States' example and provided such criminal fines against corporate executives, there appears to be general agreement among the OECD member countries surveyed that the threat of financial penalties alone has little deterrent effects on individuals.[143] It is difficult to prevent a corporation from reimbursing the individual.[144] Even if such reimbursements were outlawed, a corporation could circumvent this prohibition by (i) paying the executives in advance a premium to compensate them for the risk of a fine or (ii) reimbursing the executives through pay increases or other mechanisms not specifically prohibited.[145] Moreover, financial penalties have varying deterrent effects, given the differences in individuals' net worth and the declining marginal utility of money.[146]

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for example, seeks to match the performance of the S&P 500 Index, which includes some of the heaviest-fined antitrust offenders, such as Archer Daniels Midland Co. (fined $100 million in 1996 for price fixing), Pfizer Inc. (fined $20 million in 1999), and Eastman Chemical Co. (fined $11 million in 1998). Likewise, the Thrift Saving Program's I Fund, which seeks to match the performance of the Morgan Stanley Capital International EAFE index, includes heavily fined foreign antitrust offenders such as BASF AG, which was fined $225 million in 1999.

[142] The threat of individual sanctions (and prospect of amnesty) may also encourage executives to reveal information about cartels and cooperate in the investigation. *See* OECD 3rd Report, *supra* note 32, at 25-26.

[143] OECD Cartel Sanction Report, *supra* note 44, at 8.

[144] *Id.*; *see also* Renfrew, *supra* note 34, at 613 (quoting statement from an unidentified "able and well-known district judge" criticizing criminal fines as "meaningless" because individuals are ultimately reimbursed by proceeds of wrongdoing or company).

[145] OECD Cartel Sanction Report, *supra* note 44, at 17.

[146] John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 224 (1991). For example, a fine of $1 million may be draconian to a middle manager, with a net worth of $100,000, but insignificant to a

Likewise, unlike embezzlers, who directly pocket the ill-gotten gains, it is not always clear that corporate executives personally benefit dollar for dollar (or even from a fixed percentage thereof) from the cartel's supracompetitive profits.[147] As the OECD concluded, the executives' compensation may not be calculated solely from the cartel's ill-gotten profits but from otherwise good managerial performance. Thus, "it will typically be impossible to determine how much an individual gained from cartel activity."[148] Neither the United States nor the other eighteen countries surveyed by the ICN have a system established for calculating the maximum criminal penalty by using a percentage of the executive's annual salary or private property.[149]

6. Theory Assumes That Corporate Actors Are Rational Profit Maximizers That Can Readily Weigh Crime's Likely Costs and Benefits

When none of the industrial nations, including the United States, can readily estimate the probability of detection, the net harm from the cartel, or how much the executive will personally benefit from the price-fixing, how likely is it that an executive can accurately make these estimations? Although executives may engage in some cost-benefit analysis,[150] these criminals may not be as "rational" as their

billionaire. Others question the ability of a fine to express moral condemnation, as it may simply reflect the price for engaging in the unlawful conduct. Kahan, *supra* note 104, at 384.

[147] This is not always the case however. Bid riggers at real estate auctions, for example, have agreed that one would buy the property at a below-market price, and then the colluders later hold a private auction where they sell the property at a higher price and divide the profits. Similarly in the lysine conspiracy, the government informant, as it came to light, both price fixed for, and embezzled from, his employer, ADM. *See* KURT EICHENWALD, THE INFORMANT (Broadway 2000).

[148] OECD Cartel Sanction Report, *supra* note 44, at 20.

[149] ICN Report, *supra* note 15, at 65.

[150] For example, one former executive of a company convicted price-fixing gave a rough cost-benefit analysis:

theoretical profit-maximizing counterparts.[151] It is unknown how many executives, before engaging in a price fixing conspiracy, actually calculate their likely sentence under the Sentencing Guidelines.[152] Moreover, the behavioral econ-

> When you're doing $30 million a year and stand to gain $3 million by fixing prices, a $30,000 fine doesn't mean much . . . Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars. Maybe if I were facing a year or more, I would think twice.

Baker Speech, *supra* note 119, at 531 (quoting *Price Fixing: Crackdown Underway,* BUS. WEEK, June 2, 1975, at 48).

[151] Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 177-78 (2000). For a broader survey of behavioral law and economics literature and its questioning rational choice theory, *see* Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1666 n.7 (2003); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law & Economics*, 50 STANFORD L. REV. 1471, 1487 (1998). For its application to antitrust, *see* Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the 21st Century*, 38 LOY. U. CHI. L.J. (forthcoming 2007).

[152] In one study, 278 male inmates were asked, among other things, "When you committed this crime, how likely did you think it was that you would be caught?" and "When you committed the crime, did you know what the likely punishment would be if you were caught?" Seventy-six percent of active criminals and 89 percent of the most violent criminals, as the study found, "either perceive no risk of apprehension or are incognizant of the likely punishments for their crimes." David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 295 (2002). Similarly, as one federal district judge commented, "I have people appear before me and ask them, 'Well, did you know what the guidelines were before you committed this offense?' They say, 'Heck, no.' They don't even know about guidelines." United States Sentencing Commission, Symposium on Federal Sentencing Policy for Economic Crimes and New Technology Offenses, The Nature and Severity of Punishment for Economic Crimes; Determinants of Offense, Seriousness and Offender Culpability (Plenary Session III) (Oct. 12, 2000) (Gilbert, J.), *available at* http://www.ussc.gov/2000sympo/2000sympo.htm. One response is that the issue is not whether each executive accurately calculates the probability of detection and likely punishment, as some may over- or underestimate the likely sentence; rather, the issue is whether executives in aggregate assess the likely punishment. But this too is unknown and needs to be empirically

omics literature questions whether individuals act uniformly and predictably (as their profit-maximizing counterparts) solely in response to monetary penalties.[153] Corporate behavior may also be shaped by various environmental, internal and situational factors.[154]

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tested. *See, e.g.*, Control Risks Group Ltd. and Simmons & Simmons, *International Business Attitudes to Corruption* 10 (2006) (finding that approximately half of executives surveyed from 350 companies in Britain, the United States, Germany, France, the Netherlands, Brazil and Hong Kong claimed to be "totally ignorant" of their countries' laws on foreign corruption), *available at* http://www.crg.com/pdf/corruption_survey_2006_V3.pdf.

[153] For example, one interesting study examined whether financial disincentives (in the form of a monetary fine) curbed unwanted behavior (namely, parents who picked up their children late from certain private day-care centers). Uri Gneezy & Aldo Rustichini, *Incentives, Punishment, and Behavior*, *in* ADVANCES IN BEHAVIORAL ECONOMICS 573 (Colin F. Camerer et al. eds., Princeton Univ. Press 2004). These private day-care centers originally had no rule on what happens when parents picked up their children after 4:00 p.m.; generally, a teacher had to wait with the tardy parent's child. A fine on tardiness was thereafter introduced in some of the day-care centers, which, under optimal deterrence theory, should decrease the incidences of tardiness. Instead, the average number of late-arriving parents increased for these day-care centers. Moreover, after the fine was canceled, the average number of late-arriving parents did not return to the pre-fine levels. For the control group, on the other hand, where no fine was imposed, there was no significant shift of late-arriving parents during this period, and fewer parents reported late in these day-care centers than in the day-care centers with the fine. So why did the monetary penalty increase the undesired behavior? Perhaps, as the authors conclude, parents before were intrinsically motivated to pick up their children on time. The introduction of the fine monetized that lateness into an additional service, offered at a relatively low price. *Id.* at 581-86.

[154] Melissa S. Baucus & Janet P. Near, *Can Illegal Corporate Behavior Be Predicted? An Event History Analysis*, 34 ACAD. OF MGMT. J. 9, 12 (1991) (examining FORTUNE 500 firms convicted between 1974 and 1983 for violations that the decision-makers knew (or should have known) were illegal to determine whether illegal behavior was more likely under certain conditions, such as firm size, affected industry, environmental munificence); Anthony J. Daboub et al., *Top Management Team Characteristics and Corporate Illegal Activity*, 20 ACAD. OF MGMT. REV. 138 (1995).

7. Judges May Reject Optimal Deterrence Theory When Sentencing

Finally, courts historically have been reluctant to apply optimal deterrence theory to individual antitrust offenders.[155] It is unclear whether post-*Booker* courts will resort to this theory to generally deter antitrust offenses by sentencing antitrust offenders to longer sentences (and higher fines) than other wealth transfer crimes, given the lower probability of detecting antitrust crimes.

Participants in several studies, for example, were given cases of wrongdoing and specific information about the probability of detection.[156] Under optimal deterrence theory, decreasing the likelihood of detection should increase the severity of punishment (e.g., the fine for littering on a rural road should be higher than littering in a police station). Instead, these studies found that varying the probability of detection had no effect on the punitive award, as the participants evidently focused on the moral outrageousness of the defendant's actions.[157] From these studies, it was clear that the participants did not "spontaneously think in terms of optimal deterrence"; indeed, they failed to do so even if specifically requested to engage in that task.[158] As Cass Sunstein concluded, people's "moral intuitions are inconsistent with the economic theory of deterrence."[159] Interestingly, in an unrelated survey regarding perceptions of white-collar crime, those surveyed likewise rejected the

[155] *See, e.g.*, United States v. Alton Box Board Co., No. 76 CR 199, 1977 WL 1374, at *5 (N.D. Ill. Mar. 4, 1977) (cautioning that a sentencing judge must use care in economic crime cases to "not get swept away in a surge of mass hysteria and administer punishment that fails to relate either to the defendant or to the actual injury to society that results from his conduct").

[156] Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171 (2004).

[157] *Id.* at 174.

[158] *Id.* at 175.

[159] *Id.*

optimal deterrence theory.[160] Even when a study was conducted on University of Chicago Law School students, who were taught optimal deterrence theory, a majority rejected applying this theory in setting enforcement policies or the proper punitive damages.[161] As the authors concluded, given that "optimal deterrence policies are rejected in both the administrative and the judicial domains among a group likely to be predisposed in their favor strongly suggests that any effort to move in the direction of optimal deterrence would encounter significant popular resistance."[162]

Consequently, Congress, as it has done in the past, may be forced to continue to increase the criminal antitrust penalties to signal to courts to set higher fines. Although the antitrust community has generally accepted the optimal deterrence theory in determining criminal penalties for antitrust violations, given the economic theory's problems, caution is required. Moving antitrust law enforcement policies along this economic theory's direction could be widely perceived as unfair and wrong unless the government can frame the policy so as to fit most comfortably with society's moral intuitions.[163] At a minimum, courts, antitrust policy makers, and enforcers should not rely solely upon this theory in determining the optimal sanctions to deter antitrust violations, especially when morality, an older and more powerful sanction, is available to supplement the economic penalty.

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[160] Donald J. Rebovich et al., *The National Public Survey on White Collar Crime* 13 (National White Collar Crime Center, 2000). When asked whom they thought was more likely to be caught: a robber or fraudster who steals $1,000, seventy-four percent of those surveyed chose the robber versus twenty-two percent for the fraudster. As to whom they thought will be punished more severely, eighty-two percent thought the robber versus sixteen percent for the fraudster. When asked who *should* be punished more severely, thirty-eight percent responded that the punishments should be equal, and thirty-one percent each chose the robber or fraudster.

[161] Cass R. Sunstein, et al., *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237, 246 (2000).

[162] *Id.* at 248.

[163] *Id.*

III. MORALITY

Ultimately, as the ICN recognized, "there seems to be no secret recipe for an effective penalty."[164] If the current criminal and civil sanctions by themselves do not generally deter antitrust crimes, what role can morality play? Moreover, if morality continues to play no role in antitrust crimes, will further attempts to escalate antitrust penalties lead to moral qualms underlying general deterrence?

A. Morality Defined

For the purposes of this article, morality refers to rules of conduct associated with certain distinctive psychological and social attributes, such that a person complies with the conduct to achieve virtue and avoid vices.[165] In addition to the incentives or disincentives that the civil or criminal law provides, morality adds the incentive to form good habits to engender in individuals certain virtuous dispositions and to avoid certain vices and extreme dispositions. Even if such morals or virtues are properly internalized, the moral or virtuous person still exercises rational choice and deliberates as to the proper course of action in accord with what is moral or virtuous. At her noblest level, a virtuous individual exercises such behavior for its own sake, for spiritual reasons, or to attain true happiness. On a lesser level, she may exercise such moral behavior to seek praise and honor from her peers and avoid shame. At a baser level, she refrains from immoral acts to avoid legal punishments. At the vilest level, she willingly commits immoral acts.

B. Can Antitrust Violations Be Immoral?

One could first examine whether antitrust violations in the past were viewed as *mala prohibitum* rather than *mala*

[164] ICN Report, *supra* note 15, at 3.

[165] This definition comes from Steven Shavell, *Law Versus Morality as Regulators of Conduct*, *in* THE ORIGINS OF LAW & ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 396, 398 (Charles K. Rowley & Francesco Parisi eds., Edward Elgar Publ'g 2005).

in se.[166] But reliance on this historical distinction assumes that a crime's morality or amorality remains fixed forever.[167] One aspect of criminal law is educational.[168] As the harms of certain conduct are exposed or fully understood, society's moral condemnation may increase. For example, over the past forty years, environmental and civil rights crimes have transitioned to immoral crimes. On the other hand, the public's desire or acceptance of certain spectacles (e.g., gladiator shows in ancient Rome) may wane as later cultures displace the prevailing views.[169] Acts once deemed immoral (such as pre-marital or homosexual intercourse) may lose their stigma in certain communities. Moreover, later societies' moral condemnation of some actions may not diminish, but their view of an acceptable punishment may change.[170]

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[166] An action is *malum in se* when "it is inherently and essentially evil, that is immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state." BLACK'S LAW DICTIONARY 959 (6th ed. 1990). An action, which is deemed *malum prohibitum* "is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law." *Id.* at 960.

[167] For a fuller explanation of the problems of relying on the *malum in se* and *malum prohibitum* categories, *see* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1570-80 (1997).

[168] ARISTOTLE, NICOMACHEAN ETHICS 200-202 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000); Johannes Andenaes, *The Moral or Educative Influence of Criminal Law*, 27 J. SOC. ISSUES 17, 26 (1971).

[169] Although societal norms have evolved over time to condemn such brutal killings, the blood lust from these gladiator shows tempted St. Augustine's friend, St. Alypius, who succumbing to the crowd, became "delighted with that guilty fight, and intoxicated with the bloody pastime" such that he was no longer the man who entered the arena, but "one of the throng." ST. AUGUSTINE, CONFESSIONS CH. 6, AT 398 (Oxford Univ. Press 1991).

[170] For example, the Old Testament proscribed numerous offenses with death, such as: murder (Gen 9:6, Ex 21:12, Numb 35:16-21); physically abusing one's father or mother (Ex 21:15); cursing one's parents (Ex 21:17); blasphemy against God (Lev 24:14-16, 23); profaning the Sabbath (Ex 31:14, Numb 15:32-36); practicing magic (Ex 22:18); fortune telling and practicing sorcery (Lev 20:27); religious people who mislead others to fall away (Deut 13:1-5, 18:20); adultery and fornication (Lev

A second approach is to assume that because antitrust violations are criminalized, they must be immoral. If, as the academic literature references, hundreds of thousands of regulations are now punishable by criminal penalties,[171] then one may assume that certain conduct today is criminalized even though it carries little or no moral opprobrium. Consequently, neither criminal/civil nor historical distinctions between *mala prohibitum* and *mala in se* provide a satisfactory answer.

Because the Sherman Act does not delineate what specific anticompetitive conduct should be prosecuted criminally as opposed to civilly, there isn't any specific legislative moral opprobrium. But a good starting point is hard-core cartels, which the Department of Justice currently prosecutes criminally. A helpful framework in evaluating the moral content of this criminalized conduct has three overlapping and non-exclusive elements:[172] first, the actor's culpability or blameworthiness, which is supplied by the actor's intent; second, the moral wrongfulness of the action itself, which, as Stuart Green described, is present if the conduct made criminal is viewed by a consensus of society as immoral or in violation of a moral norm; and third, the action's social harmfulness.[173]

1. Antitrust Offender's Culpability or Blameworthiness

One could argue that it would be undesirable for courts and antitrust enforcers to infer culpability given the

20:10-12, Deut 22:22); women having intercourse before marriage (Deut 22:20-21); intercourse when one is engaged (Deut 22:23-24); daughter of a priest practicing prostitution (Lev 21:9); rape of someone who is engaged (Deut 22:25); bestiality (Ex 22:19); worshipping idols (Ex 22:20, Lev 20:1-5, Deut 17:2-7); intercourse with inlaws and incest (Lev 20:11-12, 14, 19-21); homosexuality (Lev 20:13); kidnapping (Ex 21:16); bearing false testimony at a trial (Deut 19:16, 19); and contempt of court (Deut 17:8-13).

[171] Green, *supra* note 167, at 1544-46 n.18 & 25; Coffee, *supra* note 146, at 216.

[172] This helpful framework comes from Green, *supra* note 167, at 1537.

[173] *Id.*

Sherman Act's vague and open-ended prohibition on restraints of trade. For example, a company could act with pure malice against its competitor without violating the antitrust laws (if there is no antitrust injury).[174] Alternatively, the company, acting without any malice, could find itself liable for acts that subsequently proved to be anticompetitive. The fact that the Sherman Act is sufficiently supple to keep apace with changing market practices and economic theory suggests that it is more of a civil regulatory statute than an unequivocal prohibition of the kind typically found in the criminal law.[175]

But even if the Sherman Act is supple, hard-core cartels, the focus of the Department of Justice's criminal actions, have been consistently condemned by conservative and liberal judges, economists and antitrust lawyers throughout the twentieth century.[176] It is therefore doubtful that generating strong moral condemnation of hard-core cartel behavior will have "the dangerous potential of introducing a rigidification of values too soon, of cutting off the debate, or at least restricting the ease of movement to new positions and a new consensus."[177]

Moreover, antitrust is not a strict liability crime and requires that the defendants have some level of intent before

[174] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989) ("[I]ntent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case," as "desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition.").

[175] Kadish, *supra* note 22, at 429.

[176] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 410 n.3 (2004); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); BORK, *supra* note 4, 267-68; U.S. SENTENCING GUIDELINES MANUAL § 2R1.1, cmt. background (2005) ("[N]ear universal agreement that restrictive agreements among competitors . . . can cause serious economic harm.").

[177] Kadish, *supra* note 22, at 446.

criminal liability attaches.[178] Lower courts have held that when the challenged activity is *per se* illegal under the antitrust laws, then the government need only prove the existence of an agreement and that the defendant knowingly

[178] In the context of verification of pricing information, which was not a *per se* illegal antitrust offense, the Court required that defendants either (i) intended a clearly illegal result, such as fixing prices, or (ii) acted with knowledge that illegal results, which actually occurred, were "probable." United States v. U.S. Gypsum Co., 438 U.S. 422, 444-46 (1978). With regard to different mental states, the Court recognized that "mens rea is not a unitary concept" and enumerated four possible levels of intent: (i) purpose, (ii) knowledge, (iii) recklessness, and (iv) negligence:

> In dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place. Our question instead is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow. While the difference between these formulations is a narrow one, *see* ALI, Model Penal Code, Comment on Section 2.02, p. 125 (Tent. Draft No. 4, 1955), we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. [Footnote omitted] In so holding, we do not mean to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass. *Cf.* United States v. Griffith, 334 U.S. 100, 105 [] (1948). We hold only that this elevated standard of intent need not be established in cases where anticompetitive effects have been demonstrated, instead, proof that the defendant's conduct was undertaken with knowledge of its probable consequences will satisfy the Government's burden.

Id. at 444. The Supreme Court viewed intent not strictly as indicia of criminal culpability, but as a mechanism to mitigate overdeterrence, namely, prosecuting conduct "which only after the fact is determined to violate the statute because of antiticompetitive effects." *Id.* at 441.

entered into the alleged agreement or conspiracy.[179] As a practical matter, even for such *per se* illegal antitrust offenses, the Department of Justice indicated that it would not prosecute the offense criminally if "there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action."[180]

Often the antitrust crimes' defilement originates from within, namely borne out of the executives' hearts to deceive, steal, and cheat. The "unlawful act [is] consequent upon such vicious will," not vice-versa.[181] Competition authorities have noted the "ample evidence" that cartel participants are not honest business people who inadvertently became involved in unlawful conduct, but instead were fully aware of their unlawful conduct, devising "sophisticated regimes" to operate their cartels and sometimes going to great lengths to hide the existence of their agreements.[182] For example, in the electrical equipment conspiracy cases, the Department of Justice's retained cryptographer was unable to find a cartel pattern in the jumble of switchgear bids. The prosecutors eventually discovered, from a co-conspirator's notes, that the conspirators rotated bids according to the phases of the moon.[183] Given the price-fixers' intent to subvert competition, the Court has been unsympathetic to the hapless but harmless price-fixers, since they "have little moral standing to demand proof of power or effect when the most they can say for themselves is that they tried to harm the public but were mistaken in their ability to do so."[184]

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[179] Sheryl A. Brown & Christopher Kim, *Antitrust Violations*, 43 AM. CRIM. L. REV. 217, 227 (2006) (collecting cases).

[180] ANTITRUST DIVISION MANUAL, *supra* note 23, at ch. III, § C-5.

[181] Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55 (1933) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES, *21).

[182] OECD 3rd Report, *supra* note 32, at 15; *see also* OECD Cartel Report, *supra* note 35, at 8 (citing as examples of cartel members' efforts to keep their activities secret, their burning bid files in bonfires and hiding computer files in eaves of one employee's grandmother's house).

[183] Smith, *Electrical Conspiracy (Part II)*, *supra* note 31, at 164, 210.

[184] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432 n.15 (1990) (quoting VII P. AREEDA, ANTITRUST LAW ¶ 1509, at 411 (1986)).

2. Moral Wrongfulness of Hard-Core Cartels

Moral wrongfulness involves conduct that violates a moral norm or standard.[185] Criminal sanctions cannot be justified unless accompanied by the judgment of community condemnation.[186]

One could argue that such hard-core cartel conduct—absent the sinister moniker—is nothing other than "acceptable aggressive business behavior."[187] Any moral condemnation has to be questioned, since unlike other cases of theft, the victims (and society overall) are often unaware of being fleeced, and unlike those robbed, do not suffer trepidation.[188] Nor do antitrust violators invade one's privacy, as in identity theft, or threaten the victim's physical health or safety. Given that many economists view wealth transfers agnostically and that the harm from cartels ultimately involves a "deadweight welfare loss," which few in society understand and even fewer have successfully calculated, any moral condemnation over cartel behavior is not based on personal experience, but phobias of "big business," homogenization of culture, and affluenza.

It may be that few people in society, if asked about price-fixing, would graph in their minds a triangle representing the deadweight welfare loss. Antitrust for most is ultimately grounded in the moral norm of fairness.[189] In surveys by the

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[185] Green, *supra* note 167, at 1551.

[186] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); JEROME HALL, PRINCIPLES OF CRIMINAL LAW 157, 182 (1947 ed.) (only those actions "revolting to the moral sentiments of society" should be criminalized) (quoting JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 3 (1863)).

[187] Kadish, *supra* note 22, at 425; *see also* Kramer, *supra* note 61, at 536 ("normal pattern of behavior of the majority of businessmen").

[188] Kadish, *supra* note 22, at 436.

[189] The Court noted, for example, the FTC Act's prohibition of *unfair* competition and deceptive acts or practices, 15 U.S.C. § 45(a)(1), overlaps the scope of Section 1 of the Sherman Act, aimed at prohibiting restraint of trade. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454-55 (1986). Indeed, the standard of "unfairness" under the FTC Act not only encompasses the practices that violate the Sherman Act and the other

behavioral economists, many respondents condemned as unfair certain profit-seeking behavior that economists may consider ethically neutral. Respondents were "nearly unanimous in condemning a store that raises prices when its sole competitor in a community is temporarily forced to close"[190]—conduct which some economists might not only consider "rational," but also normatively desirable in allocating (temporarily) scarce goods to those who value them the most. Even if a supermarket with no rivals sets prices five percent higher, a "mild exploitation of monopoly power," over three-quarters of the respondents reported this as "unfair."[191] It should not be surprising then that some

antitrust laws, but can include additional practices that the FTC determines are against public policy for other reasons. *Id.* at 454. The legislative history of the FTC Act, as Lande notes, shows it was enacted to better accomplish the goals of the Sherman Act, and to extend Sherman Act principles to "unfair" or "immoral" business behavior. Robert H. Lande, *Wealth Transfers As The Original And Primary Concern Of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 107 (1982). The FTC Commissioners, however, later adopted the Unfairness Policy Statement in December of 1980, which stated that "[un]justified consumer injury is the primary focus of the FTC Act" and rejected the "immoral, unscrupulous, or unethical" test, reasoning that such a test had never been relied upon as an independent basis for finding unfairness. J. Howard Beales, III, *Brightening The Lines: The Use Of Policy Statements At The Federal Trade Commission*, 72 ANTITRUST L.J. 1057, 1065 (2005). The Commission recently held, however, that a defendant's deception and failure to act in good faith in the standard-setting process, could under certain circumstances qualify as anti-competitive conduct under Section 2 of the Sherman Act. Opinion of the Commission *in* In the Matter of Rambus, Inc., FTC Docket No. 9302 (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

[190] Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, *in* ADVANCES IN BEHAVIORAL ECONOMICS, *supra* note 153, at 261; *see also* RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES & ANOMALIES OF ECONOMIC LIFE 74-77 (Princeton Univ. Press 1992).

[191] Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, *in* ADVANCES IN BEHAVIORAL ECONOMICS, *supra* note 153, at 261. Consumers typically base a deal's "value" on the deviation from an established reference point (for example, a sale of 20% off the regular price). The majority surveyed indicated that a car dealer's

successful private antitrust plaintiffs persuade juries to view antitrust litigation "as a morality play devoid of economics."[192]

As in any competitive effort, winning is praised, if the means are fair. If athletes, like bid riggers, agreed to rotate who would prevail at each contest, public outrage would ensue. But unlike athletic contests, the existence of which depends on defined rules, some may assert that the free market is unrestrained, and society tempers it only to advance other ideals (such as protection of worker safety, cleaner environment). But this argument assumes that market forces pre-exist (and exist independently of) government forces. As R.H. Coase noted, the stock market, the example often used of perfect or near-perfect competition, is one of the more heavily regulated entities.[193]

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elimination of a $200 discount off the list price for a popular vehicle was acceptable, whereas 71 percent viewed selling the vehicle $200 above the list price as unfair. *Id.* at 257. Both produce the same effect—a higher net retail price—but the direction of the deviation to or from the established reference point differed. Although the Sherman Act equally condemns cartels that raise price or eliminate discounts (*see* Catalano v. Target Sales, Inc., 446 U.S. 643, 648 (1980)), an interesting question is whether the former would evoke greater moral outrage than the latter.

[192] Hugh C. Hansen, *Robinson-Patman Law: A Review And Analysis*, 51 FORDHAM L. REV. 1113, 1184 n.359 (1983) (Elzinga commenting how one plaintiff lawyer "candidly admitted that he preferred economists to stay clear of private antitrust suits because such suits involved 'issues of morality.'"). That plaintiff's antitrust attorney wrote:

> I proceed on the premise that the jury's decision is not reached by applying highly technical, sophisticated, legal concepts to a relatively complex fact situation. It is, in my judgment, made on the simple basis of morality. The plaintiff wins because the jury, through the mysterious chemistry that operates inside the jury room, has determined that the plaintiff has been wronged or, in the language of the street, has been kicked around by the defendants and is thus entitled to some recompense.

Maxwell Blecher, *The Plaintiff's Viewpoint*, 38 ANTITRUST L.J. 50, 52 (1968).

[193] R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 718 (1992).

Instead, the "legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it."[194] Rather than an impediment to free markets, antitrust's philosophy is grounded in promoting competitive markets, in enabling entrepreneurs to enter, competitors to offer their goods and services, and consumers to choose.

In setting "the moral tone of the market place,"[195] antitrust is thus consistent with norms of fairness. While greed is good when it spurs initiative and innovation, greed is just as easily condemned when it spurs theft, fraud, or violence. The attainment of material prosperity by unfairly disadvantaging others has long been censored.[196] The vices

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[194] *Id.* at 717-18.

[195] Smith, *Electrical Conspiracy (Part I)*, *supra* note 33, at 132, 134.

[196] Thomas More, for example, noted how a sheep cartel fueled by the "wicked greed of a few men" caused greater evil. As wool prices escalated, poorer people who ordinarily made cloth out of it could not afford to buy it and therefore were unemployed and reduced to idleness and crime. THOMAS MORE, UTOPIA 23-25 (Yale Univ. Press 2001). Unless the evils of monopolies and oligopolies were remedied, warned More's traveler in UTOPIA, "it is pointless for you to boast of the justice administered in the punishment of thieves, a justice which is specious rather than either just or expedient." *Id.* at 25. In ancient Greece, corn dealers convicted of fixing prices were sentenced to death. Lambros E. Kotsiris, *An Antitrust Case in Ancient Greek Law*, 22 INT'L LAW. 451, 454 (1988). In the POLITICS, Aristotle recounts how a man of Sicily bought up the iron from the iron mines; afterwards, when the merchants from their various markets came to buy, he was the only seller, and without increasing the price much, he earned a 200 percent profit. When Dionysius, the ruler of Syracuse, heard of the Sicilian's industry, he told the Sicilian to leave Syracuse, for the Sicilian had discovered a way of making money which was injurious to Dionysius' interests. Thus, Aristotle wrote that statesmen "are often in want of financial resources and in need of more ways of gaining them." ARISTOTLE, THE POLITICS OF ARISTOTLE 31 (Ernest Barker trans., Oxford U. Press 1958). *See also* Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 215 (2003) (collecting these and other historical examples of where hardcore antitrust offenses were viewed as morally offensive and worthy of punishment). According to a populist interpretation, the American colonies opposed monopolies, which the English sovereign bestowed to varying degrees. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 226 (1956). The Kings' and Queens' monopoly grants led to

of greed and stinginess were not only a deficiency in giving but also an "excess in taking," by taking anything from anybody, such as usury.[197] Not only do price fixers steal

their denunciation as a "nest of wasps—a swarm of vermin which have overcrept the land." Slaughter-House Cases, 83 U.S. 36, 47 (1872), (quoting Sir John Culpeper, Speech in Long Parliament). For antitrust's historical roots in English common law *see generally* William Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954); Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955).

[197] ARISTOTLE, NICOMACHEAN ETHICS *supra* note 168, at 64. According to one religious interpretation, "the motive of the monopoly is, as a rule, not merely lacking in reasonableness, but positively unjust; for its ultimate aim is not simply to acquire the patronage that now goes to its rivals, but in addition to raise prices to the consumer after its rivals have been eliminated." *See* NEW ADVENT ROMAN CATHOLIC ENCYCLOPEDIA, *available at* http://www.newadvent.org/cathen/10497b.htm (discussing monopoly). Thus,

> While monopoly is not necessarily unjust, and while any particular monopoly may be free from unjust practices, experience shows that the power to commit injustice which is included in monopoly cannot be unreservedly entrusted to the average human being or group of human beings. Consequently, it is the duty of public authority to prevent the existence of unnecessary monopolies, and to exercise such supervision over necessary monopolies as to render impossible monopolistic injustice, whether against the independent business man through unjust methods, or the consumer through unjust prices.

Id. Similarly, the "Torah gives clear requirement for honest business practices." Esa Mangeloja, *Economic Utopia of the Torah* (May 14, 2004) (quoting Lev. 25:14), *available at* http://ideas.repec.org/p/wpa/wuwpmh/0405004.html#provider. Under the Talmud, "a business company that wishes to behave ethically should not use its monopolistic powers to overcharge customers or under pay employees." *Id.* In 2 Samuel 12:1-6, Nathan related to David about two men in one city (one rich with many flocks and herds, the other poor with nothing, except one little ewe lamb, which he had bought and nourished up. When a traveler came, the rich man spared his own flock, but took the poor man's lamb. David's anger was greatly kindled, and he told Nathan, that "[As] the LORD liveth, the man that hath done this [thing] shall surely die: And he shall restore the lamb fourfold, because he did this thing, and because he had no pity."). Monopoly is also unlawful in Islam as the prophet Muhammad "preached that 'It is difficult for a man laden with riches to climb the steep path that

money from consumers, as one defense counsel stated, but the challenged action "erodes the personal integrity of the individuals involved in the lying, cheating and cover-ups required to engage in conduct long known to be illegal."[198]

The philosophers' and moralists' dim view on this lust for profits is not unique. Other surveys suggest moral opprobrium toward antitrust violations. In the Department of Justice's 1985 survey of crime severity, the respondents deemed the "hard-core" antitrust crime[199] a more serious crime than someone "armed with a lead pipe, rob[bing] a victim of $1,000. No physical harm occurs."[200] Another survey, conducted in 2000, also reflected society's changing perception of the seriousness of white-collar crime.[201] Many respondents indicated that white-collar crime can be as serious, or more serious, than certain types of street crimes. The fact that the white-collar crimes were non-violent or did not result in physical injury did not undermine their seriousness: more than twice as many respondents considered the embezzler as the more serious criminal compared

leads to bliss.' He did not prohibit or discourage the acquisition of wealth but insisted that it be lawfully acquired by honest means and that a portion of it would go to the poor. He advised his followers, 'To give the laborer his wages before his perspiration dried up.'" University of Southern California, USC-MSA Compendium of Muslim Texts, http://www.usc.edu/dept/MSA/fundamentals/prophet/prophetdescription.html. For an application of Buddhist principles to economics, *see* E. F. SCHUMACHER, SMALL IS BEAUTIFUL, ECONOMICS AS IF PEOPLE MATTERED (Harper & Row 1973).

[198] Tefft W. Smith, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies, Nov. 3, 2005, at 4, *available at* http://www.amc.gov/commission_hearings/criminal_remedies.htm.

[199] *See* Marvin Wolfgang et al., NATIONAL SURVEY OF CRIME SEVERITY viii (U.S. Government Printing Office 1985) (describing the antitrust violation as "[s]everal large companies illegally fix[ing] the retail prices of their products.")

[200] *Id.*

[201] Rebovich et al., *supra* note 160, at 6.

to the street thief (fifty-six percent compared to twenty-seven percent).[202]

On the other hand, the authors of a 1995 survey concluded that its respondents did not sentence "antitrust cases as harshly as might have been anticipated. Overall, the sentences were very short: rarely more than four years for crimes involving very large losses to the general public. In addition, neither the defendant's role nor the amount of the loss made much of a difference."[203] However, this might reflect the pre-conceived notions of the surveyors. The respondents' median sentence for price-fixing was 1.22 years, higher than the existing Sentencing Guidelines baseline for antitrust offenders, and at the high end of the current ten to sixteen months baseline for antitrust offenders (before other mitigating or aggravating factors are taken into account). While the Sentencing Guidelines provide a one-level increase for bid rigging which increases the average sentence to twelve to eighteen months, the median sentence in the survey for bid rigging was three years.[204] On the other hand,

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[202] *Id.* at 7. The question posed was "Which is more serious: a 'street' thief or embezzler who steals $100?" The remaining respondents (17%) responded that they were equally serious.

[203] U.S. Sentencing Commission, *A National Sample Survey of Public Opinion on Sentencing Federal Crimes* 106 (Oct. 1995).

[204] *Id.*, at 105. The vignette for the survey involved being convicted "of conspiring with other companies to fix prices for soft drinks" and "of agreeing with competitors to rig bids for government contracts in order to control the market and guarantee higher profits for the companies involved." The Report concluded it was "not obvious" why respondents gave longer sentences to bid rigging. *Id.* at 106. Another interesting finding was the regional differences in the mean sentences for antitrust and other violations, which could not be explained by any demographic compositions. *Id.* at 133. The highest mean sentence for antitrust violations was 5.6 years from those surveyed in the East North Central region (consisting of Ohio, Indiana, Illinois, Michigan, and Wisconsin) and the lowest was 2.9 years from those surveyed in the Mountain region (New Mexico, Arizona, Colorado, Utah, Nebraska, Wyoming, Idaho and Montana). Also, the mean sentences in New England (3.7 years) and Mid-Atlantic states (New York, Pennsylvania, and New Jersey) (3.2 years) were lower than West South Central region of Texas, Oklahoma, Arkansas, and Louisiana (5.3 years). *Id.* at 134.

contrary to optimal deterrence theory, the amount of money the public was overcharged (which ranged between $500,000 and $15 million) did not impact the median sentence.[205]

In addition to public perceptions, one should also examine the moral quality of the act itself. As a legal principle, an antitrust crime occurs under Section 1 of the Sherman Act when the competitors reach an agreement to engage in hard-core cartel behavior—it does not matter if the cartel members actually raised prices, harmed consumers, or were otherwise unsuccessful.[206] In the lysine price-fixing conspiracy, the lysine executives were secretly videotaped as they joked around a conference table that the empty seat was for the industry's largest customer; another joked that the empty chair was for the FBI, and another executive added that the remaining chairs were for the FTC. Following this banter, the executives launched into the details of their price-fixing scheme for lysine. In another videotape, the president of ADM tells his competitor that ADM's slogan, which "penetrated the whole company," was: "Our competitors are our friends. Our customers are the enemy."[207] If one watches these videotapes, one may get the impression that this is nothing more than "theft by well-dressed thieves."[208] This comports with one's moral intuition

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[205] *Id.* at 106.

[206] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) (holding that "conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring" and that a violation can be established even if conspirators did not have the means to accomplish their objectives); United States v. Gravely, 840 F.2d 1156, 1161 n.6 (4th Cir. 1988) (holding that a Sherman Act violation may be established even if a conspiracy is unsuccessful); *see also* United States v. American Airlines, 743 F.2d 1114 n.1 (5th Cir. 1984) (showing that attempts to conspire can be prosecuted under Section 2 of the Sherman Act as well).

[207] Scott D. Hammond, Dir. of Criminal Enforcement, Dep't of Justice, Antitrust Div., Speech before International Law Congress 2001: The Fly On the Wall Has Been Bugged—Catching an International Cartel in the Act 4 (May 15, 2001), http://www.usdoj.gov/atr/public/speeches/8280.htm.

[208] Remarks by Joel I. Klein, Assistant Attorney General, Dep't of Justice, Antitrust Div., Remarks at the Spring Meeting of the A.B.A. Antitrust Section (Apr. 6, 2000), 1230 PLI/Corp 407, 411 (Feb. 2001).

that the executives to a cartel have chosen as their objective to defraud consumers by charging them more. It is the agreement upon this objective that renders the act immoral, and not necessarily the degree to which they ultimately succeed or fail.

3. Social Harmfulness of Hard-Core Cartels

Some religions view the circumstances, including the consequences, of the act as secondary elements in determining its morality.[209] The Sentencing Guidelines likewise treat the circumstances surrounding certain criminal acts as mitigating factors, which may increase or diminish the degree of the act's wrongfulness (for example, the amount stolen) or the defendant's culpability (such as whether the defendant abused a position of trust), but which do not alter the act's illegality. For acts which are inherently immoral, the circumstances generally do not transform the acts' moral quality, as "they can make neither good nor right an action that is in itself evil."[210]

Similarly, because the act of conspiring provides the requisite illegality, antitrust prosecutors need not, and typically do not, establish the net harm caused by hard-core cartels. Thus, the extent to which such cartels harm society is unknown. However, simply because the impact of a cartel on its victims is not typically alleged, does not mean that victims are not impacted. The economic studies, as collected by Connor and Lande, show significant overcharges attributable to cartels.[211] The overcharge percentages found in the studies may even be conservative as they do not include the deadweight welfare loss associated with cartels, and other economic and non-economic harms.

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[209] *See, e.g.*, ENGLISH TRANSLATION OF THE CATECHISM OF THE CATHOLIC CHURCH FOR THE UNITED STATES OF AMERICA § 1, ch. 1, art. 4 (1997), http://www.catholicculture.org/docs/catechism/cat_view.cfm?recnum=4963.

[210] *See id.*

[211] Connor & Lande, *supra* note 3, at 535; *see also* OECD Cartel Report, *supra* note 35, at 2, 9 (finding from more limited survey of 14 cases median markup between 15 and 20%).

Many prosecutors can provide anecdotes that demonstrate how cartels have harmed consumers. For example, one Department of Justice prosecutor described how defendants' bid rigging in real estate *nisi* and foreclosure auctions cheated the victims, who are generally the poor, deceased's heirs, incompetent persons or minors.[212] In a *nisi* auction, the homeowner is usually the estate of someone who is seriously ill or has died without a will. These public auctions are intended to ensure that the property is sold at a fair value. According to the United States' sentencing memorandum, Defendant Eric Adolph Baer and others agreed to rig the bidding at such public auctions. In one of their rigged bids, the victim was an unmarried, retired Washington, D.C. public school teacher. She became ill and entered a nursing home. To pay for her expenses, she had to sell her home. Because of her illness, her court-appointed conservator arranged for the sale through a *nisi* proceeding auction. Mr. Baer and his co-conspirators rigged the bidding of the retired schoolteacher's house, and faced with no competition from his conspirators, a designated conspirator was able to bid only $22,000 for her house. The conspirators later held a second secret auction, where one conspirator paid $32,750 for her house, and the profits were divided among the co-conspirators. That conspirator then sold shortly thereafter her house for $36,500. Meanwhile, the victim, who was cheated over $10,000, had to begin receiving Medicaid to pay for her medical care, and her conservator had to pay for her burial expenses, as she died penniless.[213]

Cartels can even harm organized religions or consumers purchasing products for the religious holidays.[214] Ultimately,

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[212] Government's Memorandum in Aid of Sentencing, *filed in* United States v. Baer, Crim. No. 90-0314 (HHG) (D.D.C. Oct. 24, 1990).

[213] *Id.*

[214] *See e.g.*, *Matzoh Case Ends in Plea*, N.Y. TIMES, Apr. 26, 1991, at D4 (reporting the no-contest plea and the $2.8 million fine payment by the B. Manischewitz Company, the nation's leading matzoh maker, for conspiring with others to increase the wholesale price on $25 million worth of Passover matzohs); *see generally* Press Release, U.S. Dep't of

cartels adversely impact society's collective interest in fair, efficient and open markets.[215]

IV. BENEFITS AND RISKS IF ANTITRUST VIOLATIONS DEEMED IMMORAL

A. Potential Benefits if Antitrust Violations Deemed Immoral

The Department of Justice's stated focus is on individual accountability and treating the business executives in these

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Justice, Antitrust Division, Former Broker to the Archdiocese of New York Pleads Guilty to Fraud, Tax and Obstruction of Justice Charges (Aug. 4, 2006) (announcing the indictment of Joseph DeRusso, Vincent Heintz, Nanette Melera, and Michael O'Shaugnnessy on charges of fraud, tax, and obstruction of justice charges. According to the indictment, defendants used their position as employees and consultants at Institutional Commodity Services, Inc., the central purchasing agent of the Roman Catholic Archdiocese of New York, to defraud the archdiocese of more than $2 million between 1996 and 2004. According to the press release, in addition to artificially inflating prices for goods and services, defendants embezzled more than $1 million from the archdiocese through a scheme where they diverted funds earmarked to buy food for children enrolled in the archdiocese's schools to companies they secretly owned and controlled. All four defendants pled guilty.).

[215] Green, *supra* note 167, at 1550; United States v. Alton Box Bd. Co., No. 76 CR 199, 1977 WL 1374, at *11 (N.D. Ill. Mar. 4, 1977) (*quoting* William B. Saxbe, Attorney Gen., Address before Legal Comm. of the Grocery Mfr. of Am. (Oct. 9, 1974)) (characterizing price fixing as "nothing more than totalitarian practices and totalitarian disdain for our democratic way of life"); Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1995 (1977) (arguing that more competition, an interest referenced in the Sherman Act's legislative history, reduces prices, increases the availability of goods, and will also mean "less accumulation of wealth from capitalized monopoly positions"). *See generally* United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945) (observing that in enacting the Sherman Act, Congress was not necessarily actuated only by economic motives. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.).

hard-core cartels as criminals.[216] But contrary to the optimal deterrence theory's singular dimension of human behavior (citizens obey the law when the legal punishments exceed the gains), citizens may comply with the law because of their own moral beliefs, peer pressure, or fear of social disapproval.[217] Indeed, as discussed below, these social factors can be quite effective in supplementing the law's deterrent effects. Consequently, highlighting the moral content of antitrust crimes may have several attendant benefits in generally deterring individuals from engaging in cartel behavior.

1. Educational Benefits

Criminal convictions may represent "a condemnation by society of certain conduct in a way that the imposition of a civil penalty cannot."[218] Even if they do not fully internalize these norms, citizens at a minimum learn through the criminal laws, and the type of sentence imposed, of the contours of that community's morality.[219] But an additional rationale for supplementing law with morality is that the "legal rules may not reflect certain information that is relevant to achieving socially desirable outcomes, whereas moral rules can reflect such information."[220] That may be the case with antitrust.

Prosecutors generally view antitrust's *per se* illegality rule as a blessing, as it spares them from proving market effects.[221] But the *per se* rule can also suckle from antitrust

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[216] 2005 Hammond AMC Testimony, *supra* note 41, at 103.

[217] *See* Green, *supra* note 167, at 1591-93 (collecting recent studies that seek to determine to what extent people obey law voluntarily).

[218] OECD Cartel Sanction Report, *supra* note 44, at 18.

[219] Coffee, *supra* note 146, at 223; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 383 (1997) (recognizing that form and severity of punishment can express community's moral condemnation).

[220] Shavell, *supra* note 44, at 413.

[221] United States v. Realty Multi List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980) ("The *per se* rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score.").

its moral outrage.[222] Neither the indictment nor the criminal information typically expound on the moral component of the defendants' behavior or on the net harm to consumers. Instead, the legal documents set out, in a professional, workmanlike fashion, the necessary legal and factual allegations. The Department of Justice's press release may contain some additional information, including a short quote from the Attorney General or Assistant Attorney General condemning cartels.[223] But invariably the Department of Justice's one- to two-page press release is truncated to perhaps a one- to two-paragraph column in a newspaper's business page. Given that the overwhelming majority of antitrust defendants plead guilty or *nolo contendere*,[224] and

[222] The Sentencing Guidelines do not mitigate this unintended consequence of the *per se* rule, since criminal fines are calculated off a baseline of commerce. U.S.S.G. § 2R1.1.3(d)(1).

[223] *See, e.g.*, Press Release, U.S. Dep't of Justice, Antitrust Division, Former New York Hospital Employee and a Manhattan Telecommunications Company Plead Guilty to Bid Rigging and Related Charges (Sept. 29, 2006) ("The Antitrust Division will hold accountable those who attempt to undermine open and competitive bidding processes," said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division. "Today's sentences demonstrate that commitment."), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/218677.htm; Press Release, U.S. Dep't of Justice, Antitrust Division, Former Commercial Refrigeration Company Manager Indicted on Rigging Bids on Contracts to Safeway Grocery Stores in Arizona (Sept. 26, 2006) ("The Antitrust Division is committed to prosecuting those who damage the integrity of the free market by conspiring to rig bids"), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/218611.htm; Press Release, U.S. Dep't of Justice, Antitrust Division, Stolt-Nielsen S.A. Indicted on Customer Allocation, Price Fixing, and Bid Rigging Charges For Its Role in an International Parcel Tanker Shipping Cartel (Sept. 6, 2006) ("The indictment charges Stolt-Nielsen and its executives with serious antitrust crimes-- price fixing, customer allocation, and bid rigging," said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division. "Cracking down on international cartels is the Antitrust Division's top priority and the Division will continue its efforts to aggressively pursue such illegal activity."), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/218199.htm.

[224] For example, 29 of 32 defendants indicted for antitrust offenses pled guilty during the 12-month period ending Sept. 30, 2005. Statistics

the follow-up private class-action antitrust lawsuits are settled, little, if any, of the incriminating evidence ever comes to light. Other than a few notable antitrust trials, such as the Department of Justice's civil monopoly case against Microsoft, most of the Department's civil and criminal antitrust prosecutions get little, if any, press.[225] As the head of the Department of Justice's Antitrust Division said in 1954, and which holds true today,

> Our cases are concluded, our decrees are entered, our fines are paid, and that is pretty much the end of the matter so far as the world is concerned. The ultimate effectiveness of particular cases is not advertised, is seldom ascertained, and never catalogued.[226]

The current head of the Antitrust Division stressed the importance for enforcers to publicize their anti-cartel efforts:

> Over time, publicizing enforcement efforts can even change the norm of what is acceptable or tolerated in the marketplace. A chief difficulty faced by any enforcement program—antitrust or otherwise—is the tendency of deviant behavior, left unchecked, to become the norm. If criminal activity is presented as inevitable, some will simply accept it as a cost of doing business and a few will even seek to participate, seeing an opportunity for a share of anticompetitive gains. Aggressive enforcement com-

Div., Office of Judges Programs, Admin. Office of the U.S. Courts, *2005 Judicial Business: Annual Report of the Director Leonidas Ralph Mecham*, Table D-4 (Defendants Disposed of, by Type of Disposition and Major Offense), *available at* http://www.uscourts.gov/judbus2005/appendices/d4.pdf.

[225] *See* Sandra S. Evans & Richard J. Lundman, *Newspaper Coverage of Corporate Price-Fixing*, 21 CRIMINOLOGY 529 (1983) (noting that the press coverage of the 1970's folding-carton antitrust cases was similar to the 1960's heavy electrical antitrust cases in that the newspapers failed to provide frequent, prominent, and criminally-oriented coverage of the price-fixing cases. Very few individuals or corporations were identified in newspaper articles describing the sentencing, and few articles that described the sentencing indicated that the individuals were guilty of criminal acts.).

[226] 1954 Barnes Speech, *supra* note 34.

> bined with appropriate publicity helps break this cycle, reminding market participants that they do not have to tolerate the criminals in their midst. If publicity is particularly effective, it can lead both to more complaints and to complaints that are more actionable, as cartel victims and amnesty applicants learn to give enforcers the specific information necessary to make a case. And finally, let us not forget the reality that criminal anti-cartel enforcement is a government function, and government resources are always scarce. Antitrust enforcers should not be shy about publicizing the fact that anti-cartel enforcement is, on a dollar-for-dollar basis, among the best uses of law enforcement resources from the standpoint of consumer welfare.[227]

Consequently, one inexpensive mechanism for the enforcement agencies is to publicize the moral wrongfulness of the act itself as well as the social harm and to provide examples from specific victims to "rekindle in the public a sense of the immorality of the defendants' acts."[228] The OECD recently complemented the Canadian competition authority's media strategy, which includes emphasizing in the news releases the harm caused by the cartels on consumers as well as the penalties involved.[229] A recent Canadian media analysis "showed the positive result of this active strategy as the number of media reports dealing

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[227] Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Speech at 11th Annual Competition Law & Policy Workshop, European Union Institute: Seven Steps to Better Cartel Enforcement, (June 2, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/216453.htm; *see also* OECD 3rd Report, *supra* note 32, at 18 (raising public awareness of harm caused by cartels important part of nation's enforcement efforts).

[228] Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 222 (1965); *see also* OECD Cartel Report, *supra* note 35, at 5, 6 (noting that an important step in enhancing anti-cartel enforcement is "improving public knowledge about the nature of this conduct and the harm that it causes [which] would bolster popular support for more effective action against it.").

[229] OECD 3rd Report, *supra* note 32, at 19.

annually with criminal enforcement activities is substantial and increasing."[230] Besides publicizing these concrete examples, the federal antitrust agencies may also want to conduct more empirical economic work on the net harm of cartels.

2. Internalizing the Moral Norm

A second benefit of supplementing antitrust crimes with morality is the internalization of the moral norm, which reduces policing costs.[231] Criminal law and punishments may serve as "moral lesson[s]" designed to "inspire the public with sentiments of aversion towards those pernicious habits and dispositions with which the offence appears to be connected; and thereby to inculcate the opposite beneficial habits and dispositions."[232] The utility of the business executives internalizing such moral norms is critical, as the Department of Justice "cannot hope to monitor the competitive behavior of every business entity in our economy any more than the Internal Revenue Service can monitor effectively every taxpayer."[233] Ultimately, the Department of Justice must hope that corporate executives internalize the prohibition against price fixing and refrain from communicating pricing and other commercially sensitive matters with their competitors.

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[230] *Id.*

[231] Shavell, *supra* note 44, at 403; Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. LAW & CRIMINOLOGY 325 (1980). Some have argued that this internalized self-monitoring process "represents an important constraint on individual maximizing behavior that needs to be incorporated in economic models of individual action." Gary M. Anderson & Robert D. Tollison, *Morality and Monopoly: The Constitutional Political Economy of Religious Rules*, 12 CATO J. 373, 375 (1992) (citing DAVID GAUTHIER, MORALS BY AGREEMENT (1986); David Levy, *Rational Choice and Morality: Economics and Classical Philosophy*, HISTORY OF POLITICAL ECONOMY 14 (1982); VICTOR VANBERG, MORALITY AND ECONOMICS: DE MORIBUS EST DISPUTANDUM (1988)).

[232] JEREMY BENTHAM, THE PRINCIPLES OF MORALS & LEGISLATION 184 n.1 (Prometheus Books 1988).

[233] Baker & Reeves, *supra* note 64, at 620.

One may wonder whether business executives already refrain from impermissible anti-competitive communications. Many do, but cartel behavior still persists. A moral message may serve as an additional counterweight to corporate pressures to increase profitability. As companies are a composite of executives, seldom will the corporate message be harmonious. Ethical transgressions in organizations, according to several studies, are attributable to many factors, including "unclear standards, pressure to perform, and intolerance of criticism."[234] For example, after being involved in over a dozen antitrust cases in the 1940s, General Electric disseminated in the 1950s its written policy that employees must "conform strictly to the antitrust laws."[235] But GE executives were under tremendous corporate pressure to meet their departments' financial goals. Each year, these managers had to budget for more profit as a percent of net sales as well as a larger percentage of available business.[236] These "reach" goals were unattainable, according to some mid-level GE executives, absent collusion. If they failed to meet these "reach" goals, the GE executives could expect to be fired. As one GE executive rationalized, collusion may have been illegal "but it wasn't unethical."[237]

An additional critical variable may be whether a person's co-workers or peers are engaged in the illegal behavior.[238]

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[234] Muel Kaptein et al., *Demonstrating Ethical Leadership by Measuring Ethics: A Survey of U.S. Public Servants*, 7 PUBLIC INTEGRITY 299, 305 (2005); studies cited *supra* note 154.

[235] Smith, *Electrical Conspiracy (Part I)*, *supra* note 33, at 135.

[236] *Id.* at 172.

[237] *Id.* at 135. But after serving time in prison, a former general manager and vice president of GE observed that "realizing the taint of a jail sentence is enough to put some fear into people, and then once fear is in people then they start looking at the moral values a little bit on whether or not [price fixing] makes any sense." Baker & Reeves, *supra* note 64, at 622 (quoting Administered Prices: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 16790 (1961)).

[238] Grasmick & Green, *supra* note 231, at 329; Dan M. Kahan, *supra* note 219, at 354-55 (stating that individuals' decisions to commit crimes

For example, in the Department of Justice's NASDAQ antitrust case, an accepted business norm among the NASDAQ market-makers was not to trade for certain stocks in odd-eighth increments (such as quoting a bid or ask price for that stock at $10 1/8 or $10 3/8) but only in even-eighth increments (such as $10 1/4 or $10 1/2).[239] This quoting convention, according the Department of Justice's civil complaint, had the effect of increasing the spread and the NASDAQ market-makers' profits. After reaching this common understanding to adhere to this quoting convention, the defendants, which included all the leading Wall Street investment firms, allegedly used peer pressure to enforce it. According to the Department of Justice's complaint, Wall Street executives made it known throughout the industry that it was "unethical" or "unprofessional" for a market maker to "break the spread" by using odd-eighth quotes in stocks with dealer spreads of 3/4s of a point or greater and accused market makers who did so of "making a Chinese market."[240] This peer pressure also included coercing non-complying market makers to adhere to the common understanding. Such coercive tactics included, among other things, making telephone calls to market makers who had violated the quoting convention or narrowed the inside

are responsive to decisions of other individuals and not just the price of the crime).

[239] *See* Complaint, United States v. Alex. Brown & Sons, Inc., 169 F.R.D. 532 (S.D.N.Y. 1996) (No. 1:96cv05313), *available at* http://www.usdoj.gov/atr/cases/f0700/0740.htm. As alleged in the civil complaint, from at least as early as 1989 through 1996, a common understanding arose among the defendants and other Nasdaq market-makers concerning, among other things, the manner in which bids and asks would be displayed on Nasdaq. Under this quoting convention, stocks with a dealer spread of 3/4 point or greater were quoted in even-eighths (quarters). Under the quoting convention, market makers use odd-eighth fractions in their bid and ask prices only if they first narrow their dealer spread in the stock in question to less than 3/4 of a point. The defendants entered into a consent decree with the Department of Justice, and later in 1998 settled a private class-action complaint for over one billion dollars, which is one of the larger settlements in the history of the Sherman Act.

[240] *Id.* at ¶ 41.

spread, or refusing or threatening to refuse to deal with traders and firms that violated the quoting convention.[241]

Consequently, unlike white collar criminals who can weigh, and switch between, the legitimate earnings and illegitimate gains (such as through insider trading), an executive engaging in price fixing may have higher switching costs. The antitrust violator, after all, colludes with the other major companies in that industry. To refrain from this illegal behavior, she may not only have to leave her employer but the relevant market altogether.

Interestingly, an empirical analysis of successfully prosecuted cartels between 1910 and 1972 showed that cartels where a trade association facilitated collusion had nearly four times the number of participants as when no trade association was involved.[242] Thus, peer pressure and fear of social disapproval may outweigh the threat of any legal punishment (especially if the illegal action is considered morally neutral).

Moreover, company executives may have different perspectives. Corporate higher-ups, as in one study, might view the price-fixing as "isolated incidents of human weakness tempted by the prevailing low morals in a few isolated industry subcultures."[243] In contrast, the mid-level managers closer to those convicted for price-fixing may attribute the blame to the conflicting company goals or moral gray zones where "[t]he need to survive conflicts with the

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[241] *Id.*

[242] Where trade associations were involved, the mean number of colluding firms was 33.6, and the median was 14 firms; in cases involving price-fixing cartels (without a trade association involved), the mean was 8.3 firms and the median was 6 firms. Arthur G. Fraas & Douglas F. Greer, *Market Structure & Price Collusion: An Empirical Analysis*, 26 J. INDUS. ECON. 21, 36, 41 (1977); *see also* OECD Cartel Report, *supra* note 35, at 7 (one characteristic that recurred repeatedly in a survey of 119 cases prosecuted by 15 OECD member countries between 1996 and 2000 was the existence of an industry trade association that provided the opportunity for conspirators to meet and agree).

[243] Jeffrey Sonnenfeld, *Executive Apologies for Price Fixing: Role Biased Perceptions of Causality*, 24 ACAD. MGMT. J. 192, 195 (1981).

drive to be super clean."[244] The lower-level executives engaged in the price-fixing might offer several justifications: they are only seeking a "fair" profit, their customers are unethical in lying about the low prices charged by the other competitors, and with the excess capacity, eventually the ruinous competition will lead to a far worse outcome of plant closings and layoffs.[245] With such competing norms (deciding to bid rig to prevent layoffs during the Christmas holidays), the illegality of the actions of hard-core cartels becomes more relative and less absolute. But if the individuals face not only the risk of incarceration, but also the attendant deterrents of moral guilt and social disapproval, this may raise the ante on the competing norm.

3. Potential to Reduce Enforcement Costs

Although developing a moral norm and educating society about it may have high fixed costs, once that moral norm is internalized, self-policing reduces enforcement costs. Given the difficulty in detecting hard-core cartel behavior, internalization of the moral standard and the concomitant guilt when breaching the standard would apply even when the government is not looking. It can also reduce the likelihood of false positives and negatives since, absent self-deception, "a person will naturally know what he did and why."[246] In contrast, imprisonment as the primary deterrent for morally-neutral behavior entails not only the costs in

[244] *Id.* at 196 (quoting other executives who made similar justifications by noting the power of big buyers, the drive to stay alive, or the belief that they were not engaging in this behavior for their own behalf but for the betterment of the company); Andrew Hopkins, *Controlling Corporate Deviance*, 18 CRIMINOLOGY 198, 201 (1981) (noting that some corporate cultures shelter top executives from bad news).

[245] When the criminal law "earns a reputation as a reliable statement of what the community perceives as condemnable and not condemnable, people are more likely to defer to its commands as morally authoritative, at least in borderline cases where the propriety of certain conduct, or the degree of its impropriety, is unsettled or ambiguous." Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U.L. REV. 201, 212 (1996).

[246] Shavell, *supra* note 44, at 404.

incarcerating these executives, but the lost productivity. Guilt, which does not entail such administrative expenses, is not only "a socially cheaper form of sanction than imprisonment" but is also immediate.[247]

4. Shaming and Praise

A fourth benefit of supplementing antitrust crimes with morality is the fear of informal sanctions from peers and social disapproval generally.[248] Shaming, "the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions,"[249] has long been a tool to encourage or deter behavior. Julius Caesar, for example, shamed his mutinous soldiers with only one word.[250] Disgruntled consumers can now use the Internet to shame corporations.[251] Under the Sentencing Guidelines, a corporate offender can be ordered "at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses."[252] Similarly, although more empirical work is required, "much anecdotal evidence suggests that people sacrifice substantial amounts of money to reward or punish

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[247] *Id.* at 405.

[248] *See, e.g.*, Grasmick & Green, *supra* note 231, at 328; Kahan, *supra* note 219, at 384; Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001).

[249] Kahan & Posner, *supra* note 248, at 368.

[250] Julius Caesar quelled an army's mutiny by calling the disobedient soldiers "*quirites*," meaning citizens. TACITUS, THE ANNALS I.42 25 (Modern Library 2003).

[251] Kim Hart, *Angry Customers Use Web to Shame Firms*, WASH. POST, July 5, 2006, at D1.

[252] U.S. SENTENCING GUIDELINES MANUAL § 8D1.4 (2006).

kind or unkind behavior."[253] Thus, shaming is nicely aligned with a traditional view of criminal law, as it clearly communicates society's moral opprobrium toward certain conduct.[254] Earlier studies have found support for shaming, finding that social factors such as "morality, peer involvement and threat of social disapproval were the main factors influencing choices in terms of compliance with the law."[255] Absent a threat of being exposed as an offender to one's peers who would then impose informal sanctions, the threat of legal punishment by itself may be ineffective.[256]

One interesting study of Norwegian commercial fishermen illustrates how shaming can be an effective deterrent. Under the optimal deterrence theory, the fishermen should have been frequently violating the regulations limiting the total amount that could be harvested from a certain fish stock given their high economic incentives to cheat and the low risk of being detected by enforcement authorities.[257] These fishermen, however, generally complied with the government regulations, not because of any fear of the legal sanctions, but because of a moral obligation to obey the law and to maintain their standing in their community of about 390 inhabitants.

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[253] Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281, 1283 (1993).

[254] Shaming is also consistent with general deterrence. To effectively shame, the courts and antitrust enforcers would want to widely publicize—especially to the defendants' industry peers—the nature of the defendants' criminal act, its net harm, and the punishment.

[255] *See* Stig S. Gezelius, *Do Norms Count? State Regulation and Compliance in a Norwegian Fishing Community*, 45 ACTA SOCIOLOGICA 305 (2002) (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Nehemia Friedland et al., *Some Determinants of the Violation of Rules*, 3 J. APPLIED SOC. PSYCHOL. 103 (1973); Grasmick & Green, *supra* note 231; Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292 (1977); Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter*, 17 LAW & SOC'Y. REV. 457 (1983); Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442 (1976)).

[256] Grasmick & Green, *supra* note 231, at 329.

[257] Gezelius, *supra* note 255, at 308.

Abiding the law, according to the study's author, was an important part of the Norwegian ideal of the good citizen.[258] The one exception was when this moral obligation clashed with another moral norm, namely the right to secure an income "good enough to stay in business and to make a reasonable living of it."[259] The law could be occasionally violated without provoking widespread condemnation within the community when trumped by this more fundamental moral norm (such as a fisherman's needs to provide for his family during a particular economic hardship).[260] But illegal fishing for the purpose of maximizing profits was met with "severe social degradation and potentially also exclusion."[261]

Shaming, however, may not represent the elixir for deterring all criminal offenses. First, unlike a small Norwegian fishing village where "social transparency is high" and a "fisherman's professional behavior and qualities affect his general standing in the community as a matter of course,"[262] some may question the power of morality, peer involvement, and the threat of social disapproval in the United States, where citizens may be indifferent to those who live several cul-de-sacs or apartment buildings away.[263] Second, absent any moral outrage over the criminalized act (or its social harm), shaming would likely be ineffective—akin to publishing on the Internet the names of all individuals caught speeding on a federal highway. If indiscriminately applied to both morally-neutral and morally

[258] *Id.* at 308-09.

[259] *Id.* at 309.

[260] *Id.*

[261] *Id.* at 310.

[262] *Id.* at 307.

[263] One study concerned the rate office workers paid for bagels under an honor system, by leaving the amount owed in a box. The data showed that smaller offices with a few dozen employees paid three to five percent more than an office with a few hundred employees. STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS 48 (2005); *see also* Ernst Fehr & Simon Gächter, *Reciprocity and Economics: The Economic Implications of Homo Reciprocans*, 42 EUR. ECON. REV. 845, 854-57 (1998) (arguing that reciprocity provides "a key mechanism for the enforcement of social norms," which in turn shape human behavior).

reprehensible conduct, shaming may also desensitize the public.[264] Third, clumsy attempts to shame may backfire and arouse pity or sympathy for the wrongdoer.[265] Fourth, the effectiveness of shaming might vary depending on the ease with which consumers and other stakeholders can discipline a corporate offender. Where the corporation's crimes directly harm its customers, employees, suppliers or other stakeholders, the reputational costs, as reflected by the incremental decline in share price beyond the anticipated monetary fines and damages, can be quite large.[266] In other instances where the harm is indirect, such as environmental offenses, the company's stock price may not reflect such reputational losses, perhaps because those directly harmed

[264] *See* Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1930 (1991) (contending that the overuse of shaming lessens its effectiveness as a deterrent).

[265] For example, the convicted price fixers in Judge Renfrew's experiment gave speeches to the business and legal community on their crimes. Instead of eliciting outrage, the defendants frequently elicited sympathy from audience members responding to the judge's survey. Many audience members believed that these price fixers were ignorant, well-intentioned business executives who had unwittingly fallen into the trap of a vague law, a conclusion inconsistent with the defendants' own admissions of unlawful conduct before the court. As Judge Renfrew admitted, to the extent his court-ordered speeches "created a false impression of the defendants' conduct and the character of the antitrust laws, they were counterproductive." Renfrew, *supra* note 34, at 599-600. The prosecution of one company under Australia's Trade Practices Act had a positive effect on sales (fifteen percent increase), which management attributed to the favorable publicity their product received during the prosecution. Hopkins, *supra* note 244, at 211. Although the sample size was small (nineteen companies), Hopkins found the absence of any discernible consumer reaction against the prosecuted companies as one the more striking findings of his study. Despite the lack of consumer reaction, Hopkins found that the real mechanism of deterrence was the fear of loss of reputation of the individual managers, who "felt personally stigmatized by any imputation that the company had acted unethically or illegally." *Id.* at 212.

[266] The decline in the stock price of publicly-held companies might reflect not only the anticipated monetary penalty but reputational costs as well. Jonathan M. Karpoff et al., *The Reputational Penalties for Environmental Violations: Empirical Evidence*, 48 J.L. & ECON. 653, 655 (2005).

(the citizens living near the defendant's plant) are not the company's customers, employees, or suppliers.[267] Some price-fixers consequently might be more difficult to discipline by withholding purchases.[268] Suppose hypothetically that the nation's yeast suppliers colluded. Although a key ingredient for bread and other baking products, yeast typically represents a small cost component for bread manufacturers, which in turn sell their bread to consumers under their own or private labels. While the public may express moral disapproval toward the yeast manufacturers, it is unlikely that consumers will stop purchasing bread at the local supermarket (and if they did, they would punish the innocent flour producers as well as bread producers). Similarly, because yeast is a critical ingredient with no ready substitutes, the bread bakers, absent new entry or vertical integration, would have to continue doing business with the yeast manufacturers post-conviction.

But even in these situations where the public cannot directly punish the antitrust offender, the court or competition officials should employ shaming. After all, individuals, not corporations, meet in hotel rooms to fix prices, punish defections, and ultimately cooperate in an investigation, and criminal antitrust enforcement needs to personalize the crime to effectively deter future price-fixing.[269] A Canadian antitrust official, for example, observed

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[267] *Id.*

[268] While some antitrust offenders are household names, some of the top offenders (in terms of amount of fines) involve unfamiliar foreign or domestic companies producing unfamiliar products such as graphite electrodes, sorbates, parcel tanking shipping, sodium gluconate, and commercial explosives. It may be difficult to shame these foreign executives, when their countries do not view price-fixing as immoral (or even illegal).

[269] As one antitrust defense counsel said, "There should be certainty that the right people will be persistently prosecuted and sent to jail." Tefft W. Smith, Kirkland & Ellis LLP, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies 11 (Nov. 3, 2005), *available at* http://www.amc.gov/commission_hearings/criminal_remedies.htm. He recommended that the jail sentence be the headline, and the corporate fine be the by-line. *Id.* at 23. The Department

that the "negative publicity surrounding a conviction as well as wavering consumer confidence can act as deterrents and may have a greater impact than criminal penalties alone."[270] Business executives may be "essentially motivated by the desire to achieve a positive image by winning acceptance or status in the eyes of others."[271]

Currently, given the high percentage of settlements, corporations and their top executives often skirt such shaming. As one antitrust commentator noted, "Any stigma of the criminal prosecution that filters through to the unidentified and unindicted responsible corporate officers may be so diluted as to be ineffectual as a deterrent."[272] Although the Department of Justice has been active in highlighting the prosecutions of these hard-core cartels through speeches and press releases, there is always room for improvement. As the former head of the Department of Justice's Antitrust Division said, "Until those who commit antitrust crimes are dealt with as if they were truly criminals, other business persons and the public will not regard them as criminals, and we shall have lost the social stigma that is so much a part of general deterrence."[273] No doubt creative shaming techniques exist, especially with the Internet. To the extent consistent with its legal and ethical obligations,[274] the Department of Justice could shame

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of Justice official also stressed individual accountability and the importance of jail sentences, which is borne out by the record number of months antitrust offenders have been incarcerated. 2005 Hammond AMC Testimony, *supra* note 41, at 55.

[270] OECD Cartel Sanction Report, *supra* note 44, at 49. One unidentified antitrust agency in the ICN survey noted that besides monetary penalties, damage to reputation may deter cartel activity. ICN Report, *supra* note 15, at 54. Another unidentified agency also implied that press coverage may constitute an effective penalty. *Id.*

[271] Dennis H. Wrong, *The Oversocialized Conception of Men in Modern Sociology*, 26 AM. SOC. REV. 183, 185 (1961).

[272] Kramer, Comment, *supra* note 61, at 539-40.

[273] Baker Speech, *supra* note 119, at 534.

[274] Such shaming sanctions may be reviewed on appeal under a standard of judicial discretion, as to whether the shaming condition violates the fundamental goal of probation—rehabilitation of the offender.

corporate antitrust offenders with a "Hall of Shame" on its Internet site that includes the mug shots of the convicted executives, fuller descriptions of their role in defrauding customers, and testimonials by victims of how they were harmed. An antitrust commentator once suggested converting a famous hotel in Washington, D.C. into a prison with glass floors and ceilings, where the public could inspect the antitrust violators along with other white-collar criminals, "converse with them or jeer at them as they pleased."[275]

For corporations convicted of antitrust crimes, the Department of Justice may recommend, under the Sentencing Guidelines, that the corporate offenders at their expense publicize the antitrust violation and their steps to prevent the recurrence of similar offenses.[276] Depending on its heavy-handedness, this court-ordered self-criticism could run afoul of First Amendment principles or otherwise be ineffectual.[277] The Department of Justice, however, could identify in its press release and on the Department's

In addition, the shaming element could be challenged as "cruel and unusual punishment" under the Eighth Amendment. Ryan J. Huschka, Comment, *Sorry For The Jackass Sentence: A Critical Analysis Of The Constitutionality Of Contemporary Shaming Punishments*, 54 U. KAN. L. REV. 803 (2006); Aaron S. Book, Note, *Shame On You: An Analysis Of Modern Shame Punishment As An Alternative To Incarceration*, 40 WM. & MARY L. REV. 653 (1999).

[275] Victor H. Kramer, *Jail Sentences for Price Fixers? Yes, But What Kind of Jail and How Long?*, 46 ANTITRUST L.J. 534, 536 (1977). Near the speaker button outside the rooms, Kramer proposed that the history of each criminal's offense be related. *Id.* at 536. Kramer argued that the "sentence should be calculated to subject the defendant to maximum exposure for his crime for the shortest possible period of time that will have the deterrent effect." *Id.* at 535.

[276] Sentencing Guidelines for the United States Courts, 18 U.S.C.S. Appx. § 8D1.4(a) (2006).

[277] For example, Judge Renfrew's sentence, which required the antitrust defendants to make an oral presentation to business and civic court-ordered speeches about their crimes, offended some. One attorney said the court-ordered speeches "smack[ed] too much of the self-criticism demanded of 'sinners' by Red China and other doctrinaire Communist nations." Renfrew, *supra* note 34, at 609.

Internet site the board of directors and executives who directly managed the price-fixers, publicize how the company profited during this period (including the bonuses and compensation paid to these corporate executives), and identify all of the company's earlier convictions.[278]

But aside from shaming, another strong behavioral motivator is praise. In reading of late both child rearing and dog obedience books, I was struck by a consistent theme throughout, namely, the use of praise, rather than punishment (or the threat thereof).[279] Optimal deterrence theory is premised solely on avoidance of costly punishment, which has proven ineffectual by itself to develop positive habits in either children or puppies. Why should corporate

[278] Some shareholder activists, for example, effectively employed shaming by naming the corporate directors in their advertisements in the WALL STREET JOURNAL. Skeel, *supra* note 248, at 1847-48. Moreover, a publicly-held company convicted of a federal crime could be required to prominently disclose who was involved in the decision-making process with respect to that crime, what were their justifications for these actions, if supervisors failed to discover the crime, what were the reasons for their failure, how are they being held accountable for any derelictions, and the company's efforts to prevent recurrence of such criminal offenses. *See* Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1656 (2002) (demanding corporations to disclose decision-making process could help ensure greater individual accountability and moral responsibility). The U.S. Securities and Exchange Commission considers many of these factors when determining its enforcement responses, by asking *inter alia* (i) what compliance procedures were already in place to prevent the misconduct, (ii) did senior management participate in, or turn a blind eye toward, obvious indicia of misconduct, (iii) did the company immediately stop the misconduct, (iv) what actions did the company take against culpable individuals, and (v) did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct. Barry W. Rashkover, *Reforming Corporations Through Prosecution: Perspectives from an SEC Enforcement Lawyer*, 89 CORNELL L. REV. 535, 539-40 (2004).

[279] *See, e.g.*, THE MONKS OF NEW SKETE, HOW TO BE YOUR DOG'S BEST FRIEND (Little Brown 1978); T. BERRY BRAZELTON & JOSHUA D. SPARROW, TOUCHPOINTS THREE TO SIX (Da Capo Press 2001); AMERICAN ACADEMY OF PEDIATRICS, CARING FOR YOUR SCHOOL-AGE CHILD: AGES 5 TO 12 (Edward L. Schor ed.-in-chief Bantam 1999).

executives be any different? Studies have found that individuals exposed to information that emphasized moral duty and praise outperformed those exposed solely to monetary incentives[280] or information emphasizing the possible penalties.[281] Executives may quickly adapt once exposed to their peers' attitudes.[282] Instead of shaming, the government can praise corporations that effectively instill in their employees the moral norms that oppose hard-core cartels. Such praiseworthy behavior may arise if a company refuses an invitation to collude and promptly reports it to the antitrust enforcers.[283]

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[280] Gneezy & Rustichini, *supra* note 153, at 578-80 (discussing a study involving high school students during Israel's donation days, whereby students solely given speech of public benefits collected more money than group given speech but also financial incentives).

[281] One study involving citizens preparing their income tax statements attempted to determine the effect of sanction threats and to compare them with appeals to conscience. Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 296-99 (1967). For the "sanction-treated" group, the emphasis was on the severity of possible jail sentences and the likelihood that tax violators would be apprehended. The "conscience" group was exposed to questions "accentuating moral reasons for compliance with tax law." *Id.* at 287. The conscience appeal, overall, had a stronger effect on income reported than did the threat of sanctions. The study's results gave some evidence that although the threat of punishment can increase compliance (particularly among the wealthiest respondents), appeals to conscience (particularly among the college-educated respondents) can be a more effective instrument than sanction threat for securing compliance.

[282] Kahan, *supra* note 219, at 359 (citing experimental and empirical data).

[283] Some may question the motives of companies that implicate their competitors (given the strategic advantage in having the competitors mired in costly and time-consuming litigation). But the accuser's motive is less significant than its veracity. No doubt a risk of false positives exist, which may be tempered somewhat by 18 U.S.C. § 1001(a)(2) (2001) (federal crime to "knowingly and willfully" make "any materially false, fictitious, or fraudulent statement or representation"). Alternatively, the government could highlight effective corporate compliance programs in speeches or on the Internet (but even here it may be embarrassing if that company shortly thereafter is convicted of a serious federal or state crime).

B. Potential Risks if Antitrust Violations Deemed Immoral

The first risk of antitrust violations being deemed immoral is the defensibility of antitrust exemptions for cartel behavior. As the ICN noted, "Virtually every jurisdiction has exemptions from anti-cartel laws, either in connection with regulation of an industry or because legislative choice has been made not to apply antitrust laws to certain conduct or industries."[284] The Department of Justice Manual cites agriculture,[285] export activities,[286] insurance,[287] labor,[288]

[284] ICN Report, *supra* note 15, at 13.

[285] *See* 15 U.S.C. § 17 (2005) (permitting, among other things, operation of agricultural or horticultural mutual assistance organizations when such organizations do not have capital stock or not conducted for profit); Capper-Volstead Agricultural Producers' Associations Act, 7 U.S.C. §§ 291-292 (2005) (allowing persons engaged in the production of agricultural products to act together for purpose of "collectively processing, preparing for market, handling, and marketing" their products and permits cooperatives to have "market agencies in common"); Capper-Volstead Cooperative Marketing Act of 1926, 7 U.S.C. § 455 (2005) (authorizing agricultural producers and associations to acquire and exchange past, present, and prospective pricing, production, and marketing data); Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608 (2005) (providing U.S. Secretary of Agriculture authority to enter into (i) marketing agreements with producers and processors of agricultural commodities and (ii) marketing orders, except for milk, that control amount of an agricultural product reaching the market and thus serve to enhance the price).

[286] Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-21 (2005) (limited antitrust immunity for export trade, export trade activities and methods of operation specified in certificate of review issued by Secretary of Commerce with Attorney General's concurrence); Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-64 (2005) (antitrust immunity for formation and operation of associations of otherwise competing businesses to engage in collective export sales; immunity does not extend to actions that have an anticompetitive effect within United States or that injure domestic competitors of members of export associations).

[287] McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015 (2005) (exempting from antitrust laws "business of insurance" to the extent "regulated by state law").

fishing,[289] defense preparedness, [290] newspapers,[291] professional sports,[292] small business joint ventures,[293] and

[288] 15 U.S.C. § 17 (2005) (providing that labor of human being is not a commodity or article of commerce and that the Act permits labor organizations to carry out their legitimate objectives); 29 U.S.C. § 52 (2005) (immunizing collective activity by employees relating to dispute concerning terms or conditions of employment); Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-110, 113-115 (2005) (providing that U.S. courts do not have jurisdiction to issue restraining orders or injunctions against certain union activities on the basis that such activities constitute unlawful combination or conspiracy under antitrust laws).

[289] Fishermen's Collective Marketing Act, 15 U.S.C. §§ 521-522 (2005) (permitting persons engaged in the fishing industry as fishermen to act together for purpose of catching, producing, preparing for market, processing, handling and marketing their products).

[290] Defense Production Act of 1950, 50 U.S.C. app. § 2158 (2006) (providing that the President or his delegate, in conjunction with Attorney General, may approve voluntary agreements among various industry groups for development of preparedness programs to meet potential national emergencies. Persons participating in such an agreement are immunized from the operation of antitrust laws with respect to good faith activities undertaken to fulfill their responsibilities under agreement).

[291] Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-1804 (2006) (granting limited exemption for joint operating arrangements between newspapers to share production facilities and combine commercial operations, provided that newspapers retain separate editorial and reporting staffs, determine their editorial policies independently, and so long as one newspaper party to the joint venture is classified as failing).

[292] Sports Broadcasting Act, 15 U.S.C. §§ 1291-1295 (2006) (exempting, with some limitations, agreements among professional football, baseball, basketball, and hockey teams to negotiate jointly, through their leagues, for the sale of television rights).

[293] Small Business Act, 15 U.S.C. §§ 638-640 (2006) (Small Business Administration may, after consultation with Attorney General and Chair of FTC, and with Attorney General's prior written approval, approve any agreement between small business firms providing for a joint program of research and development if Administrator finds that such program will strengthen free enterprise system and national economy. To the extent President has delegated his authority under § 640, the Department of Justice may also be asked to approve, on Attorney General's behalf, proposed voluntary agreements or programs among small business concerns to further objectives of Small Business Act found to be in the public interest as contributing to national defense).

local governments[294] as enjoying limited or general immunity from the federal antitrust laws. One benefit of morally-neutral regulations is their mutability: such regulations can be readily altered to reflect these detailed nuances, exceptions and clarifications.[295] If the moral wrongfulness and social harms from hard-core cartels are widely publicized, it will be harder to justify such antitrust exemptions for special interest groups. A Commissioner of the current Antitrust Modernization Commission poignantly raised this very issue:

> [O]ne difficulty I have with the level of criminal jail terms and fines is because so much of commerce is price-fixed every day... under various immunities and exemptions, and... if you're out in Iowa and one guy's a farm and the other guy is a farm implement guy and they both are good price fixers, one goes to jail and the other has a big dinner in his honor. He's on the cover of the farm journals, the man of the year. I have always thought that the one byproduct of that is that people don't in this country view price fixing as evil as they should because so many of their neighbors do it under immunities and exemptions.... How do you reconcile the ever increasing demand for higher fines and higher sentences with the free pass to so much of the price fixing that goes on under the immunities and exemptions?[296]

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[294] Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (2006) (providing antitrust immunity for local government officials and employees thereof acting in an official capacity with respect to actions brought under 15 U.S.C. § 15 for damages, fees or costs. The Act provides similar immunity for claims directed at a person, as that term is defined in 15 U.S.C. § 12, based on official action directed by local government).

[295] Shavell, *supra* note 44, at 401.

[296] Donald G. Kempf, Jr., Commissioner, Statement at the Antitrust Modernization Commission Public Hearing, 81-2 (Nov. 3, 2005), *available at* http://www.amc.gov/commission_hearings/criminal_remedies.htm. Judge Parsons similarly raised this discrepancy in explaining his reluctance to sentence incarceration for all of the antitrust defendants in United States v. Alton Box Board Co., No. 76 CR 199, 1977 WL 1374, at *6 (N.D. Ill. March 4, 1977). A related point is when an immunity for a

Likewise, some of the participants in the notorious electrical equipment cartels in the 1960s reported that "they first experienced price fixing when they served as industry representatives in federal price-control programs during World War II."[297]

A second risk is that for moral norms to be effective, they must be simple and unequivocal, e.g., "thou shall not" prohibitions. This renders competition policy, with its many permutations, immunities, and exceptions, an unsuitable candidate. Indeed, the fact that so many antitrust immunities exist suggests its amorality, since it presumably should be difficult to carve out immunities for immoral acts, such as murder, theft, or torture.

It may be easy to proclaim "Thou Shall Not Price-Fix," but what is price-fixing? In some highly concentrated industries, competitors need not expressly collude to reach a supracompetitive price. If the competitors fall short of expressly agreeing and arrive at such a supracompetitive price, through other facilitating devices, is such coordinated behavior immoral, even if lawful?[298] Likewise, competitors regularly agree upon prices within a joint venture where they also to varying degrees integrate resources and share risks. If prices increase after the joint venture's formation, does its morality depend on the participants' intent or the degree of integration?

A critic may wonder whether it is the means (the illicit agreement) or the ends (supracompetitive price, deadweight loss, etc.) that render the act immoral. If it is the means, how does the moralist reconcile morally-neutral anticompetitive actions that pose greater harm? For

particular industry is lost, does the activity automatically become immoral?

[297] Ball & Friedman, *supra* note 228, at 221 (citing Smith, *Electrical Conspiracy (Part I)*, *supra* note 33, at 132, 136).

[298] Short of specifically agreeing to fix prices, for example, competitors may collude by signaling their intentions to each another by announcing in advance a price increase, to see whether the other competitors will follow. This may or may not violate the antitrust laws. *See* Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency*, 19 ANTITRUST 81 (Spring 2005).

example, if it is deemed immoral for two competitors to fix prices, is it immoral if these two competitors merged solely to raise prices?[299] Suppose one company, after unsuccessfully attempting to collude with its competitor, acquires that competitor, closes its plant, fires its workers, and raises prices. Would that be any less immoral than the price-fixers given the anticompetitive means and end? Aside from hard-core cartels, many legal activities may lead to supra-competitive prices, such as high tariffs on imported goods or other regulatory barriers. Competitors with an evil intent can petition the government for such protectionist measures, which would result in supracompetitive pricing. Conversely, what if the means were immoral, but the end was socially beneficial? The government may want to discourage the output of certain harmful activities, such as smoking. Would price fixing in such industries be immoral, where the result would be less output and fewer deaths?[300] Consequently,

[299] *See, e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 576 (1966) (describing the defendant's monopoly that was perfected through its acquisition of its significant competitors' controlling interests). In the EU, unlike the United States, the European Court of Justice found that a firm can abuse its dominant position where it has an administrative monopoly and charges services fees which are disproportionate to the economic value of the service provided. *See* Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne, Case C-323/93, 1994 ECR I-5077, *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=693J0323. This is still applied today. *See also* European Commission, *European Policy and the Consumer* 4 (2004), *available at* http://europa.eu.int/comm/competition/publications/consumer_en.pdf (noting that company can abuse its dominant position by charging unreasonably high prices, which may exploit customers).

[300] In FTC v. Swedish Match, Judge Hogan juxtaposed the government's efforts to block a merger in the chewing tobacco industry on the theory that prices would likely increase post-merger, with the government's attempt to stem the consumption of tobacco by increasing the prices through taxes, regulating advertising, and decreasing the amount of retail shelf-space devoted to this product. 131 F. Supp. 2d 151, 153 n.1 (D.D.C. 2000). The court appreciated the FTC's explanation that consumption would not likely decline post-merger, but that consumers would only pay more. Thus, the court saw no health benefits in permitting

where does one draw the line between immoral and moral anticompetitive conduct, and is the morality contingent on the means (the agreement to collude), the end (the supracompetitive price), or both? How principled would that line be, given that the net harm from such "moral" conduct may at times exceed the net harm from the immoral cartel?

A third criticism is whether antitrust can shoulder the ethics of the marketplace.[301] Since the 1980s, antitrust's *per se* liability standard is being applied to fewer practices.[302]

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the acquisition, and ultimately on antitrust principles, preliminarily enjoined the transaction. *Id.*

[301] Critics could cite *Brooke Group* for the proposition that the antitrust laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. 509 U.S. at 225 (discussing Section 2 of the Sherman Act); *see also* Hunt v. Crumboch, 325 U.S. 821, 826 (1945) ("That Act does not purport to afford remedies for all torts committed by or against persons in interstate commerce."); Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979) ("Even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws."); Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 571 (5th Cir. 1978) ("Dealings between a manufacturer and its agents may be arbitrary, unfair, or lacking in good business judgment, but, without more, they will not violate the Act."); Merkle Press Inc. v. Merkle, 519 F. Supp. 50, 54 (D. Md. 1981) ("Courts must be circumspect in converting ordinary business torts into violations of the antitrust laws. To do so would be to 'create a federal common law of unfair competition' which was not the intent of the antitrust laws."); Uniroyal, Inc. v. Hoff & Thames, Inc., 511 F. Supp. 1060, 1067 (S.D. Miss. 1981) (quoting Scranton Construction v. Litton Industries Leasing Corp., 494 F.2d 778, 783 (5th Cir. 1974)) (Sherman Act not "a panacea for all business affronts which seem to fit nowhere else"); B&B Oil & Chem. Co. v. Franklin Oil Corp., 293 F. Supp. 1313, 1317 (E.D. Mich. 1968) ("But the antitrust acts do not purport to formulate a code of business morality. They are not tablets of stone for the conduct of business generally."). But these cases assert the unremarkable proposition that what is immoral may not necessarily be anticompetitive. These cases do not address the issue here of whether a *per se* illegal antitrust crime is immoral.

[302] Most recently in State Oil Co. v. Khan, the Court in eliminating its *per se* ban on vertical restraints on maximum price, described its role "in recognizing and adapting to changed circumstances and the lessons of accumulated experience." 522 U.S. 3, 20 (1997). The Court may also have the opportunity in its 2006-2007 term to reconsider the *per se* ban on

Antitrust has moved away from criminal laws' absolute commands of "moral propaganda" to a softer-edge pricing standard,[303] namely the fact-intensive rule of reason standard, which recognizes the difficulty of predicting *ex ante* the likely competitive effects of many business activities. The ethics of many business professions, such as law and medicine, are largely governed by burgeoning regulations, not the antitrust laws.[304] Given the contraction of antitrust's *per se* rule and the growth of other laws, regulations, and codes for various industry participants, critics could argue that antitrust would be a poor vehicle to educate lawyers, doctors, and other professionals of which practices are ethical or unethical.[305] Granted some business practices that are allocatively inefficient may be construed as immoral, but antitrust should not veer toward these normative judgments of morality. If notions of morality were added to the courts' and enforcers' review, the outcome could become so uncertain and unpredictable as to chill many legitimate pro-

certain vertical restraints on minimum price. Leegin Creative Leather Prod., Inc. v. PSKS Inc., No. 04-41243, 171 Fed.Appx. 464, 2006 WL 690946 (5th Cir. Mar. 20, 2006), *mandate stayed by (pending petition for cert.)*, 2006 WL 2466835 (U.S. Aug 28, 2006), *petition for cert. filed*, 75 USLW 3207 (U.S. Oct. 4, 2006)(No. 06-480). At the 2006 American Bar Association's Spring Antitrust Meeting, some panelists questioned, after Illinois Tool Works, Inc. v. Independent Ink., Inc., 126 U.S. 1281, 1292 (2006), the remaining vitality of what is left of the *per se* illegality to tying arrangements. As the D.C. Circuit concluded, the Court has backed away from fixed categories (like *per se* illegal v. rule of reason) toward a continuum between *per se* illegality and rule of reason, depending on each case's circumstances, details and the logic of the restraint. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 35 (D.C. Cir. 2005).

[303] *See* Coffee, *supra* note 146, at 225-28 (discussing prohibiting versus pricing standard).

[304] As the Court noted, other laws, for example, "'unfair competition' laws, business tort laws, or regulatory laws, provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality.'" NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137 (1998) (quoting 3 AREEDA & HOVENKAMP, ANTITRUST LAW ¶651d, at 78 (1996)).

[305] *See, e.g.*, Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 272 (7th Cir. 1984) (Posner, J.) (doubting that an antitrust case is the proper forum for deciding questions of legal ethics).

competitive business activities. As entrenched special interest groups spin their own moral version of events, antitrust enforcement will become unprincipled. Consequently, for these critics, antitrust's focus should remain on allocative efficiency, even if it may, at times, coextend with moral norms. Although the antitrust laws are often touted as the Magna Carta of the free market system, they are nonetheless simply laws, not constitutional provisions. It should be left to Congress, the state legislatures, and the courts, as they have done in the past, to craft the moral or ethical norms for the many diverse industries and professions, rather than using the unwieldy antitrust laws.[306]

C. Implications if Morality is Ignored

After weighing the benefits and risks of deeming hard-core cartel violations as immoral, one could simply opt for the current course of avoiding the issue. But that raises several risks.

1. Questions about Criminalizing Antitrust Violations

Absent any moral basis for its criminality, a continuing policy dispute will be whether antitrust violations should be criminalized.[307] If antitrust crimes are indeed morally neutral, then prosecuting them criminally should be the last resort for deterrence. If corporate executives are indeed rational profit maximizers and the harm from an antitrust

[306] Indeed, a profession's canon of ethics (for example, in prohibiting competitive bidding) could be deemed moral to its members, but nonetheless violate the Sherman Act. National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978).

[307] One popular antitrust treatise identifies as a "basic policy dispute about antitrust law ... the appropriateness of criminal sanctions." PHILLIP E. AREEDA & HERBERT J. HOVENKAMP, ANTITRUST LAW • ¶ 303b3 at 31 (2d ed. 2000). The authors recognized, however, that the Sherman Act's criminal provisions are unlikely to be eliminated. *Id.*

violation is solely pecuniary,[308] then arguably a monetary penalty coupled with other civil penalties and damages should deter such undesired behavior. Not surprisingly, some strong proponents of the optimal deterrence theory see little, if any, utility in incarcerating antitrust violators.[309] Richard Posner, for example, downplays the stigma from a criminal conviction as an additional deterrent, since a "rational person is influenced by his decision whether to engage in criminal activity by the probability of punishment as well as by the magnitude of the punishment imposed if it is imposed."[310] Fines, unlike incarceration, are simply another wealth transfer that "only negligibly reduces the aggregate wealth of society."[311] In addition, criminal prosecution involves additional costs, given (i) the involvement of the grand jury; (ii) the constitutional safeguards for the defendants, such as a higher evidentiary proof (which

[308] Moreover, unlike other kinds of thefts, there is a low possibility that the cartel members' conduct would instill fear in its victims or the public generally. R. NOZICK, ANARCHY, STATE AND UTOPIA 65-71 (1974). But while not instilling fear, such rampant antitrust violations may cause consumers to lose confidence in the market system.

[309] Cohen & Scheffman, *supra* note 47, at 342-43. If antitrust violations were deemed morally-neutral, even those who do not subscribe to optimal deterrence theory may find imprisonment unnecessary for antitrust offenders, under the Model Penal Code factors, given (i) the nominal risk that during the period of a suspended sentence or probation the defendant will commit another crime, (ii) that the defendant likely does not need correctional treatment, (iii) a lesser sentence would not depreciate the seriousness of this morally-neutral crime, (iv) the defendant's employer has compensated or will compensate the victims for their antitrust damages, (v) the defendant had no history of prior criminal activity and has led a law-abiding life before committing the present antitrust offense, (vi) the character and attitudes of the defendant indicate that he is unlikely to commit another crime, (vii) the defendant is particularly likely to respond affirmatively to probationary treatment, and (viii) given the hardship already borne by a criminal conviction, imprisonment would entail excessive hardship to himself or his dependents. Model Penal Code § 7.01.

[310] POSNER, ANTITRUST LAW, *supra* note 29, at 271; United States v. Alton Box Board, No. 76 CR 199, 1977 WL 1374, at *20 (N.D. Ill. March 4, 1977) (individual defendants citing Posner).

[311] POSNER, ANTITRUST LAW, *supra* note 29, at 270.

presumably involves incremental costs to obtain), and risk of the guilty going free (or never indicted) because of this incremental cost; (iii) the trial and sentencing (requiring a jury, probation officers, etc.); and (iv) costs of incarceration, which include lost productivity, and costs on defendant's family members.

Some argue that the threat of incarceration is necessary to deter those executives who are too poor to pay the optimally deterring fine.[312] But such inability to pay, for Posner, is simply a "detail," since it is unimportant if the individual executives are joined as defendants.[313] Rather, the profit-maximizing firms will take measures to deter their employees from further violating the antitrust laws.[314] As these adherents note, Congress found that the enforcement objectives of the Federal Trade Commission, which similarly investigates antitrust violations, could be accomplished

[312] *See, e.g.*, Mark A. Cohen, *Theories of Punishment and Empirical Trends in Corporate Criminal Sanctions*, 17 MANAGERIAL & DECISION ECONOMICS 399, 400 (1996) (under "pure economic efficiency view, the only time incarceration is required is when the offender cannot pay the optimal fine"). But, if the court concludes under the Sentencing Guidelines that the individual defendant cannot pay the entire fine, it should impose community service in lieu of a portion of the fine, which should be "equally as burdensome as a fine." U.S.S.G. § 2R1.1, comment (n.2).

[313] POSNER, ANTITRUST LAW, *supra* note 29, at 271.

[314] *Id.* This is in accord with optimal deterrence theory. Cohen & Scheffman, *supra* note 47, at 400. Moreover, "it does not matter who imposes the penalty—all sources of externally imposed sanctions are essentially 'fungible.'" *Id.* at 405. It would not matter whether the Department of Justice extracted the penalty through a criminal fine versus a private class action. In one study, the authors found that neither imprisonment (given that over eighty-five percent of those convicted at that time did not serve jail time) nor monetary penalties posed a credible threat to colluding firms, and hypothesized that the real deterrent effect at that time came from the increased likelihood of a private monetary award of trebled damages to those injured customers. Michael Kent Block, et al., *The Deterrent Effect of Antitrust*, 89 J. POL. ECON. 429, 440 (1981). A successful government price-fixing action lowers the hurdle for a private class action, which provided, at that time, the more significant financial penalty. *Id.* at 442-43.

solely through civil proceedings.[315] Even for the most aggressive utilitarian, the optimal prison term should be shorter, rather than longer, as "after a relatively short time the marginal cost to society of additional prison time likely would exceed the gains from additional deterrence."[316] Moreover, as a convicted felon, the antitrust offender will lose certain rights and privileges.[317]

As antitrust violators are sentenced to longer prison terms, and as Congress continues to increase criminal sanctions, critics will question ever louder this expenditure of tax dollars (not to mention the increasing social costs of these executives toiling away behind bars when they could be maximizing profits in the corporate world) on the criminal convictions and incarceration of these morally blameless executives when a less costly civil penalty (and/or shorter incarceration) would suffice.

2. Overcriminalization

Some utilitarians may argue that a crime "is anything which the legislature chooses to say it is,"[318] and this legislative choice is justified when the threat of

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[315] JOSEPH W. BURNS, A STUDY OF THE ANTITRUST LAWS, THEIR ADMINISTRATION, INTERPRETATION, AND EFFECT 110 (1958).

[316] OECD Cartel Sanction Report, *supra* note 44, at 8; *see also* Ehrlich, *supra* note 46, at 62 ("many studies find that increasing the risk of imprisonment for most crime categories has a significantly larger deterrent effect in elasticity terms than increasing the length of imprisonment, especially for violent crimes, and that the magnitude of the elasticities is less than 1").

[317] Although the federal law generally prohibits federal felons from obtaining, receiving, transporting, or possessing firearms, which covers both handguns and rifles, *see* 18 U.S.C. §§ 922(f)(1), 921(a)(3) (1994), antitrust offenses, for some reason, are exempt from this federal ban. *See* 18 U.S.C. § 921(a)(20)(A) (1994). For an overview of rights lost by a convicted felon, *see* ABA STANDARDS FOR CRIMINAL JUSTICE § 14-1.4 (3rd ed. 1999).

[318] Hart (*Aims of Criminal Law*), *supra* note 186, at 432 (discussing Supreme Court's decisions in Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 67-69 (1910) and United States v. Johnson, 221 U.S. 488, 497-98 (1911)).

imprisonment more effectively deters such antitrust violations than civil remedies alone. But others will respond that criminalizing such morally-neutral conduct will have several adverse consequences. First, the criminal law "is not merely a device for promoting particular economic and social ends" but is "directed to the moral standards of society."[319] As Henry Hart and others have argued, criminal sanctions cannot be justified unless accompanied by the judgment of community condemnation. One could view this on moral grounds—that society should not impose its "heavy artillery" on morally-neutral conduct, but only conduct that deviates from societal norms and is sufficiently harmful or offensive in itself to warrant the curtailment of individual liberties.[320] Indeed, the Sentencing Commission in establishing its sentencing guidelines must factor "the community view of the gravity of the offense" and the "public concern generated by the offense."[321]

A second concern is that criminalizing morally-neutral behavior will undermine the effectiveness of deterring immoral conduct.[322] The thinking is that criminalizing behavior has several attendant benefits. Criminal law serves an important educational and socializing function, whereby society decrees which behavior is immoral and, based on its punishment, the degree of its immorality.[323] These educational benefits, including the "moral gradation of punishment," are lost if morally-neutral crimes are equally or more severely punished than immoral offenses.[324] Moreover, absent a moral component, it will be harder to

[319] Burns, *supra* note 315, at 112 (quoting unidentified federal judge).

[320] Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 738 (1981).

[321] 28 U.S.C. §§ 994(c)(4)-(5).

[322] *See, e.g.*, Kadish, *supra* note 22, at 446.

[323] Coffee, *supra* note 146, at 193-94.

[324] H. L. A. HART, LAW, LIBERTY, AND MORALITY 36-37 (1963). It may have other adverse effects. For example, if the "offender will be executed for a minor assault and for a murder, there is no marginal deterrence to murder." George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POLITICAL ECONOMY 526, 527 (1970).

internalize such legal norms, which have many permutations and exceptions.

In criminalizing many morally-neutral activities, the moral stigma of a criminal conviction diminishes as well.[325] If we "tend to view the criminal as a person who violates laws which we cannot see ourselves violating," then we all eventually may be deemed criminals by violating numerous morally-neutral statutes.[326] In lessening the stigma associated with criminal behavior, such over-criminalization weakens the restraints of peer pressure and fear of social disapproval. Essentially, criminal law begins to lose its moral legitimacy.[327] For example, suppose to curb speeding along a desert highway (which has a low risk of detection), the state criminalizes this offense with a steep penalty (ten year imprisonment). Similarly, other morally-neutral activities are criminalized to varying degrees. Faced with a menu of criminalized morally-neutral and immoral conduct, citizens, rather than obeying all of these prohibitions, begin to pick and choose, depending upon the competing norm, and unilaterally determine what is indeed immoral. The internalization of the moral norm is diminished, as people no

[325] Kadish, *supra* note 22, at 445; Hart (*Aims of the Criminal Law*), *supra* note 186, at 418 n.42.

[326] Ball & Friedman, *supra* note 228, at 217. For example, one respondent to Judge Renfrew's survey confessed that at one time, he and the other people at his dining table admitted (during the defendant's speech) that they all may have unwittingly engaged in anticompetitive practices, and with the "body of law growing at an alarming rate ... two honest businessmen can break the law without knowing it." Renfrew, *supra* note 32, at 604. Thus, if one respondent's friends had been caught in the act, and received a criminal sentence, the respondent would have considered it "a gross miscarriage of justice." *Id.* (This reaction might have arisen from defendants' distorted characterizations of their activities, but it nonetheless represents one public relations' response by an antitrust defendant. Also, currently, unlike the 1950s and 1960s, the Department of Justice prosecutes criminally hard-core cartels, a discrete subset of all antitrust violations.)

[327] Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 202 (1996); Allen, *supra* note 320, at 738; Kadish, *supra* note 22, at 425-26; HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 359 (1968).

longer feel guilt or fear of shame. Instead, speeding along the highway, citizens will brake when they spot a police cruiser, but resume speeding once they are safely past.

Some criticize this concern of overcriminalization, since it fails to account for criminal law's educational function.[328] Society can eventually accept actions previously viewed as morally-neutral as immoral, as we have done with environmental, civil rights, and money laundering laws. But here the prospect is that courts, antitrust enforcers, and antitrust scholars will stubbornly refuse to discuss antitrust's morality, thereby hampering its natural evolution toward immorality.

3. Ineffectiveness

Any criminal policy that focuses solely on the optimal price to deter crime, and ignores other social factors (such as moral norms), is likely to remain ineffectual.[329] It is therefore likely that Congress will further increase the Sherman Act's criminal fines and prison sentences in the quest for that elusive level of optimal deterrence. Absent a moral basis, even the most fervent utilitarian will question the utility of incarcerating these executives for years (and perhaps eventually decades). A more pressing concern is the issue of prosecutor, jury, or judge nullification, which has thwarted antitrust prosecution for decades.[330] As discussed below, this nullification has impeded current attempts in

[328] *See* Coffee, *supra* note 146, at 200.

[329] Kahan, *supra* note 219, at 361.

[330] A classic example of such jury nullification is British law in the eighteenth century which had approximately 200 capital offenses, including stealing goods valued at a specific amount from a specific locale (such as items valued at five shillings stolen from a shop). Schwartz & Orleans, *supra* note 279, at 277-78. Juries responded by specifying a lower value for the goods (even though there was sworn testimony to the contrary) to place it below the threshold for a capital offense. By 1861, Parliament had abolished the death penalty for all but four offenses, in part because of pressure from commercial interests, "whose avowed purpose was to secure reliable enforcement of property laws by making their penalties more acceptable to juries." *Id.* at 278.

other nations to criminalize (or increase the criminal sanctions against) hard-core cartels or to prosecute cartels under existing laws. Even if the defendant pleads *nolo contendere* (or is found guilty), judges, as they did pre-Sentencing Guidelines, may reject optimal deterrence theory and sentence the individual defendant lightly.[331]

4. Morality of Overdeterrence

Moral issues are raised even if the antitrust offenders receive a severe sentence. Suppose, for example, lengthy prison sentences are indeed inflicted for speeding along the desert highway (given the offense's low probability of detection at current enforcement expenditures). What moral issues would arise if an offender is now punished with twenty years of hard labor for speeding, not because the severity is proportional to the particular offense's gravity—either in terms of social harm or the wrongfulness of the act itself—but because this represents to the legislator an efficient means to deter speeding in general?[332] The focus is no longer on the reprehensibility of the individual defendant's acts, but on the utility of using to the maximum advantage that particular defendant in generally deterring the crime.

Likewise, even if antitrust policymakers avoid these moral issues, defense lawyers and others will question incarcerating business executives for a morally-neutral offense, based solely on an empirically untested economic

[331] After *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines effectively advisory, the district court, if it determines that a Guidelines sentence does not meet the purpose of sentencing, may impose a non-Guidelines sentence. Written Statement of the U.S. Sentencing Commission before the Antitrust Modernization Commission, Nov. 3, 2005, at 8. For examples of the courts' discomfort in sentencing antitrust offenders to jail for the purposes of general deterrence, *see* Renfrew, *supra* note 34; United States v. Alton Box Board Co., No. 76-CR-199, 1977 WL 1374, at *2 (N.D. Ill. Mar. 4, 1977).

[332] Johannes Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649 (1970).

theory of optimal deterrence.[333] Even if one accepts general deterrence, one will eventually ask to what degree society should bear on an individual defendant's shoulders the "impossibility of monitoring all the businesses in the country, and the difficulty of detecting and proving criminal violations of the antitrust laws."[334] How much should an individual's liberty be sacrificed to promote general deterrence? This is simply a variation of the age-old moral issue of whether the condemnation of an innocent person can be justified as a legitimate means of saving a nation.[335] Are moderate monetary penalties, when coupled with more active enforcement, "more acceptable to the moral sentiments than harsh penalties with only sporadic enforcement?"[336] Some have questioned "the justice and wisdom of imposing a stigma of moral blame in the absence of blameworthiness in the actor."[337]

One proponent of stiffer antitrust penalties suggested that high penalties would reduce the cost of policing such behavior.[338] While the authors jokingly suggested public executions for antitrust violations, such executions had an immediate impact on pricing in the affected industry in another country. Nonetheless, as the ICN correctly pointed out, a key issue is "just how far deterrence should go."[339] This is especially troubling if criminal penalties for antitrust violations have no moral footing and the defendant could conceivably face ten years behind bars based on a potentially flawed economic theory.

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[333] For one example of such criticisms, *see* The Joint Response of the Individual Defendants To "Government's Sentencing Memorandum" *available at Alton Box Board*, 1977 WL 1374, at *16-23.

[334] 1977 Department of Justice Guidelines for Sentencing Recommendations, *supra* note 69, at 552.

[335] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 209, at §1, ch. 1, art. 4.

[336] Andenaes, Morality, *supra* note 332, at 655; *see also* Kahan, *supra* note 219, at 382.

[337] Kadish, *supra* note 22, at 442; *see also* Hart, *supra* note 186, at 422.

[338] *See* Block & Sidak, *supra* note 117, at 1132.

[339] ICN Report, *supra* note 15, at 63.

5. Public Confidence in the Integrity of Political, Economic, and Government Institutions

On the other hand, suppose that criminal law retains its educative function, and many in society deem certain hard-core antitrust violations, based on the severe criminal sanctions, as indeed immoral. If the next generation of antitrust officials and judges, however, treat such antitrust violations as though they were morally neutral (perhaps focusing more on corporate fines and less on individual accountability), then this too may have adverse consequences. The public may view the antitrust offenders as getting off easy; they may believe that "there is an inherent bias in the administration of justice" in favor of these white-collar criminals.[340]

6. Ability to Convince Other Nations to Prosecute Hard-Core Cartels

Since the Sherman Act's inception, many federal judges have treated antitrust offenders as respectable executives who posed no danger to society. One antitrust commentator in the 1950s opined that these price-fixers "are leaders in their respective communities and men of unquestioned personal integrity whose careers are clear of any taint of moral turpitude."[341] Indeed, the strictures of the Sherman

[340] Baker Speech, *supra* note 119, at 531. As Baker noted, "Crimes by corporations and businessmen 'establish an example which tends to erode the moral base of the law and provide an opportunity for other kinds of offenders to rationalize their misconduct.'" *Id.* at 532 (quoting United States v. Bengimina, 1971 Trade Cases ¶ 73,474 at 89,926 (W.D.Mo. 1971) (quoting The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: *Crime and its Impact: An Assessment* (1967))). Likewise, Judge Renfrew noted that an unidentified "able and well-known district judge" wrote him to disagree with his light sentence for antitrust offenders. The unidentified judge wrote that he would be unable to sleep nights if "[the unidentified judge] continued to imprison blacks for nonviolent felony offenses, as is often necessary, and put white 'white collar' offenders on the street." Renfrew, *supra* note 34, at 613.

[341] Kramer, Comment, *supra* note 61, at 536.

Act "run counter to the normal pattern of behavior of the majority of businessmen" and criminalize otherwise "normal" conduct.[342] Prodded by the Department of Justice, Congress, and the Sentencing Guidelines, courts have been sentencing antitrust criminals to longer prison sentences. Although the Department of Justice is dedicated to criminally prosecuting these cartels, prosecutors in other countries might find cartels a low priority compared to violent or immoral crimes,[343] given (i) cartels' perceived victimless or amorphous effects; (ii) the fact that individuals rarely enrich themselves; and (iii) the prevailing business norm.

Despite the great strides in global antitrust enforcement,[344] few other countries have matched the United States in criminalizing price-fixing and other hard-core antitrust offenses. In only a minority of countries is cartel conduct considered a crime punishable by imprisonment as well as by fines.[345] As the ICN found, the most widespread penalty provided for impermissible cartels are fines imposed on the corporate cartel members.[346] As of 1998, less than half of the OECD countries permitted the imposition of administrative or other fines on natural persons for cartel conduct.[347] Although thirteen surveyed countries theoretically

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[342] *Id.*

[343] OECD Cartel Sanction Report, *supra* note 44, at 22.

[344] The United Nations Conference on Trade and Development's 2005 DIRECTORY OF COMPETITION AUTHORITIES now identifies over 100 nations and supranational competition authorities (*e.g.*, the EC) that deal with restrictive business practices. U.N. Conference on Trade and Development, Jan. 12, 2005, *Directory of Competition Authorities*, U.N. Doc. TD/B/COM.2/CLP/49 (Jan. 12, 2005) (*prepared by* UNCTAD secretariat), *available at* http://r0.unctad.org/en/subsites/cpolicy/docs/c2clpd49_en.pdf.

[345] OECD Cartel Sanction Report, *supra* note 44, at 15 (quoting Org. for Econ. Co-Operation and Dev. [OECD], *Second Report by the Competition Committee on Effective Action Against Hard Core Cartels*, DAFFE/COMP (2003)2).

[346] ICN Report, *supra* note 15, at 58.

[347] OECD Cartel Sanction Report, *supra* note 44, at 15 (quoting OECD, *Second Report by the Competition Committee on Effective Action Against Hard Core Cartels*, DAFFE/COMP (2003)2).

authorized fines against individuals, between 1998 and 2000 only four countries actually imposed them[348] and only two imposed jail sentences.[349]

Very few corporate executives in other nations were actually imprisoned for antitrust offenses. An ICN survey of the United States and eighteen other jurisdictions found over one hundred companies fined annually in all cartel cases brought between 2001 and 2003.[350] In two of these three years, the number of fines to corporations substantially exceeded the number of fines to individuals,[351] and fines to individuals occurred more frequently than actual imprisonment.[352] Six of the nineteen countries did not report any antitrust prosecutions at all for this three-year period.[353]

Several countries, including Switzerland, have questioned criminal sanctions against individuals as an effective deterrent for an antitrust violation if the crime is not viewed as morally repugnant.[354] Among possible explanations cited

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[348] *Id.* (Australia, Canada, Germany, and United States).

[349] *Id.* (United States & Canada); *see also* ICN Report, *supra* note 15, at 66 (in nineteen country survey, only two of eight countries, which, in theory, provide for imprisonment, have actually put it into practice; one of the two only started convicting individuals in 2003, but suspended the execution of all the sentences). For an update on other countries' efforts to increase sanction for hard-core cartels, *see* OECD, *Hard-Core Cartels: Third Report on the Implementation of the 1998 Recommendation* 8-12 (2005).

[350] ICN Report, *supra* note 15, at 56. The countries surveyed were Australia, Brazil, Canada, European Union, France, Germany, Hungary, Ireland, Japan, Mexico, Pakistan, Russia, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States and Venezuela. *Id.* 179 companies were fined in 2001, 145 in 2002, and 174 in 2003. *Id.*

[351] *Id.* A total of 51 individuals were fined in 2001, 330 in 2002, and 63 in 2003.

[352] *Id.* A total of 21 individuals were imprisoned in 2001, 11 in 2002, and 30 in 2003. Although the survey does not break out the numbers by country, the United States incarcerated forty-five individuals during these three fiscal years (which ends in September rather than December), so one can roughly estimate that the United States accounted for over 70% of incarcerations.

[353] *Id.*

[354] OECD Cartel Sanction Report, *supra* note 44, at 88.

by OECD as to why other countries are reluctant to provide for sanctions against individuals is that criminal sanctions are not compatible with the nation's values and social norms, that imprisonment imposes significant costs on society, and that non-criminal sanctions would be more effective and criminal enforcement might decrease the level of enforcement.[355] Such foreign countries also view cartels as not sufficiently reprehensible to justify criminal penalties.[356]

Even where other foreign nations have criminal statutes against such hard-core cartels, competition authorities may still face, as the United States experienced for many decades, either prosecutorial, jury or judge nullification. Chinese Taipei introduced criminal sanctions in 1992 (including jail terms up to three years) but faced broad resistance within its business community, by "academics, the judicial system and the FTC itself."[357] Likewise, Mexico competition authorities found it difficult to persuade prosecutors to pursue such hard-core cartel cases as "[t]here was a lack of awareness in society that cartels were a reprehensible conduct."[358]

With the globalization of business, other nations' antitrust laws (or lack thereof) play an increasingly important role. Even if one accepted the optimal deterrence theory, it is necessary to encourage these other countries to increase their penalties for such hard-core cartel behavior.

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[355] *Id.* at 21.

[356] *Id.*

[357] *Id.* at 106.

[358] *Id.* at 111. In addition to persuading other nations' competition authorities to prosecute hard-core cartels, the Department of Justice and FTC also seek to dissuade state and local government officials from sanctioning such cartel behavior. At times, state or municipal agencies may prohibit or restrict pro-competitive activities, under the implied immunity of the state action doctrine. Parker v. Brown, 317 U.S. 341, 350–51 (1943); FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631 (1992). At times, the agency that promulgates the regulation is under the control of the industry participants it seeks to regulate, and may justify its anticompetitive actions as promoting the community's safety or welfare. If the state's anticompetitive aim is blended with a public-welfare aim, state legislators can more readily claim that their consumer protection measure trumps a morally-neutral antitrust regulation.

Given the varying degrees of due process afforded defendants in other nations, it may not necessarily be desirable that other countries criminalize antitrust violations. But absent any moral underpinnings, many other countries may not even prosecute these violations civilly. Moreover, in other nations where antitrust violations are tolerated, or not actively prosecuted, executives in those nations may have little incentive to refrain from price fixing.[359]

7. Irrelevancy

As Ball and Friedman commented, when the moral outrage that sets the criminal statute into motion subsides, the statute loses its vitality.[360] Absent a showing of the moral wrongfulness of cartels and their social harms, the antitrust laws become an easier piñata for those questioning antitrust's utility. With so many other issues vying for the citizens' attention, antitrust can easily slip into irrelevancy—a historical artifact. The Department of Justice will continue to aggressively prosecute hard-core cartels (which will continue to thrive in the global moral ambivalence); a few may be mentioned in the press but then are quickly forgotten.

V. CONCLUSION

It is clear that no economic sanction by itself can effectively deter hard-core cartels. Society must maximize the effectiveness of all available criminal and civil sanctions and remedies. The Department of Justice's Corporate

[359] Speaking personally "as someone inside a corporation," the Antitrust Modernization Commission Commissioner stated that "it is much harder to incentivize individuals in far-flung countries when they have no personal exposure and no – quite frankly, there's no impact of any price fixing that they may do . . . ." *Criminal Remedies: Public Hearing before Antitrust Modernization Commission*, at 100 (Nov. 3, 2005) (statement of Debra A. Valentine, Commissioner), *available at* http://www.amc.gov/commission_hearings/pdf/051103_Criminal_Remedies_Transcript_reform%20.pdf.

[360] Ball & Friedman, *supra* note 228, at 222.

Leniency Program is laudable in providing greater incentives for being first in confessing one's antitrust crime in exchange for criminal amnesty and reduced civil damages. It has been praised as "unquestionably, the single greatest investigative tool available to anti-cartel enforcers."[361] But in a well-functioning antitrust enforcement program, amnesty (or even moral norms) should be the last—rather than the first—weapon to deter cartels. After all, a leniency program comes into play only after (i) market conditions enabled competitors to collude, (ii) the conspirators actually conspired to the detriment of consumers, and (iii) one cartel member concluded that the likelihood of detection and penalties outweigh the supracompetitive profits from the expected remainder of the cartel. Consumers should not have to rely on the company's moral beneficence in avoiding such cartel behavior or the enlightened criminal seeking absolution through the leniency program. Such business executives are "free to practice the prerogatives of business statesmanship only to the extent that they are free from the compulsions of competition."[362] Instead, consumers expect from a free market system that competitors be compelled to provide the highest quality products at the lowest prices, not because of any kindness or sympathy, but in their quest for survival. The optimal regulator in the marketplace is neither moral norms nor criminal sanctions, but sheer competition.

Consequently, the primary anti-cartel weapon must be the effective global enforcement of competition policies. This includes each nation enforcing its merger policies to minimize the likelihood of companies either tacitly or expressly colluding in the first instance, eliminating special interest immunities and anticompetitive policies which serve

[361] Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Detecting And Deterring Cartel Activity Through An Effective Leniency Program, Speech before Int'l Workshop on Cartels (Nov. 21-22, 2000), *available at* http://www.usdoj.gov/atr/public/speeches/9928.htm.

[362] Ben W. Lewis, *Economics by Admonition*, 49 AM. ECON. REV. 384, 390 (1959).

only parochial interests and no greater societal benefit, and neither granting monopolies, sheltering them from competition, nor permitting their anticompetitive conduct. It makes no economic sense for any nation's courts, competition officials, or antitrust scholars to tout cartels as the supreme evil of antitrust law, but to be dismissive of other civil antitrust violations, such as anticompetitive mergers and anticompetitive behavior by monopolists.[363] When the market fails and collusion occurs, then competition authorities must advocate competition not only by prosecuting the cartel, but by exposing to the public its wrongfulness and net harm. Hopefully, these moral lessons will kindle sentiments of aversion in the public towards these hard-core cartels.

Although antitrust scholars, policymakers, enforcers, and courts have divorced morality from antitrust, given the

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[363] A monopolist's anticompetitive practices may impose far greater economic harm in a particular industry than a would-be cartel in that industry. As the former AAG in the Eisenhower Administration commented:

> An enforcement program built around a lackadaisical government enforcement eliminates much of the deterrent values found in private treble damage suits. What monopolist would fear his victim, when the victim could not afford to prove the monopolist's treble damage liability other than by means of a litigated government judgment? What defendant could plead a Sherman Act defense to a case brought against it by a monopolist whose secret illegal operations had not been called to public attention by a government prosecution? What deterrent effect would be found in a government prosecution did not expose the roots of a monopolist's power?

1954 Barnes Speech, *supra* note 34; *see also* MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 662–64 (1990) (noting that leniency toward mergers and monopolies in several countries, including the United States, has become counterproductive); Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach* 1-2 (May 30, 2002), *available at* http://www.isc.hbs.edu/053002antitrust.pdf (noting his conviction that "open competition, stimulated by strict antitrust enforcement, is essential not only to national prosperity, but to the health of companies themselves"); HARVARD UNIV. & WORLD ECON. FORUM, GLOBAL COMPETITIVENESS REPORT 2000 (2000).

escalation of criminal penalties for antitrust offenses and the infirmities of optimal deterrence theory, it is time to bring morality into the debate. One may remain dubious of morality having any role in antitrust policy; but for better or worse, antitrust may be all that remains to embody the general rules of competition and to describe what is fair or inequitable. The federal antitrust laws may indeed be a poor legal principle to shoulder such moral issues. Perhaps the problems that arrive at the antitrust enforcers' door represent greater moral issues in society. After vividly describing the GE & Westinghouse's notorious electrical equipment cartels, a 1961 Fortune magazine article aptly concluded with the following observation:

> The problem for American business does not start and stop with the scofflaws of the electrical industry or with antitrust. Much was made of the fact that G.E. operated under a system of disjointed authority, and this was one reason it got into trouble. A more significant factor, the disjointment of morals, is something for American executives to think about in all aspects of their relations with their companies, each other, and the community.[364]

But only in addressing the immorality or amorality of antitrust crimes does one reach these greater issues.

[364] Smith, *Electrical Conspiracy (Part II)*, *supra* note 31, at 161, 224.