CRIMINAL SANCTIONS UNDER STATE AND FEDERAL ANTITRUST LAWS*

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Perhaps the most violently debated issue in the law of antitrust remedies is whether criminal sanctions should be imposed. Some have made impassioned pleas for a crusade against criminal sanctions as abettors of "communism";[1] others have complained that private business interests in the United States regularly violate the antitrust laws with the impunity of hardened criminals.[2] Although several studies have considered the desirability of criminal antitrust sanctions,[3] certain myths and presumptions have often prevented an intelligent examination of the use of criminal sanctions in this field. This article will first examine the history and use of state and federal criminal antitrust sanctions; it then will discuss the myths and presumptions that have grown up around this most controversial of antitrust remedies and will suggest an appropriate role for criminal sanctions in the enforcement of federal and state antitrust laws.

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1 Cahill, *Must We Brand American Business by Indictment as Criminals?*, 1 ABA ANTITRUST SECTION 26 (1952). *See also* Hazard, *Are Big Businessmen Crooks?*, ATLANTIC MONTHLY, Nov. 1961, at 57.

2 *See generally* E. SUTHERLAND, WHITE COLLAR CRIME (1949). *See also* Kennedy, *The Antitrust Aims of the Justice Department*, 9 N.Y.L.F. 1, 3 (1963), where the former Attorney General categorizes clear-cut antitrust violations as "economic racketeering."

3 *E.g.*, ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 343-93 (1955); P. HADLICK, CRIMINAL PROSECUTIONS UNDER THE SHERMAN ANTITRUST ACT (1939); W. HAMILTON & I. TILL, ANTITRUST IN ACTION (TNEC Monograph No. 16, 1941); *Antitrust Administration and Enforcement and the Attorney General's Committee Report: A Brief Symposium*, 50 NW. U.L. REV. 305 (1955); Berge, *Some Problems in the Enforcement of the Antitrust Laws*, 38 MICH. L. REV. 462 (1940); Carman, *Analysis of Chapter VIII, Antitrust Administration and Enforcement*, 7 ABA ANTITRUST SECTION 148 (1966); Chadwell, *Antitrust Administration and Enforcement*, 53 MICH. L. REV. 1133 (1955); Hazard, *supra* note 1; Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Rashid, *What is Right With Antitrust*, 5 ANTITRUST BULL. 5 (1960); Spivack, *The System of Enforcement: The United States*, in COMPARATIVE ASPECTS OF ANTI-TRUST LAWS IN THE UNITED STATES, THE UNITED KINGDOM AND THE EUROPEAN ECONOMIC COMMUNITY 40 (Int'l & Comp. L.Q. Supp. Pub. No. 6, 1963); Whiting, *Criminal Antitrust Liability of Corporate Representatives*, 21 ABA ANTITRUST SECTION 327 (1962); Comment, *Criminal Prosecutions for Violations of the Sherman Act: In Search of a Policy*, 48 GEO. L.J. 530 (1960); Note, *Criminal Prosecutions Under the Sherman Antitrust Act*, 13 GEO. WASH. L. REV. 434 (1945); Note, *Increasing Community Control Over Corporate Crime —A Problem in the Law of Sanctions*, 71 YALE L.J. 280 (1961).

I. Early History of Criminal Antitrust Sanctions

The use of criminal sanctions to deter that kind of antisocial conduct now known as antitrust violations is not a recent legal development.[4] In the fifth century the Emporer Zeno issued an edict to the Praetorian Prefect of Constantinople that forbade monopolization, price fixing, and illegal contracts on penalty of perpetual exile or a fine of forty pounds of gold.[5] In Moslem law the hoarding of provisions to increase their prices was a most heinous offense.[6] And in civil law jurisdictions certain types of antitrust violations are punishable by criminal sanctions.[7]

The common law as well has long favored freedom of competition and opposed restraints of trade and monopoly.[8] From time to time criminal statutes were promulgated to deter and penalize activities that now would be antitrust violations, particularly in emergencies or when predatory practices were threatening the necessities for human

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4 For a full discussion of the historical basis for antitrust policy see State v. Central Lumber Co., 24 S.D. 136, 123 N.W. 504 (1909); Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955).

5 To insure strict enforcement, this edict assessed a fine of fifty pounds of gold against the tribunal charged with its enforcement "if it should happen that either through venality, dissimulation, or some other vice, the provisions of Our most salutary constitution with reference to prohibited monopolies and forbidden agreements of corporates bodies should not be executed." CODE 4.59.1, translated in 13 S.P. SCOTT, THE CIVIL LAW 120 (1932); *see* Note, *Commercial Trusts of Rome*, 23 AM. L. REV. 261 (1889).

6 The Hedaya declared: "[W]hosoever keepeth back grain forty days in order to increase its price, is at variance with God, and God is at variance with him." The Hedaya IV, XLIV, VI, *cited in* 13 S.P. SCOTT, *supra* note 5, at 121 n.1.

7 *See, e.g.*, CODIGO PENAL DE ESPANA arts. 556-57; CODIGO PENAL PORTUGUEZ 11, IX, I. For discussions of present-day European antitrust regulations see COMPARATIVE ASPECTS OF RESTRICTIVE TRADE PRACTICES (Int'l & Comp. L.Q. Supp. Pub. No. 2, 1961) (the law of the European Economic Community, France, West Germany, Italy, and Switzerland); RESTRICTIVE PRACTICES, PATENTS, TRADE MARKS AND UNFAIR COMPETITION IN THE COMMON MARKET (Int'l & Comp. L.Q. Supp. Pub. No. 4, 1962) (the law of Germany and the Netherlands); Venturini, *Monopolies and Restrictive Trade Practices in Italy*, 13 INT'L & COMP. L.Q. 617 (1964).

8 *See generally* A. CURTIS, TRUSTS AND ECONOMIC CONTROL 116 (1931); T. JENKS & W. CLARK, THE TRUST PROBLEM 209-14 (5th ed. 1929); W. H. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 6-21 (1914); Dewey, *supra* note 4; Holdsworth, *Industrial Combinations and the Law in the Eighteenth Century*, 18 MINN. L. REV. 369 (1934); Jones, *Historical Development of the Law of Business Competition* (pts. 1-4), 35 YALE L.J. 905 (1926), 36 YALE L.J. 42, 207, 351 (1926-27). *Contra*, In re Greene, 52 F. 104 (S.D. Ohio 1892) (citing no authority). Coke, in discussing an early English statute against "Monopolists, Propounders and Projectors," 21 Jac. 1, c. 3 (1623), once stated that "all grants of monopolies are against the ancient and fundamental laws of this kingdom." E. COKE, THIRD INSTITUTE cap. 85, at 181 (4th ed. 1669). Adam Smith also spoke out strongly against engrossing, forestalling, and the other anticompetitive practices of his day. A. SMITH, THE WEALTH OF NATIONS 499-501 (Modern Library ed. 1937). Few cases seem to have been brought, and the policy against conspiracies in restraint of trade seems to have resulted in criminal prosecutions against labor organizations primarily. *See* Dewey, *supra* note 4, at 766-71. The only known instance where businessmen were criminally prosecuted for a conspiracy in restraint of trade at common law is found in The King v. Norris, 2 Keny. 300, 96 Eng. Rep. 1189 (K.B. 1758). Consequently, the question whether conspiracies in restraint of trade were indictable common law offenses seems never to have been settled. *See* Dewey, *supra* note 4, at 771.

existence.[9] This common law antimonopolistic policy was instilled in the character of the early American colonists. Indeed, the Boston Tea Party was provoked in part by the granting of a royal monopoly to the East India Tea Company. With the advent of independence and the task of settling the remainder of the continent, antimonopoly fervor declined.[10]

The closing of the frontier, the settlement of the states'-rights conflict by the Civil War, and the explosion of the Industrial Revolution rekindled antimonopoly fervor in the second half of the nineteenth century.[11] A new impetus for antitrust legislation arose from among agrarian and labor interests.[12] The embattled farmer believed he was the victim of a massive conspiracy of monopolists and participation in a trust "should be a crime subject to severe punishment."[13] The leader of the powerful Knights of Labor summed up the workingman's attitude against trusts by saying: "He is a true Knight of Labor who with one hand clutches anarchy by the throat, and with the other strangles monopoly."[14] In 1888 all major political parties included antimonopoly planks in their party platforms.[15] This popular reaction to the business excesses of the Industrial Revolution compelled both the states and the federal government to take strong legislative action against restraints of trade and monopolies. Given the long history of legal and economic opposition to restraints of trade and the popular agitation against the abuses of nineteenth-century laissez-faire capitalism, it is not surprising that state and federal legislatures expressed the people's revulsion against antitrust violators by adopting criminal statutes.

II. The Use of Criminal Sanctions

Following the lead of earlier state legislation,[16] the Sherman Act[17] adopted criminal sanctions as a principal enforcement weapon for

[9] *See, e.g.*, Judicium Pillorie, 51 Hen. 3, c. 6 (1266); Statutum de Pistoribus, 51 Hen. 3, c. 1 (1266); Ordinatio Stapularum, 27 Edw. 3, c. 2 (1353) (the Ordinance of the Staples penalized forestallers with "pain of life and members"); An Acte Againste Regratours Forestallers and Engrossers, 5 & 6 Edw. 6, c. 14 (1552), repealed, 12 Geo. 3, c. 71 (1772); The King v. Waddington, 1 East 143, 102 Eng. Rep. 56 (K.B. 1801) (a criminal case imposing a heavy fine for engrossing).

[10] Most industry was small, and political interest became centered in the slavery issue. H. Thorelli, The Federal Antitrust Policy 55 (1954).

[11] *Id.* at 55-57.

[12] *Id.* at 143.

[13] W. S. Morgan, History of the Wheel and Alliance, and the Impending Revolution 15-17 (1889), *quoted in* H. Thorelli, *supra* note 10, at 144.

[14] T. Powderly, Thirty Years of Labor, 1859-1889, at 546 (1889), *quoted in* H. Thorelli, *supra* note 10, at 148.

[15] H. Thorelli, *supra* note 10, at 150-51.

[16] *See* H. Seager & C. Gulick, Trust and Corporation Problems 341-43 (1929).

[17] Sherman Antitrust Act, 15 U.S.C. §§ 1-7, 15 (1964).

federal antitrust legislation.[18] Although fines and jail sentences were thought to be the key federal[19] and state[20] antitrust remedies, the actual use of criminal sanctions does not reflect the criminal character of the statutes. For example, of the 1,499 antitrust cases instituted by the Antitrust Division of the Department of Justice between 1890 and 1959, only 729 were brought as criminal actions.[21] Although the Sherman Act was intended to be essentially a criminal statute,[22] actual enforcement practice has acknowledged that its equitable remedies, which can be used to enjoin prohibited conduct and restructure or otherwise correct noncompetitive markets, are equally valuable. Conversely, it can be argued that even though the actual use of federal antitrust remedies has failed to reflect the essentially criminal nature of the Sherman Act, the primary remedy of the statute has been and remains the criminal sanction with equitable relief being sought solely to prevent future violations. Experience in enforcing the Act, however, has exposed several defects in this theory.

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18 P. HADLICK, *supra* note 3, at 12, 22. Senator Sherman did not seem to favor the inclusion of criminal sanctions in the antitrust law. *See* 21 CONG. REC. 2604 (1890) (remarks of Senator Sherman). The fervor against trusts and monopolists was so strong in Congress, however, that the final version of the Sherman Act passed both Houses with only one dissenting vote. P. HADLICK, *supra* note 3, at 21. For analysis of the history and passage of federal antitrust legislation see W. HAMILTON & I. TILL, *supra* note 3; H. THORELLI, *supra* note 10; Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956). For discussion of the practical factors involved in a criminal antitrust case see Cecil, *Fines and Imprisonment*, in ABA ANTITRUST HANDBOOK 519 (1958); Cox, *The Criminal Antitrust Case—Indictment Through Trial*, in 1963 NEW YORK STATE BAR ASS'N, ANTITRUST LAW SYMPOSIUM 96 (CCH Trade Reg. Rep.); Marden, *From Subpoena to Indictment in Criminal Antitrust Cases*, in 1963 NEW YORK STATE BAR ASS'N, ANTITRUST LAW SYMPOSIUM 76 (CCH Trade Reg. Rep.); Reycraft, *Criminal Antitrust Proceedings*, in 1963 NEW YORK STATE BAR ASS'N, ANTITRUST LAW SYMPOSIUM 64 (CCH Trade Reg. Rep.).

19 P. HADLICK, *supra* note 3, at 22. The legislative history of the Sherman Act is practically nonexistent, since "the bill which was arduously debated was never passed, and . . . the bill which was passed was never really discussed." W. HAMILTON & I. TILL, *supra* note 3, at 11. However, it seems fair to say that given the temper of the debates, congressional concern with predatory practices, and the departure from the common law approach of treating such questions as a matter of private law rather than public law, Congress believed criminal prosecutions would be the primary remedies for violations of the Act. Section 4 of the Sherman Act authorizes the Attorney General to institute equitable proceedings, and § 6 authorizes property forfeitures. 15 U.S.C. §§ 4, 6 (1964). The Wilson Tariff Act provides for fines from $100 to $5000, three- to twelve-month jail sentences, injunctions, and property forfeitures for restraints of foreign trade. 15 U.S.C. §§ 8-12 (1964). The Clayton Act provides for private treble damage actions. 15 U.S.C. § 15 (1964).

20 P. HADLICK, *supra* note 3, at 22. Most pre-Sherman Act state antitrust laws were cast in the form of criminal statutes. In addition to criminal sanctions, state remedies for antitrust violations include injunctions, property forfeiture, charter and license revocation, voiding contractual arrangements, and damages. *See* App. B, *infra*, for a state-by-state outline of remedies available under state antitrust laws.

21 App. A, Table I, *infra*. Many of these cases involved several defendants, and many were companion civil and criminal cases.

22 *See* note 19 *supra*.

A. Jail Sentences

(1) The Federal Experience

Of the 729 criminal antitrust cases brought by federal enforcement officials from 1890 to 1959, only 486 cases have been pursued to the stage of imposing a sanction.[23] Of these 486 criminal cases pursued to remedy, only 48 resulted in the imposition of jail sentences,[24] and in most of these cases the sentence was suspended and the individuals were placed on probation.[25] During the first fifty years of the Sherman Act (to 1940), the twenty-four cases resulting in jail sentences comprised thirteen cases where jail sentences were imposed on businessmen and eleven in which sentences were imposed on labor leaders.[26] From 1940 to 1961 jail sentences ranging from thirty to ninety days each were imposed on twenty businessmen.[27] With the notable exception of the electrical equipment conspiracy cases in 1961, jail sentences have been imposed primarily in cases of economic racketeering[28] or upon the officers and agents of small, closely held corporations or small trade associations.[29] These statistics suggest that the smaller the corporate defendant, the easier it is to impose criminal sanctions upon those responsible for the corporation's antitrust violation.[30] In fact, attempts to impose criminal penalties upon the managers of large corporations have usually proved fruitless, particularly when the individuals and the corporation were tried together. Even though it is logically incon-

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23 App. A, Table I, *infra*. 154 of the criminal cases were dismissed or otherwise disposed of, and 81 cases were nol-prossed by the Government. *Id.*

24 *Id.*

25 For example, of 62 sentences imposed from 1950 to 1959, only 12 were to be served. *See* Dep't of Justice Case Nos. 1055, 1062, 1063, 1070, 1113, 1158, 1173, 1192, 1247, 1263, 1429, 1447, 1454, 1461, 1462, 1478, THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE U.S. 1890-1951 (CCH 1952), *id.*, 1952-1956 SUPPLEMENT (CCH 1957), *supplemented in* NEW U.S. ANTITRUST CASES (CCH Trade Reg. Rep. Transfer Binder 1957-1961) *and* 5 TRADE REG. REP. ¶¶ 45,003-59 (1957).

26 Note, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 291 (1961).

27 *Id.* The cases through 1938 are collected in P. HADLICK, *supra* note 3, at 139-77, through 1946 in STAFF OF MONOPOLY SUBCOMM., HOUSE SELECT COMM. ON SMALL BUSINESS, 79TH CONG., 2D SESS., UNITED STATES VERSUS ECONOMIC CONCENTRATION AND MONOPOLY 257 (Staff Print 1946). For statistical analyses see Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 927, 984-87 (1961); App. A, *infra*.

28 United States v. Shapiro, 103 F.2d 775 (2d Cir. 1939), United States v. Buchalter, 88 F.2d 625 (2d Cir.), *cert. denied*, 301 U.S. 708 (1937).

29 *E.g.*, Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954); United States v. McDonough Co., 1959 Trade Cas. ¶ 69,482 (S.D. Ohio). This trend in enforcement policy has been criticized as "the most serious objection" to federal criminal enforcement policy since "it discriminates against the officers of small companies." Comment, *supra* note 3, at 540.

30 Watkins, *Electrical Equipment Antitrust Cases—Their Implications for Government and for Business*, 29 U. CHI. L. REV. 97 (1961); Comment, *supra* note 3, at 540; Note, *supra* note 26, at 302-03.

sistent to convict the corporation and exonerate those who control the corporation or act on its behalf, individual defendants and juries have often shifted the responsibility for a violation to the corporation.[31] Thus the first seven decades of Sherman Act enforcement have seen relatively little use of jail sentences in ordinary antitrust cases. By and large, jail sentences have been meted out only to labor leaders in the early twentieth century and more recently in the case of flagrant antitrust violations[32]—they are a seldom-requested and seldom-imposed sanction for antitrust violations. Consequently, while legislative history, statutory construction, and the total number of criminal cases brought under the Sherman Act may indicate that the Act is essentially a criminal statute, the actual number of antitrust defendants sent to jail for Sherman Act violations suggests that the Sherman Act is something less than essentially a criminal statute in practice.

(2) The State Experience

The majority of state antitrust statutes provide for the imposition of a jail sentence for violation of the law.[33] In several states, the possible prison sentence for an antitrust violation far exceeds that of a prison sentence under federal law.[34] However, just as federal antitrust cases have demonstrated a reluctance by federal enforcement officials to request prison sentences and a reluctance by federal courts to impose them, what state enforcement there has been indicates a similar trend. The lack of state enforcement in general[35] makes any survey difficult.

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31 *See, e.g.*, United States v. General Motors Corp., 121 F.2d 376, 411 (7th Cir. 1941); United States v. Austin-Bagley Corp., 31 F.2d 229, 233 (2d Cir. 1929). In the past these results seem to have discouraged the Justice Department from indicting corporate officers when it indicted the corporation. The future may find this situation altered. *See* notes 112-13 *infra* and accompanying text.

32 Recent examples of the latter class of cases are United States v. Brookman Co., 229 F. Supp. 862 (N.D. Cal. 1964); United States v. McDonough, 1959 Trade Cas. ¶ 69,482 (S.D. Ohio); and the so-called Electrical Equipment Conspiracy Cases, Dep't of Justice Cas. Nos. 1496a, 1498, 1500, 1502, 1504, 1506, 1507, 1517, 1519, 1521, 1523, 1525, 1527, 1529, 1539, 1541, 1548, 1550, 1558, and 1566. NEW U.S. ANTITRUST CASES (CCH Trade Reg. Rep. Transfer Binder 1961).

33 Thirty-five states provide for prison sentences of varying lengths for various types of antitrust violations. *See* App. B, Remedies Available Under State Antitrust Laws, *infra*.

34 *E.g.*, FLA. STAT. ANN. § 542.05 (1962) (one to ten years for a violation, with each day of violation a separate offense); GA. CODE ANN. § 26-5008 (Supp. 1966) (up to twenty years for restraints of trade); LA. REV. STAT. ANN. §§ 51.122-23, 51.126 (1965) (up to three years for illegal restraints of trade, monopolies, or mergers).

35 *See* NEW YORK STATE BAR ASS'N, REPORT OF THE SPECIAL COMM. TO STUDY THE NEW YORK ANTITRUST LAWS, at 89a-116a (1957), where the replies to a questionnaire sent to each state attorney general indicate very few states have any program of antitrust enforcement. A similar survey by the author in 1963 indicates little change in the overall record. Replies to questionnaires on file, Legislative Research Center, University of Michigan Law School. The failure to enforce state antitrust laws has been attributed to

There are, however, few reported incidents of violations of state antitrust statutes punished by jail sentences, and there is little to indicate that many unreported instances of the use of this remedy by the states exist.

Only four old reported cases have been found in which sentences were imposed for violations of a state antitrust statute,[36] and in one of them the statute was not in terms an antitrust statute, though the conduct penalized was of an antitrust character.[37] The few remaining reported cases of prison sentences related to antitrust violations involved jail sentences for refusal to comply with court orders for the production of evidence in an antitrust investigation[38] or for violation of an injunction issued because of an antitrust violation.[39]

The paucity of litigated cases and statistics concerning state use of criminal sanctions makes any general conclusions unreliable. Nevertheless, one general inference regarding state antitrust criminal sanctions may logically be made: In some instances the failure to enforce state antitrust statutes may be attributable in part to the general harshness of the sanctions.

B. Criminal Fines

(1) Federal Experience with Criminal Fines

Violation of the major federal antitrust statutes may result in the imposition of a fine of up to 50,000 dollars for each violation.[40] Reluctance to request and impose jail sentences for antitrust violations has caused the vast majority of federal antitrust criminal prosecutions pursued to remedy to result in the imposition of a fine.[41] Moreover, since most of the cases in which a jail sentence was imposed at all

several factors. *See* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 90-96 (1964); Arnold & Ford, *Uniform State Antitrust Act: Toward Creation of a National Antitrust Policy*, 15 W. RES. L. REV. 102, 107-08 (1963); Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753 (1961); Stern, *A Proposed Uniform State Antitrust Law: Text and Commentary on a Draft Statute*, 39 TEXAS L. REV. 717 (1961).

[36] Aikens v. Wisconsin, 195 U.S. 194 (1904); Lemmon v. State, 77 Ohio St. 427, 83 N.E. 608 (1908); Arnsman v. State, 11 Ohio C.C.R. (n.s.) 113, 20 Ohio C. Dec. 445 (Lucas County Cir. Ct. 1908); State v. Hygeia Ice Co., 4 Ohio N.P. (n.s.) 361 (Lucas County C.P. 1906).

[37] Aikens v. Wisconsin, 195 U.S. 194 (1904).

[38] *E.g.*, *In re* Bell, 69 Kan. 855, 76 Pac. 1129 (1904); State v. Jack, 69 Kan. 387, 76 Pac. 911 (1904), *aff'd*, 199 U.S. 372 (1905); State v. Smiley, 65 Kan. 240, 69 Pac. 199 (1902), *aff'd*, 196 U.S. 447 (1905).

[39] *E.g.*, *Ex parte* Henry, 147 Tex. 315, 215 S.W.2d 588 (1948).

[40] 15 U.S.C. § 1 (1964).

[41] In 90% of the criminal cases brought by the federal government from 1890 to 1959, the sole remedy imposed upon the individuals or corporations involved was a criminal fine; jail sentences or suspended sentences with probation were the sole remedies in only 1% of the cases. App. A, Table I, *infra*.

involved labor leaders[42] or antitrust violations amounting to economic racketeering,[43] the ordinary business violator has, with rare exception,[44] been penalized with only a criminal fine.

Even in the assessment of criminal fines the federal courts have tended to be more lenient than the extent of the illegal injury and profits as alleged in the indictment would demand.[45] And although the dollar has become gradually devalued in the face of inflation over the past six or seven decades, the amount of the fine assessed per case and per individual has remained relatively constant and relatively low.[46]

In assessing the amount of the fine in a federal criminal antitrust case, the court may impose a separate fine for violations of separate sections of the antitrust laws, as well as separate fines for a conspiracy to violate, an attempt to violate, and the actual violation of the antitrust laws.[47] Thus, the amount of the federal antitrust fine could far exceed 50,000 dollars, since one factual pattern may reveal several indictable offenses. As a general rule, however, there have been few instances of multiple fines based upon the same factual situation.

Various factors are taken into consideration by federal courts in assessing the amount of the fine. Thus, the presence or absence of intent to violate the law and the degree of willfulness; the amount of

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42 *E.g.*, Gulf Coast Shrimpers & Oysterman's Ass'n v. United States, 236 F.2d 658 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956).

43 *E.g.*, United States v. Shapiro, 103 F.2d 775 (2d Cir. 1939); United States v. Buchalter, 88 F.2d 625 (2d Cir.), *cert. denied*, 301 U.S. 708 (1937).

44 *E.g.*, United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. McDonough Co., 1959 Trade Cas. ¶ 69,482 (S.D. Ohio). Perhaps the most famous series of cases in which businessmen have been given jail sentences are the so-called Electrical Equipment Conspiracy Cases, cited *supra* note 32. Summaries of the allegations, pleas, and dispositions of these cases may be found in NEW U.S. ANTITRUST CASES, *supra* note 32.

45 For example, in the Electrical Equipment Conspiracy Cases, cited *supra* note 32, twenty-nine corporations and forty-four individuals were indicted for bid rigging and price fixing. All defendants ultimately pleaded guilty or nolo contendere and were fined a total of approximately $2,000,000. The highest individual fine was $12,500. The value of the goods involved exceeded one billion dollars. *See also* Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir.), *cert. denied*, 373 U.S. 904 (1963); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, CRIME AND ITS IMPACT—AN ASSESSMENT 112 (1967).

46 During the 1950-1960 period of federal antitrust enforcement, fines ranged from $10 in United States v. Inland Coca Cola Bottling Co., Crim. 3450 (D. Idaho, Sept. 16, 1954) (Dep't of Justice Case No. 1206) to $187,500 in United States v. Safeway Stores, Inc., 20 F.R.D. 451 (N.D. Tex. 1957) (Dep't of Justice Case No. 1264). Of the 256 corporate executives who had fines assessed against them during this period, the average fine was slightly over $2,100. For a detailed survey of average fines levied in cases brought between 1955 and 1965 see J. CLABAULT & J. BURTON, SHERMAN ACT INDICTMENTS 1955-1965: A LEGAL AND ECONOMIC ANALYSIS 103-12 (1966). Some states have better luck. *See, e.g.*, Moody, *Texas Antitrust Laws and Their Enforcement with Some Reference to Federal Antitrust Laws*, 9 ABA ANTITRUST SECTION 100, 126-35 (1956).

47 American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Kansas City Star Co., 1955 Trade Cas. ¶ 68,117 (W.D. Mo.).

illegal benefits accruing to the accused; the degree to which the individual violators are responsible for the violation; the effectiveness of companion civil cases in ending the violation; Government recommendations on the amount of the fine; the willingness of a defendant to settle private treble damage suits, waive appeals, and plead nolo contendere; and the cost to the Government in uncovering and prosecuting the violation may all be considered to varying degrees by an individual court in assessing the amount of the fine.[48]

The use of criminal fines as an antitrust remedy has largely been a pragmatic process at the federal level. The prosecutor decides on a pragmatic basis which cases should be brought criminally, and the federal judges have used practical factors in assessing the amount of the fine. If anything, however, the fines have been low in relation to the gravity of the offense, perhaps indicating that federal courts value the fine as a deterrent device and not as a means for disgorging illegal gain. The 1955 amendment to the Sherman Act raising the maximum fine from 5,000 to 50,000 dollars[49] was based on a theory that the criminal fine should serve both as a deterrent and to some degree as a remedial device to recover illegal profits.[50]

The criminal fine is, of course, the only criminal sanction that can be imposed on a corporation as a corporation. In view of the disparity between the amount of the fine and the amount realized by corporate antitrust violators in many cases,[51] the chief value of the criminal fine against a corporation seems to lie in its branding a convicted corporation a criminal.[52] While this label does not normally affect a corporation in a tangible monetary way, unless of course it might influence the granting or retention of a government franchise, contract, or other governmental largesse, it does reflect upon the corporation's image. Since goodwill is an important property right of a corporation,[53] a criminal conviction for corporate violation of antitrust

48 *See, e.g.*, United States v. Gasoline Retailers Ass'n, 1960 Trade Cas. ¶ 69,596 (N.D. Ind.), *aff'd*, 285 F.2d 688 (7th Cir. 1961); United States v. McDonough Co., 1959 Trade Cas. ¶ 69,482 (S.D. Ohio); United States v. Association of Am. Battery Mfrs., 1954 Trade Cas. ¶ 67,753 (W.D. Mo.); United States v. Minneapolis Elec. Contractors Ass'n, 1953 Trade Cas. ¶ 67,622 (D. Minn.).

49 15 U.S.C. § 1 (1964). The Attorney General's Committee had recommended that the fine be raised from $5,000 to $10,000. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 352 (1955); *see* Carman, *supra* note 3.

50 *See Hearings on S. 996, S. 2252-55, Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. (1962).

51 *See* notes 45-46 *supra* and accompanying text.

52 Kadish, *supra* note 3, at 434.

53 *See generally* B. WRIGHT, THE NATURE AND BASIS OF GOODWILL (1929); JU MEI YANG, GOODWILL INTANGIBLES (1927); Foreman, *"Conflicting Theories of Goodwill,"* 22 COLUM. L. REV. 638 (1922).

policy may have a deterrent value.[54] The extent to which this is true depends upon how well-known the conviction becomes[55] and upon the public's reaction to the violation. This latter factor, of course, may rest in turn on the degree of moral turpitude the public attaches to an antitrust violation, a factor psychologists have yet to measure.

In summary, therefore, the criminal antitrust fine is the most common device used to deter and punish antitrust violations; in most cases the amount of the fine does not approximate the amount of illegal gain; the criminal antitrust fine is the only criminal sanction for deterring and punishing a corporate violator; and the chief deterrent value of the criminal antitrust fine lies in its branding the corporate antitrust violator a criminal in detraction from business goodwill.[56]

(2) State Experience with Criminal Fines

State antitrust laws have long been characterized by their reliance upon criminal fines and civil forfeitures to enforce compliance with antitrust policy. Thirty-eight states provide criminal fines for a gamut of antitrust violations.[57] However, any attempt to evaluate the use of criminal fines in state antitrust enforcement meets the same difficulties that prevented a comprehensive evaluation of jail sentences as an enforcement device. Evidence of actual enforcement is slight, and those cases where state antitrust laws have been enforced by criminal fines are usually of pre-World War I vintage.[58] Consequently, little meaningful decisional law concerning criminal antitrust enforcement at the

54 *See* W. FRIEDMAN, LAW IN A CHANGING SOCIETY 196 (1959); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 863-64 (2d ed. 1961). *But see* Note, *supra* note 26, at 287 n.35.

55 Some writers have charged that antitrust violations do not generally become well known because of a reluctance or "conspiracy of silence on the part of the press" to publish antitrust prosecutions. *See, e.g.*, E. SUTHERLAND, *supra* note 2; *cf.* text accompanying notes 96-97 *infra*. The notoriety of a "big" criminal antitrust case seems to serve the salutary purpose of causing self-regulation. *See* Whiting, *Antitrust and the Corporate Executive*, 48 VA. L. REV. 1, 3 (1962).

56 The primary value of criminal antitrust sanctions is their deterrent effect upon individual businessmen. *See* note 59 *infra*. Since courts seldom imprison individual violators and the sanction of a fine seldom corresponds with the amount of illegal gain, the chief deterrent in a criminal sanction seems to be the stigma that attaches upon indictment and conviction for a criminal offense.

57 *See* App. B, *infra*.

58 *E.g.*, Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1908); Sanford v. People, 121 Ill. App. 619 (1905); Chicago, Wilmington & Vermillion Coal Co. v. People, 114 Ill. App. 75, *aff'd*, 214 Ill. 421, 73 N.E. 770 (1905). Before the Kentucky antitrust law was declared unconstitutionally vague in International Harvester Co. v. Kentucky, 234 U.S. 216 (1914), the county attorneys of Kentucky were establishing a record for fines by prosecuting the International Harvester Company for antitrust violations in each county. Examples are International Harvester Co. v. Commonwealth, 137 Ky. 668, 126 S.W. 352 (1910); Commonwealth v. International Harvester Co., 131 Ky. 551, 115 S.W. 703 (1909). The State of Texas seems to have had the greatest success with criminal fines. From 1912 to 1924, $1,538,250 in fines were levied under the Texas antitrust laws.

state level has developed. For example, many state antitrust laws expressly penalize corporate officers acting in a representative capacity,[59] but several have never been interpreted by the courts.

Another reason that the states impose criminal fines even less often than they resort to the other antitrust sanctions at their disposal is the availability of monetary civil forfeitures.[60] Usually a per diem monetary amount for each day of violation, the civil forfeiture (supposedly civil in nature) has the advantages of avoiding the stigma of criminality,[61] of substituting the procedure and standards of proof used in civil proceedings for the stricter standards of procedure and proof utilized in criminal proceedings,[62] and of allowing the state to appeal.[63] But most states use even civil forfeitures only rarely. The general failure to enforce state antitrust laws, again, provides little empirical support for an analysis whether criminal fines or civil forfeitures are necessary or desirable remedies in a state-enforced antitrust policy. However, the general reluctance to impose jail sentences and the need to make antitrust violations unprofitable suggest that some form of fine or forfeiture may be necessary in a state-enforced antitrust statute.

III. Some Myths, Presumptions, and Peculiarities of Criminal Antitrust Enforcement

Certain myths and presumptions have plagued an intelligent and rational evaluation of criminal antitrust enforcement. In particular, criminal antitrust prosecutions have been attacked on three grounds: That the antitrust laws are too vague for the imposition of criminal penalties upon violators; that the degree of moral turpitude found in the mine-run antitrust violation does not justify the punishment involved in branding an individual a criminal; and that the assessment

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59 *E.g.*, Ala. Code tit. 57, §§ 106-08; Ariz. Rev. Stat. Ann. § 44-1408 (1956); Cal. Bus. & Prof. Code § 16,755 (1937); Colo. Rev. Stat. Ann. § 55-4-2 (1963); Ill. Rev. Stat. ch. 38, § 60-6 (Supp. 1966); Mass. Gen. Laws Ann. ch. 93, § 1 (1958); N.Y. Gen. Bus. Law § 341 (Supp. 1967).

60 *See* App. B, *infra*, where state forfeiture provisions are collected. Texas seems to use per diem monetary forfeitures for antitrust enforcement more than any other state. *See* Moody, *supra* note 46, at 126-35.

61 Very often the stigma of being labeled a criminal is far greater punishment than the fine or jail sentence that may be assessed. *See* E. Sutherland, *supra* note 2, at 43; Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 590-91 (1960); note 176 *infra* and accompanying text.

62 *See* United States v. Hess, 317 U.S. 537, 550-52 (1943). *But see* note 155 *infra* and accompanying text. For an analysis of the Government's difficulty in prosecuting a criminal antitrust case see Timberg, *The Case for Civil Antitrust Enforcement*, 14 Ohio St. L.J. 135 (1953).

63 *See* Steru, *supra* note 35, at 743-44.

of responsibility for a violation is all but impossible because of the size and complexity of the modern corporation. Before the need and form of jail sentences and fines in federal and state antitrust enforcement are considered specifically, the myths and presumptions that underlie these attacks upon criminal antitrust sanctions should be placed in proper perspective.

A. Vagueness of the Substantive Offense

Many have argued that the antitrust laws are so vague and the corresponding potential liability so great that it is unfair to enforce the antitrust laws by criminal sanctions.[64] Undeniably, the outer fringes of antitrust enforcement are vague:[65] vague in the scope of conduct proscribed, vague in the legal standard used to evaluate a course of action, and vague in the quantum and quality of proof necessary to prove a violation. Moreover, like some statutes,[66] and more than most statutes,[67] the antitrust laws are in constant flux and evolution. As the national economy, marketing techniques, business policy, and a host of other factors that give impetus and direction to individual business judgments evolve, interpretation and application of the antitrust laws shift and change to keep pace.[68]

The vagueness objection, however, has grown out of proportion and become a myth.[69] The growth of the myth has been aided and

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[64] *E.g.*, C. KAYSEN & D. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 256 (1959); Chadwell, *supra* note 3; Comment, *supra* note 3, at 532.

[65] Certain types of Robinson-Patman Act cases and extended rule of reason cases under the Sherman, Clayton, and Federal Trade Commission Acts are particularly open to objection on this ground. Even so, federal and most state antitrust legislation have withstood repeated attacks by parties urging that this legislation is unconstitutionally vague. *E.g.*, United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) (§ 3 of the Robinson-Patman Act); Nash v. United States, 229 U.S. 373 (1913) (rule of reason imported into the Sherman Act); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) (Texas antitrust legislation; the first vagueness attack on an antitrust statute); *cf.* Cline v. Frink Dairy Co., 274 U.S. 445 (1927) (Colorado antitrust statute unconstitutionally vague); International Harvester Co. v. Kentucky, 234 U.S. 216 (1914) (Kentucky antitrust statute unconstitutionally vague); People v. Building Maintenance Contractors' Ass'n, 41 Cal. 2d 719, 264 P.2d 31 (1953) (proviso in California antitrust statute unconstitutionally vague). *See generally* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 5-12 (1955) (rule of reason); J. FLYNN, *supra* note 35, at 44-48 (vagueness of state antitrust legislation).

[66] For an interesting analysis of statutory construction and its relation to the subject matter of the statute see E. LEVI, AN INTRODUCTION TO LEGAL REASONING 27-57 (1961 ed.).

[67] The Sherman Act has been equated with the Constitution for purposes of flexibility of interpretation and growth by judicial review. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

[68] *See, e.g.*, United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964) (joint venture); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (intra-enterprise conspiracy); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) (the depression price-fixing case).

[69] This may prevent an intelligent evaluation of the use of criminal sanctions in antitrust enforcement. *See, e.g.*, Cahill, *supra* note 1. *But see* Withrow, *Compliance with the Antitrust Laws*, 9 N.Y.L.F. 187 (1962).

abetted by the "judiocentric" orientation of lawyers and legal commentators who read only the often long and sometimes confusing opinions of courts. Largely unnoticed are the vast numbers of antitrust violations prosecuted by the federal government that seldom provoke a judicial opinion and seldom receive more than cursory notice by the courts and commentators.[70] From 1950 to 1959, eighty-seven percent of the civil antitrust cases pursued to remedy by the Antitrust Division of the Department of Justice were settled by consent decrees. During the same period, eighty-two percent of the criminal antitrust cases pursued to remedy by the Antitrust Division were settled by nolo contendere pleas.[71] In many, if not most of these cases, the defendants were charged with per se violations of the antitrust laws.[72] While the percentage of actual cases terminated by nolo contendere pleas and consent decrees may in part be explained by a desire to avoid the expense and notoriety of a criminal prosecution[73] or the effect of a prima facie case under section 5 of the Clayton Act in subsequent treble damage actions,[74] an equally plausible, but seldom mentioned, explanation for this phenomenon is that the defendants have been caught in a clear-cut violation and they know it.

The lack of uncertainty about whether activity is or is not violative of the antitrust laws seems more prevalent at the local level. In those states actively enforcing their antitrust laws, almost all cases prosecuted are of the per se variety;[75] and the vast majority of federal cases involving local restraints of trade, which should be remedied by state antitrust enforcement but are handled by the Antitrust Division of the Department of Justice or the Federal Trade Commission because of state inaction, are per se cases.[76]

A final factor deflating the vagueness myth and mitigating the

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70 W. HAMILTON & I. TILL, *supra* note 3, at 88; Note, *Proposal for Legislative Revisions of the Criminal Phases of the Anti-Trust Laws*, 3 U.C.L.A.L. REV. 650 (1956).

71 App. A, Table II, *infra*.

72 Comment, *The Frequency of Price Fixing: An Indication*, 57 NW. U.L. REV. 151 (1962). This seems to be particularly true of essentially local restraints of trade. See J. FLYNN, *supra* note 35, App., Table IV.

73 W. HAMILTON & I. TILL, *supra* note 3, at 57; Hansen, *The Antitrust Laws in a Changing Economy*, 6 U.C.L.A.L. REV. 183 (1959).

74 *See generally* text accompanying notes 121-39 *infra*. For discussion of the effect of nolo pleas and guilty pleas in subsequent treble damage actions *see* Note, *The Admissibility and Scope of Guilty Pleas in Antitrust Treble Damage Actions*, 71 YALE L.J. 684 (1965).

75 *E.g.*, DALLAS BAR ASS'N, FALL ANTITRUST CLINIC 126-35 (1953), reprinted in Moody, *supra* note 46, at 126-35 (collecting the Texas cases from 1947 to 1952); J. FLYNN, *supra* note 35, App. Part II; NEW YORK STATE BAR ASS'N, *supra* note 35, at 24a-48a, 65a-88a; Rahl, *supra* note 35, at 766-71; Sieker, *The Role of the States in Antitrust Law Enforcement—Some Views and Observations*, 39 TEXAS L. REV. 873 (1961).

76 J. FLYNN, *supra* note 35, App., Table IV (1964); Rahl, *supra* note 35, at 770-71.

unfairness of using criminal sanctions in antitrust enforcement is the exercise of discretion in selecting cases for criminal prosecution. Those cases involving dubious questions of antitrust liability because of the vagueness of evolving antitrust policy or the questionable effect of a particular type of conduct are not prosecuted criminally. The announced policy of the Antitrust Division is to reserve criminal sanctions for clear-cut antitrust violations of the per se variety.[77] This policy, when coupled with the newly enacted Civil Investigative Demand Bill[78] obviating the use of grand juries for investigative purposes, lends weight to the belief that criminal sanctions and procedures are usually used only when they are deserved.[79]

In order to determine which remedies are fair, proper, or necessary for the enforcement of state and federal antitrust laws, the question of antitrust vagueness must be placed in proper perspective. The proposals in this article are premised upon the author's conclusion that criminal sanctions are only imposed in clear-cut cases of violation.[80] To be sure, there are areas of uncertainty causing confusion and frustration in the business world, where competitive business conduct may be stifled by a fear of unknown antitrust liability. But

[77] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 350 (1955). The Antitrust Division has recently reiterated this policy. *See* PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 45, at 109-12. A study of all complaints and indictments brought by the federal government since 1890 confirms the vitality of this policy. Nonetheless, there is some evidence of an abuse of discretion by the Antitrust Division. For example, it has been rumored that special sections have been set up from time to time within the Antitrust Division to watch one particular business entity. If this be true, it may result in over-zealous application of criminal sanctions and what can only be called a prostitution of the criminal sanction. *See, e.g.*, United States v. General Motors Corp., 5 TRADE REG. REP. ¶ 45,061 (1965) (the first criminal monopoly case, later nolle prosequi); United States v. General Motors Corp., 216 F. Supp. 362 (S.D. Calif. 1963). The same high standards of fairness that are applicable elsewhere in criminal enforcement apply equally in criminal antitrust cases. *See, e.g.*, United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961) (negligent suppression of evidence by the Government vitiated lower court conviction); United States v. New Orleans Chapter, Associated Gen'l Contractors, Inc., 238 F. Supp. 273 (E.D. La.), *rev'd on other grounds*, 382 U.S. 17 (1965). The flexibility in criminal antitrust cases is caused by the notion of conspiracy. The essence of a Sherman Act violation is a conspiracy, one of the broadest standards of illegality found in the criminal law. *See* Note, *Criminal Prosecutions Under the Sherman Antitrust Acts*, 13 GEO. WASH. L. REV. 434, 447-52 (1945). Even so, the indictment or information in a criminal antitrust case must meet the same standards of certainty as applied elsewhere in criminal law. *See* United States v. A.P. Woodson Co., 198 F. Supp. 579 (D.D.C. 1961). *See generally* Cecil, *supra* note 18.

[78] 15 U.S.C. §§ 1311-14 (1964), *analyzed in* Decker, *The Civil Investigative Demand*, 21 ABA ANTITRUST SECTION 370 (1962). Prior to the passage of the Civil Investigative Demand Bill the Antitrust Division used the grand jury for investigative purposes. *See* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 343-49 (1955).

[79] Unequal enforcement does not seem prevalent. Of course, the prosecutor's discretion may be abused. If this were occurring, it would be a powerful argument for eliminating criminal sanctions and the prosecutor's discretion to enforce the law inequitably.

[80] This factual conclusion is based in turn upon the author's reading of all the complaints and indictments filed from 1890-1960 when preparing App. A, *infra*.

the risk of criminal liability for venturing into a practice subsequently condemned as violative of antitrust policy is substantially mitigated by the practice of reserving criminal sanctions for clear-cut violations. Therefore, the vagueness myth has little relevance to the question whether antitrust policy once well-defined, should be enforced by criminal sanctions.

B. Moral Turpitude and the Gravity of the Offense

Even the most ardent of "trustbusters" agree that a violation of the antitrust laws is not normally a crime involving "moral turpitude."[81] Consequently, antitrust violations are classified as *malum prohibitum* crimes rather than *mala in se* crimes.[82] This distinction is relevant to the determination whether the panoply of criminal procedure with its attendant stigma and personal humiliation should be applied to antitrust offenders. At issue is whether antitrust violations should be treated like minor traffic violations, where the issuance of a citation and brief court appearance are the only vestiges of criminal procedure, or like major criminal violations where the more humiliating aspects of the criminal process are applied, such as arrest, fingerprinting, photographing the defendant, and bail. It is argued that the formal criminal procedure applicable when the accused is charged with and prosecuted for a serious crime should not be invoked for a crime that does not involve moral turpitude.[83] It is important, therefore, to determine whether antitrust violations are crimes of moral turpitude; and if not, whether something less than the full criminal process and sanctions should be applied in antitrust cases.

If a crime is defined as "conduct, which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community,"[84] and the broad social purpose of criminal law as "defining the minimum conditions of man's responsibility to his fellows,"[85] it is apparent that the mores of the community provide much of the foundation of the criminal law.[86]

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81 *E.g.*, Arnold, *Antitrust Law Enforcement, Past and Future*, 7 LAW & CONTEMP. PROB. 5, 11 (1940).

82 Newman, *White-Collar Crime*, 23 LAW & CONTEMP. PROB. 735, 738-39 (1958).

83 This proposition is discussed in Kadish, *supra* note 3.

84 Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 403 (1958); *cf.* MODEL PENAL CODE § 1.02 (P.O.D. 1962).

85 Hart, *supra* note 84, at 410.

86 Even Bentham recognized an element of morality as a part of criminal law. He saw as the business of government the promotion of the happiness of society by punishing and rewarding. J. BENTHAM, THE THEORY OF LEGISLATION 27-30 (C. Ogden ed. 1931). Of course, what constitutes the happiness of society largely depends upon the mores of the particular society. The criminal law promotes happiness by utilizing sanctions as

But the word "mores" is not used here to mean just the prevailing viewpoint of the community at any one time. Rather, it is used to mean the deep-seated convictions of a particular society; convictions drawn from the history of that society; the economic and political presumptions upon which that society is built; the religious, cultural, and other basic factors which form a community conviction concerning the distinction between right and wrong.

Since our economic system is based upon a philosophy of private enterprise and competition,[87] and since experience has amply demonstrated the necessity for a government-enforced antitrust policy, it is clear that antitrust violations run counter to the mores of the prevailing economic and political philosophy of the citizens of the United States.[88] It is not too much to say that private combinations setting up private governments in parts of the economy are just as destructive and defeating of the present economic system in the United States as socialism and other collectivistic economic systems would be destructive of the basic presumptions of our economic system.[89] In this sense, therefore, antitrust violations may be said to violate the strongly entrenched mores in the United States and involve questions of moral right and wrong.

But to say that an antitrust violation is a crime of moral turpitude is another matter. Economic mores and human morality cannot be equated except perhaps in the unreal world of extreme left- and right-wing economic and political theory. Moreover, illegal restraints of trade are not foul or base in the minds of most individuals,[90] unless

deterrents. *See id.* at 26; *cf.* O. HOLMES, THE COMMON LAW 41 (1881) (the "first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong").

87 One estimate, not including minor local utility regulations, patents, fair trade, export trade associations, and some of the smaller natural resource industries, places the percentage of national income exempt from the antitrust laws as of 1954 at 18.4%. C. KAYSEN & D. TURNER, *supra* note 64, at 42, table 4.

88 *See generally* A. BERLE, THE AMERICAN ECONOMIC REPUBLIC (1963). The defenders of the private enterprise system, though not always sympathetic to current enforcement trends, recognize the antitrust laws as an integral part of the competitive system. *See* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 1 (1955); Oppenheim, *Antitrust Booms and Boomerangs*, 59 NW. U.L. REV. 33 (1964); *cf.* 1964 Laws of Puerto Rico, act 77, preamble.

89 Smith, *The Incredible Electrical Conspiracy*, 63 FORTUNE, April 1961, at 132, 134; *cf.* United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167, 170 (S.D.N.Y. 1955): "Upon [the] vigorous and constant enforcement [of the antitrust laws] depends the economic, political and social well-being of our nation. The concept that antitrust violations really are 'minor' and 'technical' infractions, involve no wrongdoing, and merely constitute 'white collar' offenses, has no place in the administration of justice." The advertising and public statements of the managers of American business suggest that they are in wholehearted agreement with the philosophy of competition. *See generally* SUTTON, HARRIS, KAYSEN & TOBIN, THE AMERICAN BUSINESS CREED (1956).

90 Newman, *supra* note 82, at 744. "Turpitude" is derived from the Latin "turpitudo," meaning "foul" or "base" in the sense of depravity. WEBSTER'S COLLEGIATE DICTIONARY 1080 (5th ed. 1936).

the restraint happens to involve economic racketeering or perhaps breaches of trust by labor leaders.[91]

Antitrust violations are often equated with traffic violations for purposes of analyzing the degree of moral turpitude involved.[92] The better view, however, distinguishes these two types of violations. Sutherland, in his classic study of "white collar crime," found the difference to rest in the arbitrariness of traffic regulations as opposed to our deep philosophical commitment to a "free enterprise" economic system:

> Those who insist that moral culpability is a necessary element in a crime argue that criminality is lacking in the violations of laws which have eliminated the stigma from crime. This involves the general question of the relation of criminal law to the mores. The laws with which we are here concerned are not arbitrary, as in the regulation that one must drive on the right side of the street. The Sherman Antitrust Law, for example, represents a settled tradition in favor of free competition and free enterprise. This ideology is obvious in the resentment against communism. A violation of the antitrust law is a violation of strongly entrenched moral sentiments.[93]

An observer's viewpoint toward the degree of moral turpitude implied by an antitrust violation depends more on his evaluation of substantive antitrust law and his attitude toward laissez-faire capitalism than upon a survey of community sentiment. He may reach a conclusion on the advisability of applying criminal sanctions against antitrust violators without examining his attitude toward substantive antitrust policy. This explains a basic inconsistency in antitrust criticism:

> Liberally orientated social scientists, otherwise critical of the case made for the deterrent and vindicatory uses of punish-

[91] The earlier history of the Sherman Act indicates the criminal sanctions of the antitrust laws were used primarily against labor leaders. *See* W. HAMILTON & I. TILL, *supra* note 3, at 121; THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE U.S. 1890-1951, Case Nos. 8a, 8b, 102, 103, 167, 170, 171 (CCH 1952). To a certain extent, the same seems to be true today where the activity of labor defendants is outside the scope of the labor exemption from the antitrust laws. *See, e.g.*, Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

[92] *E.g.*, Arnold, *supra* note 81, at 11.

[93] E. SUTHERLAND, *supra* note 2, at 45; *accord*, Loevinger, *The New Frontier in Antitrust*, 39 TEXAS L. REV. 865, 866 (1961), where the then Assistant Attorney General in charge of the Antitrust Division stated: "It should now be clear that a deliberate or conscious violation of the antitrust laws is not a mere personal peccadillo or economic eccentricity, but a serious offense against society which is as immoral as any other act that injures many iu order to profit a few. Conspiracy to violate the antitrust laws is economic racketeering which gains no respectability by virtue of the fact that the loot is secured by stealth rather than by force."

> ment of ordinary offenders, may be found supporting stern penal enforcement against economic violators. At the same time conservative groups, rarely foes of rigorous punishment for ordinary offenders, appear less sanguine for the criminal prosecution when punishment of business offenders is debated.[94]

But reflection upon the unique characteristics of this type of crime suggests other reasons for these seemingly inconsistent viewpoints toward criminal enforcement of the antitrust laws. First, white collar crimes, particularly antitrust violations, are "complex and their effects diffused."[95] The gist of an antitrust violation is beyond the understanding and everyday experience of the vast majority of citizens, even when they are victims of the violation. The *corpus delicti* is subtle —the victim, whether person or property, is not normally physically injured and the fact that a crime is taking place is not readily apparent.[96] The method of committing the crime is subtle and without violence, and the public is generally unaware of the event. The perpetrators of the violation are, more often than not, respectable members and leaders of the community. It is as difficult to arouse public opinion in condemnation of an act that has no apparent effect upon society as it is to penalize criminally an individual whose life is otherwise morally praiseworthy for conduct beyond the realm of community understanding.

Secondly, the news media often fail to arouse public sentiment against antitrust violations by widely reporting their discovery and describing their impact upon the victims. Whether this is because there is a community of interest between the news media and the class most often violating the antitrust laws, as has been charged,[97] or because the news media do not consider antitrust violations newsworthy items, the result is the same. The public is generously made aware of the details of the latest local murder, rape, or theft involving personal tragedy to a limited number of individuals, but is not generally informed of antitrust violations adversely affecting the entire

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94 Kadish, *supra* note 3, at 424.

95 E. SUTHERLAND, *supra* note 2, at 50.

96 *E.g.*, United States v. Bituminous Concrete Ass'n, 1960 Trade Cas. ¶ 69,878 (D. Mass.); *see* Smith, *supra* note 89.

97 E. SUTHERLAND, *supra* note 2, at 50-51; Kadish, *supra* note 3, at 435. A survey of news coverage of the electrical conspiracy cases, the largest criminal antitrust case in history, bears out Sutherland's indictment of the news media. Most newspapers gave scanty coverage to the case and usually buried the story on the inside pages. *See* NEW REPUBLIC, Feb. 20, 1961, at 7. A post-sentencing survey of newspapers concerning the same case showed a similar result. Note, *supra* note 26, at 288-89 n.35.

community and often involving the restraint of millions of dollars of trade and commerce. Since the public is rarely informed of the occurrence or effects of antitrust violations, it is not surprising that public resentment is seldom aroused.[98] Therefore, the imposition of a criminal sanction upon antitrust violators has little educational value to the public, and the argument that these are *malum prohibitum* crimes gains weight since the mores of the community cannot be formulated without knowledge of the conduct going on and its impact upon society.

A third distinguishing characteristic of "white collar" crime in the antitrust area is the gravity of the offense. Diffusion of the impact of the violation over a wide geographic or large consumer market frequently disguises the total gravity of the offense. Very often, however, an illegal restraint of trade may net the guilty parties many thousands or millions of dollars in illegal profits,[99] or make possible the reaping of untold profits by the elimination of competitors by illegal means.[100] A recent indictment in the 3.6 billion dollar carbon steel industry suggested that antitrust violations may also have a substantial impact upon the national economy and contribute heavily to the so-called inflationary spiral because of the basic product involved.[101] Although the normal antitrust violation involves far greater

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[98] Occasionally, high calibre reporting can make the public aware of questionable business practices or undesirable economic trends. *See, e.g.*, Harris, *The Real Voice* (pts. 1-3), NEW YORKER, March 14, 1964, at 48, March 21, at 75, March 28, at 46 (report on Senator Kefauver's investigation of the drug industry); Smith, *supra* note 89. Unfortunately, the American news media seldom rise to such heights.

[99] The so-called Electrical Equipment Conspiracy Cases, *e.g.*, United States v. Westinghouse Elec. Corp., 1960 Trade Cas. ¶ 69,699 (E.D. Pa. 1960), involved products whose aggregate annual sales exceeded $1.7 billion and resulted in corporate fines of $1,721,000, individual fines of $136,000, and 31 thirty-day jail sentences, 24 of which were suspended. *See* Watkins, *supra* note 30. At the state level, antitrust violations have included price fixing and territorial restrictions on the sale of washing machines throughout Texas, *see* Moody, *supra* note 46, at 127 ($50,000 in penalties assessed against nine defendants); monopolization of sugar production and sales in Louisiana, State v. American Sugar Ref. Co., 138 La. 1005, 71 So. 137 (1916); price fixing of milk, State v. Golden Guernsey Dairy Co-op, 257 Wis. 254, 43 N.W.2d 31 (1950), and salt, State v. Allied Chem. & Die Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960), in Wisconsin; a secondary boycott of out-of-state products in New York, Mayer Bros. Poultry Farms v. Meltzer, 274 App. Div. 169, 80 N.Y.S.2d 874 (1948); and bid rigging of gymnasium bleachers in Illinois and Minnesota, *see* 153 BNA ANTITRUST & TRADE REG. REP., at A11-A12 (1964) (settled by Illinois for $300,000, by Minnesota for $717,637). For a fuller enumeration of recent state action against restraints of trade see NEW YORK STATE BAR ASS'N, *supra* note 35, at 65a-89a. For an enumeration of recent federal action against local restraints of trade see J. FLYNN, *supra* note 35, App. (1964). While the products involved may seem insignificant in most state cases, the dollar volume involved in the line of trade and commerce often exceeds one million dollars and the economic injury to a geographically limited consumer market is significant.

[100] *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); E. SUTHERLAND, *supra* note 2, at 50.

[101] United States v. United States Steel Corp., 1964 Trade Cas. ¶ 71,208 (S.D.N.Y.). The

sums of money than most thefts by force or fraud and has a far greater impact upon the welfare of society than most crimes of violence, it paradoxically is subject to less, if any, public resentment. However, even if the crime is one not involving moral turpitude, the effect of the violation is usually so grave that use of the full process of the criminal law seems justified if it is assumed that criminal sanctions can deter prohibited conduct.

A fourth factor distinguishing white collar antitrust violations from most crimes is that the violators do not think of themselves as criminals and feel no moral responsibility.[102] This phenomenon is perhaps attributable to the individual's viewpoint toward the substantive law, his beliefs concerning government regulation of business, and the social and business atmosphere in which the violator lives and works.[103] Without a firm conviction of the justness and rightness of antitrust policy and government regulation, voluntary compliance as a matter of intellectual conviction is difficult to obtain and the advisability of utilizing penal sanctions to enforce the statute becomes a confused issue. On the one hand the coercive effect of penal sanctions may be required to insure compliance in spite of the individual's convictions concerning the basic law; conversely, the use of penal sanctions to enforce a law considered to be unfair, unjust, and unwise may only heighten disrespect for the law in general and increase violations of the objectionable statute. Moreover, it cannot be argued that the rehabilitative function of criminal law is served by imprisoning corporate executives for antitrust violations. To the extent the threat of punishment can cure acquisitive tendencies with antisocial effects, it is possible that the existence of criminal sanctions serves some rehabilitative function. But this possibility is too slender a reed to support a criminal sanction; in fact, a criminal sanction may increase disrespect for antitrust policy, since the remedy seems vindictive rather than vindicative. Consequently, the effectiveness of criminal sanctions in antitrust cannot be divorced from individual attitudes toward substantive antitrust policy, and an intelligent evaluation of the utility

Government quickly settled the case by accepting nolo pleas. The importance of the case and the circumstances of the settlement have raised some serious questions. *See* Note, *Section 5 of the Clayton Act and the Nolo Contendere Plea*, 75 YALE L.J. 845 (1966).

102 E. SUTHERLAND, *supra* note 2, at 223-24; *see* United States v. Westinghouse Elec. Corp., 1960 Trade Cas. ¶ 69,699 (E.D. Pa. 1960) (where attorneys representing defendants in the "Electrical Equipment Conspiracy Cases" characterized antitrust violations as "crimes having to do with regulation of the economy" and not "crimes of violence," "treason," or "other serious crimes against the government").

103 Lane, *Why Businessmen Violate the Law*, 44 J. CRIM. L.C. & P.S. 151, 161 (1953). *See generally* M. CLINARD, THE BLACK MARKET (1952).

of sanctions founders upon an absence of empirical information on their deterrent value in the antitrust field.[104]

A fifth distinguishing characteristic of white collar crime in the antitrust area is the degree of responsibility among individuals within a corporation accused of violating an antitrust statute and the prosecutor's difficulty in assessing responsibility. The first aspect of the responsibility issue is related to the vagueness of the antitrust laws. As was pointed out earlier, the vast majority of antitrust violations prosecuted criminally by the federal government involve clear-cut per se violations. While it may be questionable whether certain activity may fall within the per se violations,[105] the Government in its discretion ordinarily reserves criminal sanctions for clear-cut violations.[106] Moreover, those violating the antitrust laws normally have high caliber legal advice prior to launching any type of business venture and after being charged with an antitrust violation by the Government, are intelligent, have the advantage of an extensive education, and—from what evidence is available—do not usually violate the antitrust laws because of ignorance of their existence or content.[107] Conse-

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104 A severe handicap to the analysis of criminal antitrust sanctions generally is absence of empirical research into the criminology of white collar crimes. Relatively little has been done since Sutherland's pioneer work in the way of examining why such crimes are committed, what the effect of a criminal sanction is upon the violator, and whether antisocial conduct labeled white collar crime should be punishable by criminal sanctions. The work of an eighteenth-century thinker, Jeremy Bentham, remains the basis for much modern thinking. Consequently, it is not strange that the student of antitrust is largely ignorant of the impact of penal sanctions. *But see* Kadish, *supra* note 3. The President's Commission on Law Enforcement and Administration of Justice noted the widespread prevalence of white collar crimes and the general lack of empirical research on the question. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, *supra* note 45, at 109. Until extensive research is engaged in by the social sciences and legal scholars, criminal sanctions in antitrust enforcement will be a controversial subject and much of the controversy will be based upon myths and presumptions rather than facts.

105 *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); United States v. Colgate & Co., 250 U.S. 300 (1919).

106 In response to a query from the Attorney General's Committee to Study the Antitrust Law, the Antitrust Division of the Department of Justice reported:

> In general, the following types of offenses are prosecuted criminally: (1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) a less easily defined category of cases which might generally be described as involving proof of use of predatory practices (boycotts, for example) to accomplish the objective of the combination or conspiracy; (4) the fact that a defendant has previously been convicted of, or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense. There are other factors taken into account in determining whether to seek an indictment in cases that may not fall precisely in any of these categories. The Division feels free to seek an indictment in any case where a prospective defendant has knowledge that practices similar to those in which he is engaging have been held to be in violation of the Sherman Act in a prior civil suit against other persons.

ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 350 (1955).

107 Lane, *supra* note 103.

quently, the responsibility of an individual violating the antitrust laws is much greater than the responsibility of the average violator of the criminal law who often lacks legal counsel before and after his offense, comes from a degrading environment, or suffers from some type of mental or psychological difficulty.

The prosecutor's task in assessing responsibility, however, is often a difficult proposition. In many large corporations managerial responsibility is so diffused and internal lines of responsibility are so tenuous that the ultimate responsibility for a criminal antitrust violation cannot be placed with certainty.[108] This difficulty, of course, dulls the effectiveness of the criminal sanction in antitrust enforcement since those ultimately responsible for the violation escape punishment and those who are punished or are subject to punishment are not totally responsible. These uneven results create a sense of dissatisfaction with criminal antitrust enforcement, since the most guilty may escape liability.

Finally, for purposes of analyzing state antitrust sanctions, a peculiarity of local antitrust violations must be taken into consideration. Antitrust violations at the local level tend to be of the more clear-cut or per se variety. In most cases in which a state antitrust statute has been applied or should have been applied, the violation is per se and the offending parties are individuals, small corporations, or small business or labor organizations.[109] Consequently, violations are easily proved, responsibility for the violation is easier to assess, and the injury and injured are seldom so widely diffused as to obfuscate the gravity of the offense in the mind of the public.[110]

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108 This allegation seems to have been particularly true in the Electrical Equipment Conspiracy Cases, and one of the primary factors for the violations. For many observers it was difficult to believe that the upper echelon of company executives could not have known of the violations. On the other hand, the decentralization programs of some of the electrical companies made it easy to understand that top management would find it difficult to prevent lower echelon executives under external competitive pressures and internal management pressures from surreptitiously violating the antitrust laws. *See generally* Smith, *supra* note 89; Watkins, *supra* note 30. These cases may have had the salutary effect of inducing self-regulation in large corporate entities. *See* Whiting, *supra* note 55, at 3.

109 *See* notes 75-76 *supra* and accompanying text.

110 Federal criminal antitrust enforcement has been criticized on the ground that because assessment of criminal responsibility is easier in the small closely-held corporation or small trade association, criminal sanctions are not applied equally, since the managements of large corporations are seldom convicted while those of small corporations are convicted. Comment, *supra* note 3, at 540-41. Whether this is an argument for abolishment of criminal sanctions, for the imposition of liability upon responsible corporate officials without having to show mens rea or knowledge, *see* Note, *supra* note 26, at 302-03, or for federal incorporation laws to give federal officials power to restructure and govern internal structure of unwieldy corporations, *see* Watkins, *supra* note 30, at 108-10, has not been answered.

With these observations in mind, the following conclusions may be drawn: (1) Antitrust violations do contain an element of moral wrong, but are not crimes of moral turpitude. (2) The class of individuals normally violating this type of regulation and the problem of placing responsibility within the corporate structure make it difficult and rare to assess the full measure of criminal sanctions now available under the antitrust laws against the individuals truly responsible for the violation. (3) Those violating the antitrust laws should be held to a high degree of responsibility in view of the certainty of standards in many areas of antitrust regulation, the availability and use of well-trained counsel by many of those indicted for antitrust violations, and the high degree of intelligence, education, and social background of the normal antitrust violator. (4) The gravity of an antitrust offense, whether statewide or on a national scale, often far exceeds the material public harm involved in most criminal acts.

C. Assessing Criminal Responsibility

Perhaps of more interest in the development of criminal antitrust remedies and a peculiarity of criminal antitrust enforcement is the difficulty of assessing individual responsibility within the corporate structure for corporate antitrust violations.[111] Federal enforcement officials are increasing their efforts to make this assessment.[112] Since one weakness of criminal antitrust enforcement has been the Government's inability to assess criminal liability against the individual responsible for a corporate act or policy violating the law,[113] this trend may be viewed as an effort by federal enforcement officials to overcome one of the more basic objections to criminal antitrust enforcement and make the criminal antitrust sanction more effective.

In their effort to hold corporate executives criminally liable for corporate antitrust violations, federal officials may rely on section 14 of the Clayton Act,[114] which imposes criminal liability upon corporate officers, directors, and agents where they have "authorized, ordered or done any of the acts constituting in whole or in part" the corporation's violation of the "penal provisions of the antitrust laws," and on the

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111 *See generally* Kadish, *supra* note 3; Watkins, *supra* note 30; Whiting, *Antitrust and the Corporate Executive* (pts. 1-2), 47 VA. L. REV. 929, 48 VA. L. REV. 1 (1961-1962).

112 This development is evidenced by the trend toward naming corporate officers as co-defendants in criminal antitrust prosecutions against corporations. *See* Whiting, *supra* note 111.

113 Timberg, *supra* note 62, at 320.

114 15 U.S.C. § 24 (1964).

decision in *United States v. Wise*,[115] which imposes criminal liability under sections 1 and 2 of the Sherman Act on corporate officers acting in a representative capacity. Thus, corporate officers will be criminally liable under the Sherman Act if they have engaged in illegal conduct on their own account or on the account of their corporation; they will also be subject to the criminal sanctions of section 14 of the Clayton Act for violations of that section.[116] The structure of the modern corporation, however, particularly the large and decentralized corporation, complicates the assessment of individual responsibility for the corporation's antitrust transgressions. Excessive decentralization and lower echelon managerial independence may effectively avoid top management antitrust responsibility, though they be established for sound business reasons. Whether this is an argument in favor of abandoning criminal sanctions or one in favor of dissolving large corporate entities that violate the antitrust laws with regularity,[117] the present prospect of achieving either solution is remote. But the current situation is unsatisfactory as well, since the assessment of criminal sanctions upon anyone other than those ultimately responsible for the corporation's antitrust violations may leave the administration of the law unfair, unjust, and ineffective. Any suggestion that section 14 of the Clayton Act be amended to establish a respondeat superior standard[118] would meet strong opposition and might well discourage corporate decentralization and lower echelon managerial independence. The effectiveness of federal antitrust enforcement will rest with federal enforcement officials, who must maintain their determination

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115 370 U.S. 405 (1962), *noted in* 48 A.B.A.J. 1071 (1962); 4 B.C. IND. & COMM. L.J. 177 (1962); 61 MICH. L. REV. 596 (1963); 4 WM. & MARY L. REV. 217 (1963). Corporate officers are therefore liable for up to a $50,000 fine instead of the $5,000 limit under § 14 of the Clayton Act, and the standards of proof are the ones available under §§ 1-3 of the Sherman Act.

116 The language of § 14, although seldom interpreted, does not seem adequate to permit the Government to pierce the mists of diffused responsibility within the corporate bureaucracy and hold top management accountable for antitrust violations they induce or permit. Apparently, the statute requires that there be proof beyond a reasonable doubt that the corporate officer authorized, ordered or did the "acts" constituting a penal violation of the antitrust laws. *Compare* Meehan v. United States, 11 F.2d 847 (6th Cir. 1926), *with* United States v. Mathues, 9 F.2d 913 (3d Cir. 1925). Such proof would be difficult or impossible in cases where a corporate officer has tolerated or indirectly induced antitrust violations by subordinates.

117 Many economists approach antitrust remedies from the viewpoint that they only attack the symptoms, not the basic causes for anticompetitive conduct. They therefore have little interest in criminal sanctions and stress the necessity for governmental power to restructure noncompetitive markets or markets having high concentrations in the form of duopoly or oligopoly. *See, e.g.*, C. KAYSEN & D. TURNER, *supra* note 64 at 234-72; M. MASSEL, COMPETITION AND MONOPOLY 94 (1962); Watkins, *supra* note 30.

118 This section now seems to require proof of active illegal conduct. *See* note 116 *supra*.

to impose criminal liability on the particular corporate officer responsible for the violation.

At the local level, however, the difficulty of assessing antitrust responsibility should not be as troublesome. In the first place, some state statutes expressly provide for managerial liability for corporate antitrust violations.[119] A second and perhaps more important practical factor in assessing criminal responsibility for corporate antitrust violations at the local level lies in the nature of the restraints local enforcement officials may expect to encounter. As was pointed out earlier,[120] local restraints of trade are generally flagrant violations by small corporations, local unions, or local trade associations. This factor should not only make proof of violation simpler, but should also facilitate a proper assessment of individual blame within the internal structure of the offending entity.

D. Nolo Contendere Pleas

Over the history of the enforcement of the federal antitrust laws, defendants in seventy-five percent of criminal antitrust cases pursued to remedy by the Antitrust Division of the Department of Justice have pleaded nolo contendere;[121] the corresponding figure for the decade of the fifties is eighty-one percent.[122] This peculiarity of criminal antitrust enforcement may be explained by several factors.[123] A major factor is the effect of section 5(a) of the Clayton Act, which provides:

> A final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws . . . shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . .[124]

The proviso to this section has generally been construed to include nolo contendere pleas,[125] but the analogous question whether guilty

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119 *E.g.*, CAL. BUS. & PROF. CODE § 16755; MASS. GEN. LAWS ch. 93, § 10 (1958); REV. CODE MONT. § 94-1104 (1947); N.M. STAT. ANN. § 49-1-1 (1953); N.C. GEN. LAWS § 75-6 (1965).

120 Text accompanying notes 75-76 *supra.*

121 App. A, Table I, *infra.*

122 App. A, Table II, *infra.*

123 *See* notes 73-74 *supra* and accompanying text.

124 15 U.S.C. § 16(a) (1964).

125 *E.g.*, Pfotzer v. Aqua Systems, Inc., 162 F.2d 779, 784 (2d Cir. 1947); Simco Sales Serv., Inc. v. Air Reduction Co., 213 F. Supp. 505 (E.D. Pa. 1963); Atlantic City Elec.

pleas are also included or instead merit prima facie effect has not been free of doubt. Some have concluded that "a guilty plea falls within the proviso and is therefore outside the scope of the section."[126] Others have restricted the application of the proviso to consent decrees in government civil enforcement and to nolo contendere pleas in criminal actions.[127] The latter position seems better reasoned, for it can give effect to both of the competing interests present: to facilitate private treble damage actions and to assist Government enforcement "by encouraging defendants to capitulate at a saving of time and expense to the government" in criminal antitrust cases.[128]

But explaining the high percentage of nolo pleas on the basis of escaping the prima facie effect of section 5(a) of the Clayton Act for subsequent treble damage actions has tended to obscure the essential legal characteristics and implications of the plea, which is something more than a mere device for escaping the res judicata effect of a guilty plea. At common law a plea of nolo contendere was not a plea in the sense in which that word is now used in criminal law. Rather, it was a petition to the sovereign's mercy, and a defendant could not avail himself of the plea as a matter of right—a court had discretion whether the plea should be accepted.[129] Thus traditionally the plea of nolo contendere was an admission of guilt and not merely a device for escape from the legalistic stigma and consequences of admitting the commission of a crime. A court is warranted, in the strict sense, in imposing the full criminal penalties assigned by the statute in

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Co. v. General Elec. Co., 207 F. Supp. 620 (S.D.N.Y. 1962); United States v. Standard Ultramarine and Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 336 (D. Minn. 1939), *aff'd*, 119 F.2d 747 (8th Cir.), *cert. denied* 314 U.S. 644 (1941).

126 Note, *supra* note 74, at 686.

127 *E.g.*, Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *rev'g in part* 211 F. Supp. 712 (N.D. Ill. 1962).

128 Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412, 415 (7th Cir. 1963). If all criminal antitrust cases were contested, the Antitrust Division either would need a substantial budget increase or would be forced to curtail the scope of its activities drastically.

129 *See generally* 2 W. HAWKINS, A TREATISE ON PLEAS TO THE CROWN 466 (8th ed. 1824); Lenvin & Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L.J. 1255 (1942); Comment, *Nolo Pleas*, 8 DE PAUL L. REV. 68 (1958); Note, *Nolo Contendere—Its Use and Effect*, 52 CALIF. L. REV. 408 (1964). There are only two major limitations on the availability of the plea. Nowhere may it be used in a capital case, and in some jurisdictions it is unavailable in a felony case. Lenvin & Meyers, *supra* at 1258. This latter limitation is important in those states whose criminal antitrust statutes create felonies and which limit the availability of nolo pleas to cases of minor misdemeanors, *e.g.*, State v. Kiewel, 166 Minn. 302, 207 N.W. 646 (1926); Williams v. State, 130 Miss. 827, 94 So. 882 (1923); Roach v. Commonwealth, 157 Va. 954, 162 S.E. 50 (1932), and in those states which will not accept the plea in felony cases, *e.g.*, Schad v. McNinch, 103 W. Va. 44, 136 S.E. 865 (1927); Brozosky v. State, 197 Wis. 446, 222 N.W. 311 (1928).

question after a plea of nolo contendere.[130] The only major limitation upon the power of the court to impose a penalty is the court's judicial discretion exercised in the light of the facts pled to activate sovereign mercy.

The troublesome question with regard to nolo pleas and their effect on criminal sanctions in antitrust enforcement is whether courts should accept the plea in the first instance, rather than whether the courts may assess the maximum criminal sanction once the plea has been accepted. Acceptance of a nolo plea dulls the effectiveness of antitrust sanctions in general both because private litigants are deprived of a prima facie case under section 5(a) of the Clayton Act and because the court is less likely to assess maximum criminal penalties in the absence of full litigation of all the facts and circumstances surrounding the violation.[131] In addition, it is logical to assume that the defendant and his acquaintances are less likely to believe that he has been convicted for the commission of a criminal act since it is easy to rationalize the nolo plea as a settlement of questionable liability for the best interest of all concerned. Consequently, the full stigma of being convicted of a serious crime is lost and the deterrent effect of the criminal sanction is watered down considerably.[132]

Although the Antitrust Division has usually resisted acceptance of nolo pleas, the courts have been exceedingly liberal in accepting the plea in criminal prosecutions under the antitrust laws, relying on the policy of the proviso to section 5(a) of the Clayton Act, the public interest in expediting litigation and easing crowded dockets, and the facts and circumstances of individual cases.[133] Rule 11 of the Federal Rules of Criminal Procedure authorizes courts to accept nolo pleas, but judicial discretion under Rule 11 should be exercised in light of the policy supporting criminal antitrust sanctions and the policy behind section 5(a) of the Clayton Act.[134] Relying on the proviso to section 5(a) several courts have held that defendants have the right to capitulate without trial in antitrust cases.[135] A basic difficulty with

130 *See, e.g.*, Hudson v. United States, 272 U.S. 451 (1926); United States v. McDonough, 1959 Trade Cas. ¶ 69,482 (S.D. Ohio).

131 *See* United States v. Jones, 119 F. Supp. 288, 289 n.1 (S.D. Cal. 1954) where the Antitrust Division stated its opposition to ready acceptance of nolo pleas by the courts and asserted: "Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime."

132 *Id. See also* Note, *supra* note 101, at 848-57.

133 Note, *supra* note 101, at 860-61.

134 Note, *supra* note 101, at 862.

135 *E.g.*, United States v. Brunswick-Balke-Collender Co., 203 F. Supp. 657 (E.D. Wis. 1962) (consent decree with an "asphalt clause" rejected); United States v. Ward Baking Co., 1963 Trade Cas. ¶ 70,608 (N.D. Fla.), *vacated and remanded*, 376 U.S. 327 (1964)

this position is that section 5(a) was not intended to confer any rights on antitrust defendants but was primarily intended to benefit third parties injured by an antitrust violation.[136] The proviso to that section was intended to facilitate enforcement of the Act by encouraging defendants to capitulate.[137] It is indeed anomalous, therefore, for a court to hold that a defendant has a right to plead nolo contendere in a criminal antitrust case or that a court in its exercise of discretion under Rule 11 can ignore objections by the Government to the acceptance of the plea. If the Government objects to a nolo plea in a particular case, the court should not overrule the Government's decision not to avail itself of the benefits Congress intended to bestow upon the prosecution, except perhaps where there is a clear showing of abuse by the Government in objecting to the plea. This position would conform with the congressional purpose in establishing criminal sanctions for use in antitrust enforcement, for it would increase the deterrent effect of criminal sanctions; at the same time, it would fulfill the basic purpose of section 5(a) of the Clayton Act by aiding private treble damage claimants.

At the state level, the actual use of nolo pleas in antitrust enforcement is difficult to measure in light of the general absence of state criminal prosecutions. No state statute makes specific reference to the availability of the plea.[138] The use of consent decrees in civil actions and forfeiture cases, however, indicates a willingness to emulate federal practice and therefore make use of the plea.

It is recommended that the states follow the practice of allowing nolo contendere pleas in state-initiated criminal antitrust cases to the extent that they expedite state antitrust enforcement. One of the

(consent decree entered without Government consent); United States v. B.F. Goodrich Co., 1957 Trade Cas. ¶ 68,713 (D. Colo.).

136 51 CONG. REC. 1962, 1964 (1914) (President Wilson's statement to Congress in support of the passage of § 5 of the Clayton Act); *see* Note, *supra* note 101.

137 *See* 51 CONG. REC. 15,824 (1914) (remarks of Senator Lewis); 51 CONG. REC. 16,276 (1914) (remarks of Senator Webb); 51 CONG. REC. 16,004 (1914) (remarks of Senator Chilton); H.R. REP. No. 627, pt. 2, 63d Cong., 2d Sess. (1914).

138 Tennessee's antitrust law refers expressly to the availability of consent decrees in actions against cooperative marketing associations restraining or monopolizing trade, TENN. CODE ANN. § 69-111 (1955), and Washington's antitrust law, which has no criminal sanctions, refers to the availability of "assurance of discontinuance." WASH. REV. CODE ANN. § 19.86.100 (Supp. 1966). In some states it has been held that the plea of nolo contendere is not available at all, either on the theory it is not within the criminal code of the state and is therefore excluded by implication. People v. Miller, 264 Ill. 148, 106 N.E. 191 (1914); Mahoney v. State, 197 Ind. 335, 149 N.E. 444 (1925); State v. Hill, 145 Kan. 27, 64 P.2d 71 (1937); State v. Kiewel, 166 Minn. 302, 207 N.W. 646 (1926). *Contra*, McPab v. State, 42 Wyo. 396, 295 P. 278 (1931). In other states a statute has abolished the plea expressly. *See, e.g.*, People v. Dailboch, 265 N.Y. 125, 191 N.E. 859 (1934). Thus at the state level no generalizations about the availability of nolo pleas are possible.

major hurdles facing any state antitrust enforcement program is a lack of funds, and because nolo pleas may mitigate operational expenses for state antitrust enforcement, they should be sanctioned and encouraged, though wholesale use of the plea should be carefully guarded against, since the deterrent effect of criminal sanctions may become diluted. Since the primary effect of the plea is to allow defendants to avoid the cost and embarrassment of defending a criminal action and yet protect themselves from the collateral estoppel effect a statute may give other pleas in private damage actions, many defendants will need no inducement to plead nolo. However, both state and federal judges should consider the following factors in deciding whether to accept the plea or in determining the punishment to be assessed after the plea is accepted:[139] (1) the gravity of the offense; (2) the effect of the acceptance of the plea on private litigants; (3) the character of the offense; (4) the recidivism of the defendant; (5) the cost of uncovering and investigating the offense; (6) the culpability of the individual defendants; (7) the impact of the offense upon affected individuals and the community; and (8) the need for instilling respect for and adherence to antitrust policy through the stigma of a litigated conviction of the antitrust laws.

IV. Proposals Concerning Criminal Sanctions in Antitrust Legislation

The central premise of those who advocate the use of criminal sanctions to enforce compliance with antitrust policy is that criminal sanctions act as a deterrent.[140] As is true elsewhere in criminal law, the difficulty with the deterrence theory is lack of proof that jail sentences, fines, and the stigma of being labeled a criminal do coerce compliance with the antitrust laws. The only concrete evidence available on the question concerns those who are not deterred by criminal sanctions and are apprehended.[141]

But the alternatives to criminal sanctions as a method of enforcement offer little comfort. Injunctions can only operate *in futuro* and

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139 These factors have been among those considered by federal judges when considering nolo pleas in federal criminal antitrust cases. United States v. Safeway Stores, Inc., 20 F.R.D. 451 (N.D. Tex. 1957); cases cited note 48 *supra*.

140 *See generally* E. Sutherland, *supra* note 2; Bell & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 Stan. L. Rev. 197 (1965). The Report of the Attorney General's Committee also indorsed the use of criminal sanctions in cases of clear-cut violations. Att'y Gen. Nat'l Comm. Antitrust Rep. 343-53 (1955).

141 *Cf.* note 104 *supra* and accompanying text.

may well be viewed by those subject to antitrust regulation as a nuisance or as only one of the many risks of doing business. The deterrent value of an injunction is, therefore, very slight.

Trebling damages on behalf of private litigants may well seem a useful alternative deterrent to criminal sanctions. However, most treble damage suits are spawned by Government-initiated suits and most private litigants rely heavily upon Government investigation and prosecution to prove their cases.[142] The success of privately initiated suits has not been impressive,[143] and the sting of private treble damages as a deterrent has been substantially mitigated by a revenue ruling holding that treble damages are deductible from income as an ordinary and necessary business expense.[144] Consequently, whatever deterrent effect may be attributable to treble damage actions is largely lost by their tax deductibility and also by the unproven likelihood that a corporation can pass the cost of damages on to consumers in the form of higher prices, to employees in the form of lower wages, or to stockholders in the form of lower dividends.

Yet some courts have considered treble damage suits a severe penalty, and a danger may be presented by suits promoted by lawyers specializing in such claims.[145] Moreover, the suggestion that the Gov-

142 Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959). It is particularly rare for private litigants to explore new fields of antitrust. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

143 While the ratio of private to Government suits is impressive, *see* ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 95 (1957), most of the private suits were begun after Government litigation revealed the violation. *Hearings on the Role of Private Antitrust Enforcement in Protecting Small Business Before a Subcomm. of the Select Senate Comm. on Small Business*, 85th Cong., 2d Sess. 127 (1958); Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1060 (1952). *But see* Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma*, 53 CALIF. L. REV. 627, 628 n.7 (1965). Moreover, many of the private suits were terminated short of favorable judicial action for the plaintiff. While it is impossible to determine how many private cases were favorably settled for plaintiffs, surveys of litigated cases uniformly show that plaintiffs seldom prevail. *E.g.*, Bicks, *supra* note 142, at 8, 11; Comment, *Proof Requirements in Anti-Trust Suits: The Obstacles to Treble Damage Recovery*, 18 U. CHI. L. REV. 130, 138 (1950); Note, *supra* note 26, at 290; Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952). It has been estimated that settlements are reached in approximately 25% of the cases filed. Bicks, *supra* note 142, at 5, 8. In the vast majority of cases where the Government obtained a court decision that the antitrust laws were violated, convicted defendants paid nothing to claimants in the form of damages or settlements. Note, *supra* note 26, at 290.

144 Rev. Rul. 64-224, 1964-2 CUM. BULL. 52. The implications of this ruling are far-reaching. It may encourage settlement of valid private damage actions while also stiffening resistance to nolo contendere pleas and consent decrees. The risk of a conviction or a litigated finding of civil violation followed by a private treble damage action is mitigated since the prima facie effect of section 5(a) of the Clayton Act may now mean only a large tax deduction rather than a substantial dent in profits. *See generally* Note, 113 U. PA. L. REV. 954 (1965); Barber, *Windfall for Conspiracy*, THE NATION, Nov. 9, 1964, at 333

145 *See* Note, *supra* note 101, at 868-75.

ernment have primary discretion in determining whether nolo pleas are to be accepted must be weighed in light of the fact that the Government's exercise of such discretion will have a direct influence upon the number of private treble damage claims brought subsequent to the Government case. The relationship of nolo pleas to section 5(a) of the Clayton Act cannot be ignored; but empirical research is lacking on the questions whether treble damage claims are worthwhile antitrust remedies or whether Government prosecutions should be prima facie evidence in a private treble damage action of a violation if a nolo plea is accepted,[146] or if a nolo plea is accepted over objections by the Government.[147] At this juncture it is recommended that the courts not enter nolo pleas if the Government objects to their entry, unless the defendant can prove that the Government's objection has no merit whatsoever.[148]

The tandem use of treble damage claims with criminal sanctions should measurably increase the deterrent effect of the criminal sanction. But the effectiveness of treble damages as a deterrent is limited by their tax deductibility and by the possibility that they can be passed on to consumers, employees, and shareholders.

The monetary forfeiture, a sanction common to state antitrust statutes[149] and one recommended in the Tentative Draft of the Proposed Uniform State Antitrust Law,[150] also has several inherent weaknesses. The forfeiture is usually for a set amount and is often computed on a per diem basis.[151] Aside from failing to make the punishment fit the crime, per diem monetary forfeitures can result in astronomical penalties.[152] A forfeiture is labeled as civil, but in fact is penal. Its

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146 *See* S. 2512, 89th Cong., 1st Sess. (1965).

147 *See* H.R. 8253, 88th Cong., 1st Sess. (1963).

148 Abuse of such a power by the Government will be tempered by manpower and budget limitations restricting the Government's ability to litigate and by judicial review.

149 *See* App. B, *infra*.

150 Tentative Draft of Uniform State Antitrust Act With Prefatory Notes and Comments, § 11 in 4 TRADE REG. REP. 30,101 (1967). Others have also included the civil forfeiture as a sanction in their recommendations. *E.g.*, Stern, *supra* note 35, at 742-43. Professor Rahl's proposal does not include civil forfeitures. *See* Rahl, *supra* note 35, at 779-81.

151 *See, e.g.*, OHIO REV. CODE ANN. § 1331.04 (1962).

152 *See, e.g.*, Aetna Ins. Co. v. Robertson, 131 Miss. 343, 95 So. 137, *cert. denied*, 263 U.S. 573 (1923) (forfeitures of $8,055,075); Standard Oil Co. v. State, 132 S.W.2d 612 (Tex. Civ. App.—Austin 1939, writ dism'd jdgmt corr.) (forfeiture of $450,000); Waters-Pierce Oil Co. v. State, 106 S.W. 918 (Tex. Civ. App. 1908), *aff'd*, 212 U.S. 86 (1909) (forfeitures of license to do business in state and $1,623,900). A more recent Texas case resulted in a forfeiture of $125,000. *See* 130 BNA ANTITRUST & TRADE REG. REP., at A5-A6 (1964). The Tentative Draft of the Proposed Uniform State Antitrust Act, *supra* note 150 avoids this problem by establishing maximums of up to $5,000 forfeiture for individuals violating the statute and up to $25,000 forfeiture for corporations, associations, firms, and partnerships violating the statute.

purpose is not to compensate the injured sovereign or to disgorge ill-gotten gain, but to penalize antisocial conduct. While litigation has not yet revealed whether the courts will continue to hold that civil standards of proof, civil procedures,[153] and the state's right to appeal from adverse lower court decisions in forfeiture cases pertain,[154] a trend does seem to be developing toward treating monetary and property forfeitures as criminal sanctions.[155] Consequently, a state that relies on civil forfeitures to enforce its antitrust laws may find it has a sanction with all the enforcement difficulties of a criminal law but without the deterrent value of the stigma that attaches upon a criminal conviction.

Forfeitures also have the disability of being treated as a cost of doing business. While it is unlikely that a civil forfeiture for antitrust violations will fall within the revenue ruling labeling treble damages as ordinary and necessary business expenses,[156] the danger exists that a civil forfeiture can be passed on in the form of higher market prices and that corporate officials who may be assessed a civil forfeiture may be entitled to indemnification. The deterrent effect of a civil forfeiture is, therefore, open to serious question.

Other sanctions could be suggested as antitrust remedies with a deterrent value. For example, since the criminal fine has little deterrent value when applied against the corporation because it can be passed on to the consumer, it is usually insignificant in comparison to corporate worth and profit, and receives relatively little publicity; a sanction should strike at more vital corporate interests. A corporation might be required to include in its advertising campaigns the fact that it has violated the antitrust laws by price fixing,[157] or it might be refused

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153 *See* United States v. Hess, 317 U.S. 537, 550-52 (1943); Berge, *Remedies Available to the Government Under the Sherman Act*, 7 LAW & CONTEMP. PROB. 104, 111 (1940).

154 Stern, *supra* note 35, at 744; Tentative Draft, Uniform State Antitrust Law, *supra* note 150, at 23-24.

155 Arkansas Fuel Oil Co. v. State, 154 Tex. 573, 280 S.W.2d 723 (1955); *cf.* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

156 *See* note 144 *supra*. Three categories have been developed by the courts for determining whether disbursements are business expenses: (1) reparational payments sufficiently connected with the taxpayer's business, Ditmars v. Commissioner, 302 F.2d 481, 485 (2d Cir. 1962); (2) payments made in the normal course of an illegal enterprise, Commissioner v. Sullivan, 356 U.S. 27 (1958); Commissioner v. Doyle, 231 F.2d 635 (7th Cir. 1956); and (3) fines or penalties assessed for illegal busines activity, Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958). Disbursements falling within the first two categories are deductible as "ordinary and necessary" business expenses. While courts have reached conflicting results with regard to the third category, it seems clear that monetary forfeitures are punitive and to allow a tax deduction would undermine the public policy of state antitrust legislation. *See* Tank Truck Rentals v. Sullivan, *supra*.

157 Regulation of advertising is not unusual for purposes of health or safety or to prevent fraud. *See, e.g.*, Wool Products Labeling Act of 1939, 15 U.S.C. § 68 (1964); Fur Products Labeling Act, 15 U.S.C. § 69 (1964); Textile Fiber Products Identification Act, 15 U.S.C. § 70 (1964).

permission to bid on Government contracts or partake of other forms of Government largesse.[158] Corporate officers, managers, and directors responsible for corporate antitrust violations might be penalized by ouster from office, much in the same manner that the Landrum-Griffin Act penalizes union officials with a criminal record.[159]

While the mere mention of these sanctions may terrify many corporate executives, they are at best too controversial to be politically feasible. Even so, penalties like these, which would jeopardize a corporation's share of the market or its market reputation and would threaten managerial careers within the offending corporation, would seem to be the best deterrents, for they strike closest to the factors that drive corporations and their executives to violate the antitrust laws.

The remaining alternative is the criminal sanction. And at least at the federal level, this alternative is likely to remain with antitrust enforcement for a substantial period of time.[160] The deterrent value of criminal penalties for violation of the antitrust laws is generally admitted by most commentators.[161] Moreover, when premised upon

158 Blacklisting of convicted corporations has often been suggested. *See* Note, *supra* note 26, at 289 n.35. This particular remedy, however, may prove worse than the disease. For example, if all the corporations involved in the electrical equipment cases were blacklisted, the Government would have no domestic sources for purchasing its requirements of heavy electrical equipment, worsening the balance of payments to the possible detriment of national security. The granting or withholding of government franchises, monopolies, and rights, a sanction already in widespread use, can be a much greater and more effective sanction than criminal penalties. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964). The corporate charter itself is a government privilege, permitting investors to carry on business in an artificial form so as to limit liability and acquire sufficient assets in a manageable form. Since the corporate charter is a privilege granted by the government, the charter-granting state may reserve the right to revoke the charter for abuse of the privilege. Many state antitrust statutes have reserved this right. *See* App. B, *infra*.

159 29 U.S.C. § 504 (Supp. 1965); *see* United States v. Brown, 381 U.S. 437 (1965) (holding this section unconstitutional as a bill of attainder, but not forbidding a requirement that persons committing certain acts not hold union office); *cf.* 12 U.S.C. § 78 (1964) (prohibiting corporate officers and directors engaged in flotation, underwriting, public sale, or distribution of stocks and bonds from serving as officers, directors, or employees of member banks in the Federal Reserve System), *upheld* in Board of Governors v. Agnew, 329 U.S. 441 (1947). Judge Wyzanski issued an interesting decree in United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *rev'd as to decree*, 348 U.S. 565 (1965): after divesting three affiliate corporations of the Grinnell Corporation to remedy monopolization of the automatic fire and burglar alarm business, he enjoined the affiliates from employing the president of Grinnell who for 15 years had been the leader of the illegal course of conduct.

160 The increase in criminal cases during the past few years, *see* App. A, Table II, *infra*; Whiting, *supra* note 111, the increase of criminal fines from $5,000 to $50,000, and the general endorsement of criminal penalties by the Attorney General's National Committee, *see* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 349-53 (1955), suggest a strengthening of public policy in favor of criminal sanctions for antitrust violations.

161 *See generally, e.g.*, ATT'Y GEN. NAT'L COMM. ANTITRUST REP. (1955); E. SUTHERLAND, *supra* note 2; Bell & Friedman, *supra* note 140; Kadish, *supra* note 3; Comment, *supra* note 3; Note, *Trend Toward Increasing Antitrust Sanctions*, 37 IND. L.J. 502 (1962); Note, *supra* note 26. The angnish that may be found in the writings of the representatives of business interests demonstrates the deterrent value of criminal penalties. *See, e.g.*, Cahill, *supra* note 1; Hazard, *supra* note 1.

the facts that the bulk of antitrust prohibitions are not vague, that antitrust violations are contrary to the prevailing mores of American society, and that antitrust violations have a serious economic impact upon the economy and the consumer, criminal sanctions are not only necessary to insure compliance, but are also proper sanctions.

The deterrent value of short jail sentences in especially aggravated cases would seem appropriate. The threat of serving a jail sentence should be extremely offensive to the class of individuals who normally violate antitrust policy. In view of the continuation of predatory antitrust violations by otherwise praiseworthy individuals in our society, it would seem that the drastic step of imprisoning violators from time to time is essential to coerce compliance.[162]

Those considerations applicable to the advisability of invoking jail sentences as a sanction for the enforcement of antitrust policies are also applicable to the advisability of invoking criminal fines for antitrust violations. While not as drastic as imprisonment and not serving the same ends as imprisonment, the criminal fine does have the same basic purpose of deterrence. Where imprisonment deters through fear and removal from society, criminal fines deter by the threat of being labeled a criminal and by making the violation less profitable. This latter effect is important because a criminal fine may prevent the potential violator from committing the crime if the chances of detection and loss of illegal gain outweigh the profits that would be gained by a successful violation of the statute.[163] If the criminal fine is high enough in relation to the expected illegal gain, the risk of loss may not warrant a gamble against the odds of detection, regardless of stigma, possible treble damage actions and the other values inherent in the criminal law as a means of social control. If the profit motive is the driving force behind private enterprise[164] and the psychological

162 *See generally* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 45, at 102-12.

163 It was on this theory that the criminal fines under the Sherman Act, 15 U.S.C. § 1 (1964), and the New York antitrust act, N.Y. GEN. BUS. LAW § 341 (McKinney 1962), were recently raised to $50,000. Other proposals have included increasing Sherman Act fines up to $500,000. *See* Note, *supra* note 161, at 511-15. Some believe that the size of present fines may make the risk of detection one worth taking. *See* Note, *supra* note 26.

164 The extent to which this is true may be questioned. The institutionalizing of management, *see* W. WHYTE, THE ORGANIZATION MAN (1956), the separation of ownership of the corporation from control of the corporation, *see* A. BERLE, POWER WITHOUT PROPERTY (1959); P. HARBRECHT & A. BERLE, TOWARD THE PARAPROPRIETAL SOCIETY (1960), and the drive for security within highly competitive markets, *see, e.g.*, Smith, *supra* note 89, may well have chipped away the relative importance of the profit motive as a primary factor in antitrust violations. It does seem that many of today's antitrust violations are reflections of the drive for status and financial security that arise out of a strong competitive market, rather than primarily symptoms of greed and profit motive gone rampant. It seems to this writer that many per se violations arise out of a drive for security, while

cause of most antitrust violations, the deterrent value of a criminal fine, provided the fine is adequate, seems far greater than that of a seldom-invoked prison sentence.

A factor eroding the effectiveness of the criminal fine against corporate officers, directors, and agents, despite the increase in the amount of the criminal fine and the holding of *United States v. Wise*,[165] is the doctrine of indemnification.[166] Many states grant corporations the power to indemnify corporate officers or give corporate officers the right to receive indemnification for engaging in litigation which benefits the corporation.[167] In a few instances, particularly where a corporate official has pleaded nolo contendere to a criminal antitrust indictment, courts have upheld the power of the corporation to indemnify the officers of the corporation,[168] and in one case the right of the corporate official to demand indemnification.[169]

Indemnification of corporate officials who violate the antitrust laws weakens the effectiveness of the fine as a criminal sanction, whether the conviction is based upon a nolo plea or upon full litigation on the merits. If, of course, a defendant successfully defends a criminal action brought against him in his representative capacity, indemnification might well be permissible where the adjudication of nonliability is equivalent to an adjudication that the corporation is not guilty of antitrust violations.[170] But where the negative finding

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many of the monopolization and merger violations are caused by an excess of profit motive.

Studies should be made of the motives of antitrust violators so that deterrent remedies could be developed with more accuracy. Criminal sanctions, forfeitures of illegal gain, deprivation of the right to hold corporate office, charter forfeitures, and monetary penalties should all be examined with a view toward making the deterrent fit the violation, assuming, of course, that deterrence is the proper method for social control of the presumed evils of anticompetitive conduct.

165 370 U.S. 405 (1962); *see* notes 114-16 *supra* and accompanying text.

166 *See generally* Bishop, *Current Status of Corporate Director's Right to Indemnification*, 69 HARV. L. REV. 1057 (1956); Washington, *Litigation Expenses for Corporate Directors in Stockholders' Suits*, 40 COLUM. L. REV. 431 (1940); Comment, *Corporations—Indemnification of Management for Litigation Expenses*, 52 MICH. L. REV. 1023 (1954); Note, *Indemnification of the Corporate Official for Fines and Expenses Resulting from Criminal Antitrust Litigation*, 50 GEO. L.J. 566 (1962).

167 *E.g.*, ALASKA STAT. § 10.05.009(15) (1962); CAL. CORP. CODE §§ 830, 834(b) (West 1955); COLO. REV. STAT. ANN. § 31-2-1(15) (1963); CONN. GEN. STAT. REV. § 33-454 (1961); DEL. CODE ANN. tit. 8, § 122(10) (1953).

168 Koster v. Warren, 297 F.2d 418 (9th Cir. 1961); Simon v. Socony-Vacuum Oil Co., 179 Misc. 202, 38 N.Y.S.2d 270 (Sup. Ct. 1942), *aff'd*, 267 App. Div. 890, 47 N.Y.S.2d 589 (1944).

169 Schwartz v. General Analine & Film Corp., 305 N.Y. 395, 113 N.E.2d 533 (1953). The court held that N.Y. GEN. CORP. LAW § 64 (McKinney Supp. 1961) did not apply in criminal actions. New York enacted a broader indemnification statute to cover fines, costs and attorneys' fees in 1963. N.Y. BUS. CORP. LAW § 723 (McKinney 1963).

170 *See* Schwartz v. General Analine & Film Corp. 305 N.Y. 395, 410, 113 N.E.2d 533, 540 (1953) (Field, J., dissenting).

of not guilty is not equivalent to an affirmative finding of nonliability on the part of the corporation, indemnification at least for the fine assessed should be denied.[171]

A distinction might be drawn between indemnification for fines assessed and the costs and attorneys' fees incurred in defending a criminal antitrust case even if the defense is unsuccessful. While indemnification for a fine assessed would undermine the deterrent effect of the criminal sanction, an absolute prohibition upon indemnification for costs and attorneys' fees where a defense is unsuccessful might deter corporate officers and directors from asserting meritorious defenses because of the great expense they will incur in defending a typical antitrust case. It would seem reasonable to allow a corporation leeway to indemnify for costs and reasonable attorneys' fees if the director, officer or employee acted in good faith and had no reasonable cause to believe his conduct was unlawful.[172] On the other hand, any indemnification of a corporate officer for fines, costs, or attorneys' fees should be subject to judicial review at the instance of dissenting shareholders to insure that sympathetic directors and officers or responsible directors or officers who have escaped prosecution do not subvert the deterrent purpose of the criminal fine with corporate funds.

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171 *See generally* Note, *Indemnification of the Corporate Official for Fines and Expenses Resulting from Criminal Antitrust Litigation*, 50 GEO. L.J. 566 (1962).

172 The New York indemnification statute goes beyond indemnification of costs and attorneys' fees and permits indemnification for fines paid under similar circumstances:

> (a) A corporation may indemnify any person, made, or threatened to be made, a party to an action or proceeding other than one by or in the right of the corporation to procure a judgment in its favor, whether civil or criminal, including an action by or in the right of any other corporation of any type or kind, domestic or foreign, which any director or officer of the corporation served in any capacity at the request of the corporation, by reason of the fact that he, his testator or intestate, was a director or officer of the corporation, or served such other corporation in any capacity, against judgments, fines, amounts paid in settlement and reasonable expenses, including attorneys' fees actually and necessarily incurred as a result of such action or proceeding, or any appeal therein, if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful.
>
> (b) The termination of any such civil or criminal action or proceeding by judgment, settlement, conviction or upon a plea of nolo contendere, or its equivalent, shall not in itself create a presumption that any such director or officer did not act, in good faith, for a purpose which he reasonably believed to be in the best interests of the corporation or that he had reasonable cause to believe that his conduct was unlawful.

N.Y. GEN. CORP. LAW § 723 (1963). Permitting indemnification for fines seems virtually impossible under the standard set out by the statute. If government antitrust criminal prosecutions are limited to per se cases and if guilt must be proven beyond a reasonable doubt, it is difficult to believe that a convicted officer could have had "no reasonable cause to believe that his conduct was unlawful." Even where the fine is assessed after a nolo plea, it seems unlikely that an officer could reasonably argue that he had no cause to believe his conduct was unlawful if the violation is in the per se category.

Since indemnification is governed by state law, state legislatures should carefully consider antitrust policy when enacting broad indemnification statutes. Considerable thought should be given to revising state indemnification statutes, particularly as they are applied to indemnification for costs, attorneys' fees, and fines incurred for conviction of white collar crimes.[173] The recently enacted New York indemnification statute[174] is a step toward clarifying an otherwise unclear area of corporate law.

In summary, it is recommended that federal antitrust regulation be enforced primarily by criminal sanctions. Admittedly such a proposal is contrary to the general trend in criminal law away from the philosophy of deterrence and toward the policy of rehabilitation. Since it is difficult to find any rehabilitative purpose in jailing the normal antitrust violator, it is apparent that criminal punishment can serve only as a deterrent. The fact that the ordinary defendant may be of high social standing only reinforces this belief, since the pressure of deterrence because of a threat of criminal penalties should increase in direct proportion to the increase of the social standing and reputation of the individual in society.

But in so doing, federal enforcement officials should limit criminal enforcement to per se violations and only those other types of antitrust violations which are predatory or willful, or which amount to economic racketeering.[175] Federal criminal antitrust enforcement should also strive to prosecute corporate directors, officers, and agents responsible for corporate antitrust violations that are considered criminal violations, since the uneven enforcement of the past has resulted in small business bearing the brunt of criminal enforcement; the sanction of a fine against the corporation alone is of questionable deterrent value, and disregard for the law is heightened if those responsible for the conduct of the fictitious corporate entity are able to escape punishment for crimes they have used the entity to commit.

Federal enforcement should retain the sanction of jail sentences

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173 *See generally* 28 U. PITT. L. REV. 114 (1966).

174 N.Y. GEN. CORP. LAW § 723 (1963); *see* note 172 *supra.*

175 *See* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. (1955). Per se violations include (1) price fixing, *see, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); (2) group boycotts, *see, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941); (3) tying arrangements, *see, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947); (4) horizontal division of markets, *see, e.g.*, Timkin Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States v. National Lead Co., 332 U.S. 319 (1947); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), and perhaps vertical division of markets, *see, e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963).

for use in the particularly flagrant antitrust violation. While the stigma attached to being branded a criminal and being subjected to fingerprinting, photographing, bail, and the other normal steps of the criminal process may be the actual sanctions in cases where fines are assessed,[176] the threat of being sent to jail is perhaps the strongest deterrent to antisocial conduct that any member of the middle or upper classes of our society can conceive. Although seldom invoked, the specter of imprisonment should provide some deterrence to even the most rugged of individualists.

State antitrust statutes need considerable revision in the area of criminal sanctions, and uniform state antitrust legislation should be enacted. Many state antitrust statutes contain excessive criminal sanctions,[177] others lack adequate investigative procedures,[178] and still others lack a provision giving a criminal conviction prima facie effect in private actions,[179] thereby losing the advantages of nolo contendere pleas as enforcement devices furthering efficient administration.

The case for criminal sanctions in state antitrust statutes is even stronger than is the case with federal antitrust legislation. Because local violations are usually clear-cut per se violations by small business entities,[180] the task of assessing individual responsibility is less difficult and the deterrent afforded by criminal sanctions more effective. This characteristic of state enforcement suggests that uniform legislation should limit criminal sanctions to per se violations and violations that are predatory, willful, or amount to economic racketeering.[181]

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176 It is, in fact, the criminal indictment, rather than its event in pecuniary penalty or prison sentence which looms largest in the minds of executives. No respectable citizen wishes to have his name attainted by a formal charge of crime. None relishes the discomfort, the routine, the anxiety of the process of arraignment; none wishes to be finger printed in the manner accorded to the ordinary criminal. Thus the stigma of indictment tends to be the real punishment. The actual penalty comes at the beginning, rather than the end, of the trial. The effect is to punish by presumption and not by proof. The accused is branded with the hypothesis of guilt, which in the office, at the club, on the golf links he must rebut as best he can.

W. HAMILTON & I. TILL, *supra* note 3, at 80. The same, of course, may be said for anyone charged with a serious crime, be he a "respectable citizen" or otherwise. *See also* W. HAMILTON & I. TILL, *supra* note 3, at 80-81; E. SUTHERLAND, *supra* note 2, at 43-45; Berge, *supra* note 3, at 470; Whiting, *supra* note 3, at 338-40.

177 *See, e.g.*, statutes cited *supra* note 34.

178 *See, e.g.*, COLO. REV. STAT. ANN. § 55-4-1 to -9 (1963); FLA. STAT. ANN. § 542.01-.12 (1963); ILL. REV. STAT. ch. 121½, § 302 (1964).

179 *See, e.g.*, CAL. BUS. & PROF. CODE § 16750 (Deering 1960); N.Y. GEN. BUS. LAW § 340 (McKinney 1963).

180 *See* notes 75-76 *supra* and accompanying text.

181 The new Illinois antitrust law imposes criminal sanctions only for willful per se violations. ILL. ANN. STAT. ch. 38, §§ 60-1 to -11 (Supp. 1966). Section 11 of the Tentative Draft of a Uniform State Antitrust Act, 4 TRADE REG. REP. ¶ 30,101 (1967) is deficient in this respect because it relies on a complicated formula of monetary forfeitures for deterrence.

To avoid the misuse of the criminal process in grand jury proceedings,[182] a uniform state antitrust law should also contain a civil investigative demand procedure equivalent to that found at the federal level.[183] Otherwise, criminal antitrust enforcement may be prostituted for the purpose of investigation in preparation for civil proceedings, rather than prosecution of violations as criminal activity.

To assist private litigants and add stimulation for nolo contendere pleas in clear-cut cases of violations, a provision comparable to section 5(a) of the Clayton Act,[184] making judgments or decrees other than consent decrees prima facie evidence in subsequent damage suits, should be included in any proposal for uniform legislation.[185] Such a provision should expressly define "consent decrees" to include nolo contendere pleas and to exclude guilty pleas.[186] A properly drafted provision of this type would increase the bargaining power of enforcement officials at the pleading stage of a criminal proceeding.[187]

To assist in making fines and jail sentences more meaningful deterrents and to avoid the problem that arose in *United States v. Wise*,[188] a section comparable to section 14 of the Clayton Act[189] and a broad prohibition against corporate indemnification, either as a matter of right or as a matter of corporate power, for fines incurred by directors, officers, or agents convicted of violating state or federal antitrust laws should be included in uniform legislation. The former provision would increase the deterrent value of the criminal sanction substantially and would facilitate the state's effort to impose liability on those responsible for a corporation's antisocial conduct, for it would impose individual criminal liability on corporate officers, directors, and agents for actual conduct in violation of the antitrust laws

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182 *See* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 345 (1955); *cf.* United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) (holding it an abuse of process to use a grand jury in antitrust investigations where there is no intention to bring a criminal case).

183 *See* note 78 *supra* and accompanying text.

184 15 U.S.C. § 16(a) (1964).

185 Section 17 of the Tentative Draft of a Uniform State Antitrust Act so provides: "A final judgment or decree, other than a consent decree, rendered in any proceeding under [civil forfeiture and injunction sections of the Proposed Act], shall be prima facie evidence in any proceeding under [private damage action section] as to all matters with respect to which the judgment or decree would be an estoppel between the parties to the suit." 4 TRADE REG. REP. ¶ 30,101 (1967).

186 *Cf.* notes 125-28 *supra* and accompanying text. The Proposed Uniform Act does not define the words "consent decrees."

187 In the electrical equipment cases an important factor in the court's acceptance of nolo pleas in many of the cases was the willingness of defendants in the most flagrant cases to plead guilty. The risk involved was conviction on all counts and wider liability under section 5(a) of the Clayton Act. *See* Watkins, *supra* note 30, at 98-99.

188 370 U.S. 405 (1962); *see* notes 114-16 *supra* and accompanying text.

189 15 U.S.C. § 24 (1964); *see* text accompanying note 114 *supra*.

and would establish a corporate officer's liability under state law when acting in a representative capacity. The latter suggestion should also increase the deterrent value of the criminal sanction, both federal and state, since it would force the individuals responsible for corporate criminal violations to bear the full cost of any fine that is assessed. They would be unable to shift the cost of the fine to the corporation, which in turn could make the consumer pay the cost by higher prices, make labor forego otherwise justified pay increases, or make the innocent stockholder bear the burden in the form of decreased dividends. Some leeway should be provided, however, for indemnification of attorneys' fees and costs where the officer acts in good faith.[190]

The seriousness and predatory character of many local restraints of trade[191] justify the imposition of criminal penalties of up to one year in jail and a fine of up to fifty thousand dollars in a state antitrust statute.[192] If adequate maximums are established, state courts will have sufficient discretion to tailor the penalty to fit the crime.

With the continued use of criminal sanctions in federal antitrust cases to be expected and the possibility of increased state antitrust enforcement activity, the probability of double prosecutions presents a serious danger in the minds of some commentators.[193] Since state and federal antitrust jurisdiction does overlap[194] and thirty-two state antitrust laws provide for prison sentences for varying types of antitrust violations,[195] the possibility of double prosecutions is undeniable. This possibility is enhanced by the Supreme Court decisions holding that a federal and state criminal prosecution of the same individual for the same act does not violate the double jeopardy prohibition of the federal constitution.[196]

While the possibility of double prosecutions is very real, the

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190 *See* notes 170-74 *supra* and accompanying text.

191 *See* note 99 *supra*.

192 This proposal would correspond with the penalties available under the federal antitrust laws and the Donnely Act, the New York antitrust statute, N.Y. GEN. BUS. LAW § 341 (McKinney 1964 Supp.).

193 Dillon, *But the Other Referee Said!—A Criticism of Multiple Litigation in Identical Bidding and Merger Cases*, 39 TEXAS L. REV. 782 (1961); Jeffers, *State and Federal Antitrust Actions Against Employer-Union Conspiracies: The Double Dosage Doctrine*, 39 TEXAS L. REV. 811 (1961).

194 Commonwealth v. McHugh, 326 Mass. 429, 93 N.E.2d 751 (1950); State v. Southeast Tex. Chap. Nat'l Elec. Contractors Ass'n, 358 S.W.2d 711 (Tex. Civ. App.—Texarkana 1962, no writ), *cert. denied*, 372 U.S. 969 (1963); State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960); *cf.* Parker v. Brown, 317 U.S. 341 (1943); Puerto Rico v. Shell Co., 302 U.S. 253 (1937). *See generally* J. FLYNN, *supra* note 35, at 213-16.

195 App. B, *infra*.

196 Abbate v. United States, 359 U.S. 187 (1959) (conviction by a state court not a bar to subsequent federal prosecution); Bartkus v. Illinois, 359 U.S. 121 (1959) (federal prosecution not a bar to subsequent state prosecution).

probability of double prosecutions for antitrust violations is not.[197] Aside from a reasonable expectation that enforcement officials will not engage in such a practice[198] and the fact that few actual cases of double prosecution have ever been reported, state enforcement officials may be expected to exercise great caution in this area, since state antitrust statutes would run a serious risk of preemption if double prosecutions became prevalent.[199] Moreover, state antitrust enforcement programs, where they do exist, are undermanned and understaffed, a condition that prevents the insidious luxury of duplicating federal prosecutions and indulging in unfair practices. With the passage of uniform state antitrust legislation and the development of a high degree of cooperation between federal and state enforcement officials and among state enforcement officials,[200] the danger of wasteful, unnecessary, and unfair double prosecution should be *de minimis*.[201]

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197 Very few actual cases of "double jeopardy" arise, and it is not strange that those writing in the field usually have few cases to illustrate their thesis. *See, e.g.*, Dillon, *supra* note 193; Jeffers, *supra* note 193. A proposal to the Committee on State Antitrust Laws of the Antitrust Section of the American Bar Association urging federal legislation to draw a clear statutory line between federal and state antitrust jurisdiction was defeated. 20 ABA ANTITRUST SECTION 8 (1962). The bases for objection to the proposal included: (1) the lack of any evidence demonstrating a need for the legislation; (2) the invitation to delay prosecutions by jurisdictional motions created by such legislation; and (3) the possibility of creating a no man's land of regulation similar to that in labor law.

198 J. FLYNN, *supra* note 35, at 156.

199 One of the factors weighed in preemption cases is the danger of double prosecutions. *See, e.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956); J. FLYNN, *supra* note 35, at 152-57. The closest case of double prosecution in antitrust regulation recently occurred in a Texas bid rigging case. The federal government began a criminal action against the defendants, United States v. Southeast Tex. Chap. Nat'l Elec. Contractors Ass'n, Crim. No. 13,706 (S.D. Tex., Jan. 11, 1960) (Dep't of Justice Case No. 1492), and the state brought a civil action against the same defendants for an injunction and monetary forfeitures. State v. Southeast Texas Chap. Nat'l Elec. Contractors Ass'n, 358 S.W.2d 711 (Tex. Civ. App.—Texarkana 1962, no writ), *cert. denied*, 372 U.S. 969 (1963). The federal case was dismissed after the defendants paid a forfeiture of $125,000 in the state action. *See* 130 BNA ANTITRUST & TRADE REG. REP. A5-A6 (1964).

200 J. FLYNN, *supra* note 35, at 227-52.

201 Another method for heading off double prosecutions might be the inclusion of a section similar to that in the Illinois Antitrust Act, which bars the state attorney general from bringing prosecutions under the state act when a federal civil or criminal case is pending against the same defendant for the same conduct. ILL. ANN. STAT. ch. 38, § 60-6(3) (Supp. 1966). While such a provision would protect antitrust defendants from double prosecutions caused by subsequent state proceedings, it would not seem to prevent the federal government from initiating criminal proceedings against a defendant for the same conduct after state proceedings have been commenced. In the absence of a statutory safeguard, the courts should take a more realistic attitude toward double jeopardy or apply ad hoc preemption in cases of double prosecution. *Cf.* State v. Texaco, Inc., 14 Wis. 2d 625, 111 N.W.2d 918 (1961) where the Wisconsin Supreme Court by dictum suggests the latter course. *See also* J. FLYNN, *supra* note 35, at 157.

APPENDIX A: DISPOSITION OF CASES BROUGHT BY THE DEPARTMENT OF JUSTICE[1]

TABLE I: 1890–1959

	Total	Pursued to Remedy[2]	Nolle Prosequi	Other[3]	Consent Decree
NUMBER OF CASES	1488	1108 (74%)*	81 (5%)*	299 (20%)*	493
CIVIL	766 (51%)*	619	—	144	493 (80%)†
CRIMINAL	725 (49%)*	489	81	155	—

	Injunctive Relief Granted	Guilty Pleas	Nolo Contendere Pleas	Fines Levied	Prison Sentences Imposed
NUMBER OF CASES	139	38	364	481	50
CIVIL	139 (23%)†	—	—	—	—
CRIMINAL	—	38 (8%)‡	364 (74%)‡	481 (98%)‡	50 (10%)‡

TABLE II: 1950–1959

	Total	Pursued to Remedy[2]	Nolle Prosequi	Other[3]	Consent Decree
NUMBER OF CASES	476	393 (82.6%)*	4 (0.8%)*	79 (16.6%)*	197
CIVIL	269 (56.5%)*	226	—	43	197 (87%)†
CRIMINAL	207 (43.5%)*	167	4	36	—

	Injunctive Relief Granted	Guilty Pleas	Nolo Contendere Pleas	Fines Levied	Prison Sentences Imposed
NUMBER OF CASES	36	11	136	167	16
CIVIL	36 (16%)	—	—	—	—
CRIMINAL	—	11 (7%)‡	136 (81%)‡	167 (100%)‡	16 (10%)‡

1 Source: THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE U.S. 1890-1951 (CCH 1952); *id.*, 1952-1956 SUPPLEMENT (CCH 1957); NEW U.S. ANTITRUST CASES (CCH Trade Reg. Rep. Transfer Binder 1957-1961); 5 TRADE REG. REP. ¶¶ 45,003-59 (1967). As of September 20, 1967, no final disposition has been reported for eleven cases. Seven civil cases (Dep't of Justice Case Nos. 1018, 1019, 1187, 1267, 1301, 1306, 1483) and three criminal cases (Case Nos. 1221, 1223, 1316) are pending. In Case No. 1151 the defendants were found guilty of a violation of the Sherman Act, but no remedy has been assessed. This appendix has been prepared without reference to these eleven cases.

A detailed breakdown of the information from which these tables were prepared, including a list of the cases fitting in each of the categories, is on file in the offices of the *Texas Law Review*.

2 All cases in which the Government won its case against one or more defendants and was granted some form of relief.

3 All cases dismissed on substantive or procedural grounds, acquittals, etc.

4 Mandatory and prohibitory injunctions, divestiture, dissolution, or divorcement. In no government suits were damages awarded or forfeitures imposed.

5 Includes prison sentences, suspended sentences, and probation.

* Percent of total number of cases.

† Percent of civil cases pursued to remedy.

‡ Percent of criminal cases pursued to remedy.

APPENDIX B: REMEDIES AVAILABLE UNDER STATE ANTITRUST STATUTES*

	Injunctive Relief	Fines and Forfeitures	Prison Sentences	Charter Forfeiture and Revocation of License to Do Business	Voiding Contracts and Defense of Unclean Hands	Damages
ALA. CODE	None	Tit. 14, § 62; Tit. 57, §§ 107-8	Tit. 14, § 62	None	Tit. 9, § 22	Tit. 7, § 124
ALASKA COMP. LAWS ANN.	None	None	None	Supp. 2, § 36-2A-156	None	None
ARIZ. REV. STAT. ANN.	None	§§ 44-1404B, -1408	§§ 44-1404B, -1408	§ 44-1402; Ariz. Const. art. 14, § 15	§ 44-1401B	§ 44-1405B
ARK. STAT.	§ 70-108	§ 70-102	None	§ 70-103	None	None
CALIF. BUS. & PROF. CODE	None	§ 16755	None	§ 16752	§ 16722	§ 16750
COLO. REV. STAT. ANN.	§ 55-4, -5	§ 55-4-7	§ 55-4-7	None	§ 55-4-6	§ 55-4-8
CONN. GEN. STAT. REV.	None	§ 53-310	§ 53-310	None	None	None
FLA. STAT.	None	§§ 542.05, .09	§ 542.05	§§ 542.02 to .04	§ 542.10	None
GA. CODE	None	None	§ 26-5008	None	§§ 2-2701, 20-504; Ga. Const. Sec. IV	None
HAWAII REV. LAWS (SUPP. 1963)	§§ 205A-6(4), -11(1)(b), -13	§ 205A-14(1)	§ 205A-14(1)	None	§ 205A-10	§§ 205-11(1)(a) to -12

* References are to remedies available under general antitrust laws, not special industry laws. "None" signifies that the state statute does not mention the remedy specifically, even though the remedy may be available by judicial interpretation or under some other general statute. Delaware, Kentucky, Maryland, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, and West Virginia do not appear in this table because they have no general antitrust statutes.

APPENDIX B (*Continued*)

	Injunctive Relief	Fines and Forfeitures	Prison Sentences	Charter Forfeiture and Revocation of License to Do Business	Voiding Contracts and Defense of Unclean Hands	Damages
IDAHO CODE ANN.	§ 48-112	§§ 48-101, -103, -108; Idaho Const. art. 11, § 18	§§ 48-101, -108	§ 48-107; Idaho Const. art. 11, § 18	None	§ 48-114
ILL. REV. STAT. ch. 38 §§ 60-1 to -11 (Supp. 1966)	§§ 60-7(1), -7(2)	§ 60-6	§ 60-6	None	None	§ 60-7(2)
IND. ANN. STAT.	§ 23-120	§§ 23-103, -108, -109, -116, -117	§§ 23-103, -108, -116 to -118	§§ 23-102, -113	§ 23-119	§§ 23-105, -122
IOWA CODE	§ 551.9	§§ 551.4, 553.3, 555.13	§§ 551.4, 553.3, .13, 719.1, .2	§§ 551.8, .9, 553.6, .7	§§ 551.5, 553.4, .5	§ 553.12
KAN. GEN. STAT. ANN.	§ 50-105	§§ 50-105, -106, -114, 16-112	§§ 50-105, -106, -114, 16-112	§§ 50-103 to -105	§§ 50-101, -107, -117	§§ 50-108, 115
LA. REV. STAT.	§§ 13.5088, 51.128, .129; La. Const. art. 19, § 14	§§ 51.122, .123, .126, .130	§§ 51.122, .123, .126	§§ 12.212, 51.130, .139; La. Const. art. 19, § 14	None	§ 51.137
ME. REV. STAT. ANN. ch. 137	None	§§ 10-1101, -1105	§§ 10-1101, -1105, -1106	None	None	§ 10-1105
MASS. GEN. LAWS ch. 93	§ 3	§§ 1, 9, 9A, 13	§§ 1, 9, 9A, 10, 13	§ 11	§ 2	§ 10
MICH. STAT. ANN.	None	§§ 28.35, .348, .350, .826	§§ 28.348, .350, .826	§§ 28.32, .33, .351, .352, .53, .54, .63, .64	§§ 28.31, .349, .36, .61, .62	§§ 28.38, .55

APPENDIX B (*Continued*)

	Injunctive Relief	Fines and Forfeitures	Sentences Prison	Charter Forfeiture and Revocation of License to Do Business	Voiding Contracts and Defense of Unclean Hands	Damages
MINN. STAT. ANN.	§ 623.02, .03	§ 623.01, .19(2)	§ 623.01, .19(2)	§ 623.02	None	None
MISS. CODE ANN.	§ 1088	§§ 1088, 1091	None	§§ 1097, 1132	§§ 1093, 1096	§ 1092
MO. REV. STAT.	§ 416.260	§§ 416.050, .070 to .080	§ 416.050	§§ 351.525, 416.070 to .080	§§ 416.040, .100, .110	§ 416.090
MONT. REV. CODES ANN.	§ 94-1108	§§ 94-1101, -1109; Mont. Const. art. XV, § 20	§ 94-1101	§ 94-1108 Mont. Const. art. XV, § 20	§ 13-807	None
NEB. REV. STAT.	§§ 59-810, -813, -814, -819	§§ 59-801 to -803, -815	§§ 59-801, -802, -815	§§ 59-809, -810, -813	§ 59-801	§ 59-821
N.H. REV. STAT. ANN.	None	§ 356.4	§ 356.4	None	§ 356.2	None
N.M. STAT. ANN.	None	§§ 49-1-1, -2	§§ 49-1-1, -2	None	§ 49-1-3	§ 49-1-3
N.Y. GEN. BUS. LAW	Gen. Bus. Law § 342	Gen. Bus. Law §§ 341, 342-a;	Gen. Bus. Law § 341;	None	Gen. Bus. Law § 340	Gen. Bus. Law § 340(5)
N.Y. PEN. CODE		Pen. Code § 581a	Pen. Code §§ 580(5), 581-a			
N.C. GEN. STAT.	§ 75-14	§§ 75-1, -6, -8	§§ 75-1, -6, -8	None	§ 75-1	§ 75-16
N.D. CENT. CODE	§ 51-08-11	§§ 51-08-03, -04, -13	§ 51-08-04	§ 51-08-05; N.D. Const. art. 7, § 146	§ 51-08-07; N.D. Const. art. 7, § 146	§ 51-08-08
OHIO REV. CODE ANN.	§ 1331.11	§§ 1331.03, .99	§ 1331.99	§§ 1331.07, .11	§§ 1331.01, .06	§ 1331.08
OKLA. STAT. ANN.	Tit. 79, §§ 21, 22	Tit. 79, §§ 21, 22, 27	Tit. 79, § 27	Tit. 79, §§ 21-26	Tit. 15, § 217; Tit. 79, §§ 35, 36	Tit. 79, §§ 25, 36

APPENDIX B (*Continued*)

	Injunctive Relief	Fines and Forfeitures	Prison Sentences	Charter Forfeiture and Revocation of License to Do Business	Voiding Contracts and Defense of Unclean Hands	Damages
S.C. CODE ANN.	None	§§ 66-65, -68	None	§§ 66-52, -66, 67; S.C. Const. art. 9, § 13	§ 66-51	§ 66-53
S.D. CODE	§ 13.1808	§ 13.1802	None	§§ 10.0706, 13.1802, .1808, 55.1204; S.D. Const. art. 17, § 20	§ 37.1913	None
TENN. CODE ANN.	None	§ 69-103	§ 69-103	§ 69-104	§§ 69-101, -102, -108	§ 69-106
TEX. REV. CIV. STAT. ANN.	Rev. Civ. Stat. art. 7436a	Rev. Civ. Stat. art. 7436a	Pen. Code arts. 1635, 1637-40	Rev. Civ. Stat. arts. 7430-32	Rev. Civ. Stat. arts. 7429, 7437	None
TEX. PEN. CODE ANN.						
UTAH CODE ANN.	None	§§ 50-1-4, -5	§ 50-1-5	§§ 50-1-7, -9 Utah Const. art. 12, § 20	§ 50-1-6	§ 50-1-10
VT. STAT. ANN. Tit. 11	§ 551	None	None	§ 551	None	None
VA. CODE ANN.	§§ 59-32, -33	§ 59-29	§ 59-29	§ 59-23	§ 59-22	§ 59-26
WASH. REV. CODE	§§ 19.86.080, .090	§ 19.86.140	None	§ 19.86.150 Wash. Const. art. 12, § 22	§§ 19.86.020, .060	§ 19.86.090
WIS. STAT.	§ 133.02	§ 133.01	§ 133.01	§§ 133.21 to .23, .245	§ 133.26	§ 133.01
WYO. STAT. ANN.	None	§§ 40-21, -40	§§ 40-21, -40	§§ 40-19, -20	None	None