# CORPORATE COMPLIANCE AND THE ANTITRUST AGENCIES' BI-MODAL PENALTIES

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## I

## INTRODUCTION

Mine is a singularly daunting assignment: to discuss individual compared with entity penalties as tools for encouraging corporate law compliance, to comment on the relationship between monetary payments as compensation and deterrence, and to reflect on the role of the private attorney general in the year 2000. In Part II, I briefly discuss some of the principal issues debated by corporate compliance authorities, including some of the issues relevant to the Federal Trade Commission ("FTC") and the Justice Department's Antitrust Division. In Parts III and IV, respectively, I reflect on the deterrence provided by those agencies, and on their approach to corporate compliance issues. In Part V, I consider the role of private litigation as a supplement or complement to federal enforcement of competition and consumer-protection laws. Finally, in Part VI, and again focusing on competition and consumer protection, I discuss some modest ways in which our system for deterring corporate wrongdoing could be improved.

The antitrust agencies employ penalties that are at once of increasing severity and strikingly bi-modal. Defendants in some actions by either agency may face extremely unpleasant consequences for their wrongdoing, while defendants in other actions may pay little, if any, price. One of the special roles of private litigation is to supplement agency enforcement, especially where otherwise there would be no significantly adverse consequences. Other roles are to identify cases of wrongdoing, to compensate victims, to help legal doctrine evolve, to provide an institutional safety-valve, and to preserve the integrity of an increasingly regulatory system of enforcement. That system could be improved, I suggest in Part VI, were the agencies to recognize the "externality benefits" of litigation, to develop "middle ground" civil deterrence, to continue

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to emphasize individual sanctions, and to coordinate the imposition of adverse consequences to help achieve optimal deterrence.

## II

## SELECTED CORPORATE COMPLIANCE ISSUES

Several issues stand out as particularly relevant when approaching the issue from the perspective of a recent antitrust and consumer protection enforcer.

### A. Individual Liability

To address concerns about the wrongdoing of corporations,[1] should individuals, corporations, or both be sanctioned? Judge Richard Posner was an early voice for penalizing only the corporation. He argued that a corporation "has effective methods of preventing its employees from committing acts that impose huge liabilities on it."[2] More recently, the individual-liability side of the debate has gained popularity. Professors A. Mitchell Polinsky and Steven Shavell, in particular, have argued persuasively that the state can punish an individual more severely than a firm can, and that relying on firms to punish individuals may result in insufficient incentives to avoid wrongdoing.[3]

### B. Entity Liability

Although one could ask whether entity liability is necessary, given sufficient individual liability, fairly convincing cases have been made for some form of entity sanctions. Law professors Jennifer Arlen and Reinier Kraakman have canvassed a variety of reasons: Individuals may be judgment-proof, identifying and sanctioning individuals may be more costly for the state than the firm, and entities may not respond sufficiently to individual liability.[4] Law and economics professor Thomas S. Ulen has further argued that corporations are not only in a good position to encourage employees to obey legal commands, but would face a perverse incentive to encourage law-breaking if they were not subject to the risk of vicarious liability.[5]

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1. The term "corporations" is a term of convenience. Little would turn on whether an entity is a corporation, a partnership, or a limited liability company.

2. RICHARD A. POSNER, ANTITRUST LAW 226 (1976).

3. *See generally* Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 437-44 (1997); A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239 (1993). Mark Cohen found that from 1984-90, "individuals [were] prosecuted and convicted for corporate crimes more often when the corporation on whose behalf the crime was committed [could not] afford to compensate for the harm they imposed." Mark A. Cohen, *Theories of Punishment and Empirical Trends in Corporate Criminal Sanctions*, 17 MANAGERIAL & DECISION ECON. 399, 409 (1996).

4. *See* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 695-96 (1997) (citing, among other sources, Stephen Salzburg, *The Control of Criminal Conduct in Organizations*, 71 B.U. L. REV. 421, 428 (1991), and STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 172-74 (1987)).

5. *See* Thomas S. Ulen, *The Economic Case for Corporate Criminal Sanctioning*, *in* DEBATING CORPORATE CRIME 117, 133 (William S. Lofquist et al. eds., 1997).

## C. Criminal Liability

Criminal liability for corporate wrongdoing is increasingly common, yet highly controversial.[6] By their actions, elected officials express continued and increasing support for criminalization. However, scholars express considerable unease about the use of criminal penalties against corporations.[7] Others express doubts about the use of incarceration as a penalty for white-collar crimes.[8] Economists question the policy of inflicting a sentence that is costly for society in absolute expenditures and forgone wealth-creation, when one can impose an equally onerous fine.

## D. Carrots

The federal Sentencing Guidelines have been associated with the increased use of what are known as "carrots," in other words, specified rewards for good corporate behavior.[9] The Guidelines provide that corporate penalties can be reduced if corporations have effective compliance programs or voluntarily re-

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6. The history of corporate criminal responsibility is set out in Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393 (1982).

7. *See, e.g.,* Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307, 313 (1991) (arguing that civil penalties would have been fairer and more effective, but, since criminal liability is here to stay, we should recognize it as "a form of instrumental regulation with which ordinary principles of culpability do not fit"); Michael K. Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U. L. REV. 395, 418 (1991) (arguing that civil enforcement is "just as effective"); John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 (1982) (arguing that criminal sanctions are more expensive and no more effective); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (arguing that actions against corporations should never be criminal); *cf.* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1997) (arguing that we should rely instead on reformed corporate civil liability). *But cf.* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (positing criminal law as a system of moral education); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 886 n.137 (1996) (arguing that corporate criminal liability is neither an accident nor thoughtless). For a suggestion that enforcement citations may be needed as much to focus attention as specifically to deter, see Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement*, 27 L. & SOC'Y REV. 177 (1993). To the extent this theory applies to antitrust, it might call for more less expensive, civil sanctions rather than fewer, presumably more expensive, criminal ones. *See* Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 381, 393 (1996) ("Corporate criminal liability is a legal anomaly, an historical aberration, and a moral abomination.").

8. *See* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980) [hereinafter *Optimal Sentences*]. *See generally* WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM 51-60 (1986) (arguing that incarceration is an inferior penalty); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193-98, 208 (1968).

9. *See* U.S. SENTENCING GUIDELINES MANUAL (1997). The origins and basic approach of the corporate sentencing guidelines are set out in Liene Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205 (1993); *see also* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1645-53 (1990) (explaining the modified due diligence defense, which would prevent criminal liability, findings of recklessness, and most impositions of punitive damages, and which also would influence tort findings of whether an employee's conduct was within the scope of his or her employment).

port the wrong.[10] Some commentators have objected to the entire carrot approach.[11] Others have fretted that the corporate compliance programs contemplated by the Guidelines will be ineffective unless the fruits of self-inspection are immunized or good conduct is otherwise rewarded.[12] Arlen and Kraakman argue that a composite of strict liability and duty-based liability is the ideal way to deter corporate wrongdoing and provide incentives for monitoring, investigating, and reporting violations.[13]

## III

## DETERRENCE BY THE ANTITRUST DIVISION AND THE FTC

Stepping back from such global issues and considering the penalties sought and imposed by the Antitrust Division and the FTC, two observations leap out. First, penalties for what might be termed "hard core" violations of laws enforced by those agencies have risen substantially. Second, and in part as a result of this, the agencies employ a strikingly discontinuous set of penalties.

### A. Increase in Penalties

Antitrust has seen a remarkable increase in authorized penalties. What was once a wrist-slap, or a ticket to be paid while continuing to err, is now a potentially substantial penalty. Consider the increase in possible penalties for hard-core price fixing:

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10. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f), (g) (1991) (amended 1995). An "effective" compliance program is one that "has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct," *id.* § 8A1.2 cmt. 3(k), although the concept of an effective yet unsuccessful compliance program seems a tad anomalous.

11. *See, e.g.*, Block, *supra* note 7, at 407 (objecting to what he saw as a move to a negligence standard that would result in inefficiently low industry-wide penalties (and prices) by mitigating penalties when precautions were taken,); *cf.* John C. Coffee, Jr., *"Carrot and Stick" Sentencing: Structuring Incentives for Organizational Defendants*, 3 FED. SENTENCING REP. 126 (1990) (expressing reservations).

12. *See, e.g.*, Stephen M. Axinn, *The Benefits of "Gold Star" Environmental Compliance: The Need for a Self-Audit Privilege*, 8 FED. SENTENCING REP. 221 (1996); Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 7 (1997) (proposing legislation granting immunity); Richard S. Gruner & Louis M. Brown, *Organizational Justice: Recognizing and Rewarding the Good Citizen Corporation*, 21 J. CORP. L. 731 (1996) (arguing that due diligence should prevent liability); Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul?*, 47 RUTGERS L. REV. 605 (1995) (arguing that corporate compliance programs should prevent liability); Note, *Growing the Carrot: Encouraging Effective Corporate Compliance*, 109 HARV. L. REV. 1783, 1794-95 (1996); c*f.* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 445 (1981) (arguing that "due diligence" should be a "sentencing consideration" but not a "defense"; also calling for creative use of probation).

13. *See* Arlen & Kraakman, *supra* note 4. Chancellor Allen's opinion in *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996), provided an additional, and potentially powerful, incentive for monitoring when, relying in part on the Sentencing Guidelines, he concluded that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards." *Id.* at 970.

1890: Sherman Act was passed. Violation is a misdemeanor, subject to up to one year in jail and a $5,000 fine for individuals and corporations.[14]

1955: Maximum fine for violating the Sherman Act was increased to $50,000.

1974: Violations became felonies; maximum incarceration time increased from one year to three years; maximum fine raised from $50,000 to $100,000 (individuals) and $1 million (corporations).[15]

1977: Department of Justice Sentencing Guidelines said the "base period" recommended sentence for a Sherman Act conviction will be eighteen months.[16]

1984: Fine for individuals raised to $250,000, and, for entities and individuals, the fine may be the greatest of that figure or twice the defendant's gross gain or victims' loss.[17]

1987: Federal case sentencing became subject to the Sentencing Reform Act of 1984;[18] the Sentencing Guidelines further increased the possible penalties.[19]

1990: The maximum fine was increased to $10 million for entities and $350,000 for individuals.

1991: Corporate sentencing guidelines take effect, further increasing potential fines.[20]

1998: The Division is expected to ask Congress to increase the maximum corporate fine from $10 million to $100 million.[21]

Average imposed corporate fines jumped in 1977 and again in 1990, rose thereafter, and soared in 1997.[22] If recent cases are indicative of the future,

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14. 15 U.S.C. § 1 (1990).

15. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified as amended in scattered sections of 15 U.S.C.). Congress's 1974 expression of interest in larger penalties stimulated judges to impose increased penalties even for misdemeanors, for which maximum penalties had not been changed. *See* Mark A. Cohen, *The Role of Criminal Sanctions in Antitrust Enforcement*, 7 CONTEMP. POL'Y ISSUES 36, 42 (1989).

16. The Guidelines also indicated that a base level individual fine would be $50,000, but "[f]ines are usually poor alternatives to prison sentences and should be used and viewed only as a second choice." 4 Trade Reg. Rep. (CCH) ¶ 13,115.

17. Criminal Fine Enforcement Act of 1984, 18 U.S.C. § 3623 (1986) (repealed in 1987); Criminal Fines Improvement Act of 1987, 18 U.S.C. § 3571(d) (1994) (reauthorizing this potentially significant alternative maximum fine). The Division has relied on this authorization nine times to achieve fines of greater than $10 million. *See* Gary R. Spratling, Remarks Before the National Institute on White Collar Crime(Mar. 6, 1998), *available at* <http://www.usdoj.gov/atr/public/speeches/1583.htm>).

18. 18 U.S.C. §§ 3551-86 (1994).

19. *See* Judy Whalley, Criminal Antitrust Enforcement, Remarks Before the ABA Section of Antitrust Law Spring Meeting (Mar. 22, 1990), *in* 7 Trade Reg. Rep. (CCH) ¶ 50,035, at ¶¶ 48,653-54.

20. The 1991 revised Guidelines, in general, reduced potential individual fines and increased individual potential jail sentences, and established complicated corporate penalty calculations. *See* ANTITRUST SECTION, AMERICAN BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 715-16 (4th ed. 1997).

21. *See Justice Plans to Ask Congress to Hike Maximum Fines for Sherman Act Offenses*, 73 Antitrust & Trade Reg. Rep. (BNA) 353 (Oct. 9, 1997); Gary R. Spratling, Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg, Remarks Before the 12th Annual National Institute on White Collar Crime 14 (Mar. 6, 1998), *available at* <http://www.usdoj.gov/atr/speeches/1583.htm> (explaining the Division's support of this proposal).

corporate fines are likely to remain high.[23] Individual fines, which are de-emphasized by the Division, do not appear to have followed any particular pattern.[24] Average jail time per individual sentenced exceeded three months in only six of the years before 1989, and the average jail time imposed exceeded

22. As reported in, Joseph C. Gallo et al., The First Century of Justice Antitrust Enforcement (1998) (unpublished manuscript), before 1977, average antitrust fines per firm equaled or exceeded $72,000 (in 1982 dollars) only once. Since 1977, average antitrust fines exceeded $110,000 (in 1982 dollars) in every year. Average antitruct fines per firm rose sharply during the 1990s, as shown in the following table:

| Fiscal Year | Total Fines (in thousands) | Number | Average (in thousands) |
|---|---|---|---|
| 1990 | 22,658 | 73 | 310.4 |
| 1991 | 17,573 | 55 | 319.5 |
| 1992 | 22,430 | 45 | 498.4 |
| 1993 | 40,427 | 64 | 631.7 |
| 1994 | 38,996 | 59 | 660.9 |
| 1995 | 40,222 | 32 | 1256.9 |
| 1996 | 25,245 | 31 | 814.8 |
| 1997 | 203,931 | 30 | 6,797.7 |

Source: ANTITRUST DIVISION, WORKLOAD DATA FOR THE PAST 10 YEARS (Jan. 1997) (1987-96).

23. *Cf.* United States v. Heeremac, Vof., No. 97 CR 0869 (N.D. Ill. filed Dec. 22, 1997), *noted in* 6 Trade Reg. Rep. (CCH) ¶ 45,097; United States v. Dockwise N.V., No. 97-CR-870 (N.D. Ill. filed Dec. 22, 1997), *noted in* 6 Trade Reg. Rep. (CCH) ¶ 45,097. In the foregoing cases, three companies agreed to plead guilty to an international conspiracy in marine construction and transportation services and pay a $65 million criminal fine, the second largest criminal antitrust fine ever, and three individuals agreed to plead guilty and pay fines totaling $325,000. *See also* United States v. Roquette Freres, No. CR 97-00356 (N.D. Cal. filed Dec. 17, 1997), *noted in* 6 Trade Reg. Rep. (CCH) ¶ 45,097 (French corporation and individual pled guilty to participating in an international industrial cleaner conspiracy and agreed to pay criminal fines of $2.5 million and $50,000, respectively).

24. For inflation-adjusted data from 1955-94, see Gallo et al., *supra* note 22. Recent nominal individual fines are as follows:

| Fiscal Year | Total Fines (in thousands) | Number | Average (in thousands) |
|---|---|---|---|
| 1987 | 1,636 | 42 | 38.95 |
| 1988 | 1,996 | 53 | 37.66 |
| 1989 | 2,892 | 54 | 53.56 |
| 1990 | 917 | 30 | 30.57 |
| 1991 | 2,806 | 37 | 75.84 |
| 1992 | 1,275 | 27 | 47.22 |
| 1993 | 1,868 | 45 | 41.51 |
| 1994 | 1,240 | 33 | 37.58 |
| 1995 | 1,211 | 25 | 48.44 |
| 1996 | 1,572 | 16 | 98.25 |
| 1997 | 1,247 | 17 | 73.35 |

Source: ANTITRUST DIVISION, WORKLOAD DATA FOR THE PAST TEN YEARS (Jan. 1997) (1987-96).

six months in only four of the years before 1989.[25] Starting in 1989, consistently longer sentences have been imposed (although to fewer individuals, presumably as a result of what the Division describes as a policy of pursuing "fewer, but more significant prosecutions").[26]

Although the FTC has no criminal authority with which to contrast its general lack of civil antitrust sanctions, its consumer fraud program seeks and obtains sanctions almost as draconian as criminal penalties against parties who have engaged in near-criminal (if not criminal) wrongdoing. This program, which came to dominate FTC consumer protection efforts during the 1980s,[27] continues to be a mainstay of FTC enforcement activity. In recent years, the FTC has allied itself with the state attorneys general and other federal enforcers in coordinated attacks that impose serious consequences on perpetrators of consumer fraud.[28]

As part of its fraud program, the FTC regularly seeks and obtains from federal courts orders banning individuals from specific fields of endeavor (typically

25. *See* Gallo et al., *supra* note 22.

26. *Id*. Recent data from the Antitrust Division is as follows:

| Fiscal Year | Jail Days Imposed | Individuals Sentenced | Average Sentence |
|---|---|---|---|
| 1987 | 1,994 | 15 | 133 |
| 1988 | 5,892 | 30 | 196 |
| 1989 | 7,473 | 32 | 234 |
| 1990 | 2,739 | 17 | 161 |
| 1991 | 6,594 | 22 | 300 |
| 1992 | 2,488 | 11 | 226 |
| 1993 | 4,726 | 14 | 338 |
| 1994 | 1,497 | 9 | 166 |
| 1995 | 3,902 | 16 | 244 |
| 1996 | 2,431 | 5 | 486 |
| 1997 | 789 | 3 | 263 |

Source: ANTITRUST DIVISION, WORKLOAD DATA FOR PAST 10 YEARS (JAN. 1997) (1987-96); 1997 data was obtained from the Antitrust Division.

27. The origins and development of the FTC's consumer fraud program are set forth, and the program is evaluated in Miles W. Kirkpatrick et al., *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43 (1989) [hereinafter Kirkpatrick II].

28. *See* Federal Trade Comm'n, *Fighting Consumer Fraud: The Challenge and the Campaign* (Jan. 1997), *available at* <http://www.ftc.gov/reports/Fraud/index.htm>; Federal Trade Comm'n, *Fighting Consumer Fraud: New Tools of the Trade* (Apr. 1998), *available at* <http://www.ftc.gov/reports/fraud97/index/html>.

telemarketing) or requiring that they post a bond before engaging in such an activity.[29] Given the records of many of these individuals, a requirement to post a bond is often functionally equivalent to banning them from the activity altogether. While not prison, a lifetime sentence to refrain from one's chosen way of making a living is a remarkably severe (if perhaps well-deserved) consequence.[30]

The FTC has also won orders requiring defendants to pay quite massive sums to specified persons and the U.S. treasury. For instance, in November of 1997, the FTC announced a $2.74 million "consumer redress" settlement for the benefit of 38,000 consumers injured in an internet scam.[31] Although not styled as "fines" or "penalties," these "consumer redress"[32] payments extract cash, sometimes for the benefit of the Treasury, just as effectively as any penalty.[33]

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29. *See, e.g.*, FTC v. Career Assistance Planning, Inc., 7 Trade Reg. Rep. (CCH) ¶ 71,948 (N.D. Ga. Sept. 19, 1997) ($6 million performance bond); FTC v. Micom Corp., 1997-1 Trade Cas. (CCH) ¶ 71,753 (S.D.N.Y. Mar. 12, 1997) ($500,000 performance bond).

30. Although it is desirable as a matter of policy for the FTC to be able to impose the substantial penalties discussed in the text, this program is in considerable tension with the original conception of the FTC. The FTC was originally conceived as an expert body that could examine particular practices and terminate those that were unfair or deceptive. *See* 15 U.S.C. § 45(b) (1994) ("If . . . the commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it . . . shall issue . . . an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."). Consistent with this conception and statutory authority, cases have declared that "[t]he purpose of the Federal Trade Commission Act is to protect the public, not to punish a wrongdoer. . . ." Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1963); *see also* FTC v Ruberoid Co., 343 U.S. 470, 473 (1952) ("Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."); *cf.* FTC v. Cement Inst., 333 U.S. 683, 706 (1948) ("[T]he effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future.").

31. *See* Federal Trade Comm'n, Victims of Moldovan Modem "Hijacking" Scheme to Get Full Redress Under FTC Settlements, (Nov. 4, 1997), *available at* <http://www.ftc.gov/opa/9711/audiot-2.htm>.

32. The FTC has only gradually assumed its role as a major collector of consumer redress. In 1971, the FTC issued an opinion that reversed the hearing examiner's initial decision and concluded that the agency could order restitution either to restore "the competitive *status quo*" or because the respondent's holding of ill-gotten gains "was an unfair trade practice in and of itself." Curtis Publ'g Co., 78 F.T.C. 1472, 1516 (1971) (dismissing complaint on other grounds). The FTC observed that, with respect to the statutory authorization to issue "cease and desist" orders, "[i]t has been generally recognized that the remedial powers thus conferred are far broader and more flexible than a literal reading of the statutory language would indicate." *Id.* at 1512 (footnote omitted). When an unfortunate Ninth Circuit opinion held that the FTC's section 5 authority did not extend to ordering refunds of wrongly obtained moneys, Heater v. FTC, 503 F.2d 321 (9th Cir. 1974), the FTC elected not to seek *certiorari*, but rather to rely on new authority granted it by Congress in section 19 of the FTC Act.

Section 19 authorizes the FTC to seek and courts to grant "such relief as the court finds necessary to redress injury" from violations of trade regulation rules. *Id.* Also, when an FTC adjudicative proceeding has determined that a respondent committed an "unfair or deceptive act or practice," the FTC may win such relief in court if it "satisfies the court" that "a reasonable man would have known under the circumstances" that the act or practice "was dishonest or fraudulent." *Id.* The FTC has used this authority to win consumer redress in a couple of litigated proceedings and many administrative consent orders. *See, e.g.*, FTC v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993) (reasonable person would have known it was "dishonest or fraudulent" to mislead consumers into believing that heat detectors were superior to smoke detectors, so consumer redress—but not other disgorgement—was justified under section 19 of the FTC Act).

Although, absent consent, section 19 authority can be used only in federal court after a full administrative trial, the FTC cautiously developed an alternative basis for obtaining court-ordered consumer

More dramatic still, the FTC seeks many of these remedies through ex parte proceedings in which judicial asset freezes are successfully sought.[34] The fear

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redress and other relief without an administrative trial. FTC Act section 13(b), which was added in 1973, is a general authorization for the FTC to seek a preliminary injunction against any continuing or expected violation of any law it enforced. 15 U.S.C. § 53. Section 13(b) also provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Id*. On this seemingly slender reed, the FTC established its massive program for winning substantial relief against fraud artists. *See* Robert D. Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 ANTITRUST L.J. 141 (1988).

Ironically, the breadth of section 13(b) was first recognized by an appellate court over the FTC's protests. In *FTC v. Weyerhaeuser Co.*, 665 F.2 1072 (D.C. Cir. 1981), a divided court rejected the FTC's argument that a court was authorized to grant only a full-stop preliminary injunction, and not a hold-separate order. Judge Douglas Ginsburg explained for the Court that, rather than carefully delineating a remedy, section 13(b) "[p]rincipally. . .posts a clear entrance sign for FTC provisional relief applications." *Id.* at 1084. Congress intended that courts would mold decrees with the flexibility traditional in equity. *Id*. This teaching, from an FTC defeat, was promptly used in an FTC success, FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982), which reversed a district court's decision to limit the FTC to relief it could have ordered in an administrative proceeding:

> Although the plain language of the statute speaks only of enjoining an allegedly unlawful act of [sic] practice, virtually identical statutes permitting other agencies to seek preliminary injunctions have been interpreted as invoking the full equitable jurisdiction of the district court. These cases make indisputably clear that a grant of jurisdiction such as that contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it.

*Id.* at 717-18 (citations omitted).

A month later, the Ninth Circuit set forth a similar view and explicitly held that section 13(b) authorized courts to freeze assets. *See* FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982) ("We hold that Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the FTC, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.").

Since the early 1980s, the district courts and the courts of appeal have consistently interpreted section 13(b) to permit courts to rely on their traditional equitable powers to "order any ancillary equitable relief necessary to effectuate the exercise of the granted powers." FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989); *see also* FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997) (same). Those inherent equitable powers have been the basis for the awarding of consumer redress, restitution, recission, and other relief. *See id.* at 531 (affirming award of $16 million in consumer redress); FTC v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996) (ordering $487,500 in disgorgement to consumers or, if not feasible, to the U.S. Treasury; FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991) (affirming the monetary equivalent of recission). Courts have ruled that even substantial consumer redress and disgorgement (courts do not always distinguish carefully between the two) are not punitive. *See, e.g.*, FTC v Febre, 128 F.3d at 537 ("This court has held that disgorgement is designed to be remedial and not punitive. . . . As an equitable remedy, disgorgement is meant to place the deceived consumer in the same position he would have occupied had the seller not induced him to enter into the transaction. Disgorgement also prevents the defendant from being unjustly enriched by his fraud." ) (citations omitted); *Gem Merchandising Corp.*, 87 F.3d at 470 (holding that disgorgement is appropriate "'to deprive a wrongdoer of his unjust enrichment and to deter others'") (quoting SEC v. First City Fin. Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989)).

33. The FTC's anti-fraud campaign was assisted by Congress when it passed the Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. §§ 5711-24 (1994); *see also* 16 C.F.R. § 310 (1997) (implementing regulations). This statute and the rules implementing it make various fraudulent telemarketing practices punishable through substantial civil penalties in suits brought by the FTC or state attorneys general.

34. *See, e.g.*, Amy Travel Serv., Inc., 875 F.2d at 575-76 (affirming district court's freeze of all assets except amount court thought reasonable for attorneys' fees and expenses); FTC v. H.N. Singer, Inc., 668 F.2d at 1107 (finding that lower court had power to freeze assets); FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1432 (11th Cir. 1984) (per curiam) (agreeing with lower court's conclusion that it "has the inherent power of a court of equity to grant ancillary relief, including freezing assets and ap-

that justifies such relief is that otherwise the malfeasors will squirrel assets away, safe from the arm of the law. The coincident by-product of such orders, however, is that the defendants may have little stomach for defending a lawsuit (or, if they have stomach, few assets).[35] Time and again, the FTC wins relief against little opposition.

TABLE 1
REDRESS ORDERED IN FTC CASES

| Fiscal Year | Number of Cases | Amount Ordered ($000) |
|---|---|---|
| 1990 | 37 | 51,459 |
| 1991 | 37 | 83,521 to 125,471 |
| 1992 | 49 | 73,029 |
| 1993 | 27 | 15,913 |
| 1994 | 48 | 60,274 |
| 1995 | 62 | 63,973 |
| 1996 | 48 | 80,993 |
| 1997 | 92 | 121,300 |
| TOTAL | 400 | 550,462 to 592,412 |

Source: Table modified from Calkins, *supra* note 3, with addition of more recent data supplied by the FTC.

## B. Contrast with Remedies for Other Violations

The likelihood of imposing potentially very serious penalties for "hard-core antitrust violations"[36] and consumer fraud makes the absence of any federal

pointing a Receiver, as an incident to its express statutory authority to issue a permanent injunction under section 13 of the Federal Trade Commission Act").

35. *Cf.*, *e.g.*, FTC v. Silvers, No. 96-3977 (C.D. Cal. Dec. 11, 1997) (stipulated judgment) (three of the four named defendants signed individually); FTC v. Deco Consulting Serv. Inc., No. 96-7196 (S.D. Fla. Dec. 19, 1997) (one of three named defendants signed individually); FTC v. S.J.A. Soc'y, Inc., No. 2:97cv472 (E.D. Va. Sept. 3, 1997) (one of three defendants signed individually).

36. Anne K. Bingaman & Gary R. Spratling, Criminal Antitrust Enforcement, Joint Address before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law (Feb. 23,

sanction for most other violations of the Sherman Act and the FTC Act striking. The most egregious example of anti-competitive predation, the most aggressively offensive group boycott, the most transparently illegal merger—assuming they did not cross the line to criminality—would each likely result in, at most, a prospective, nonpunitive order.[37] This is less a problem with mergers, because most major mergers are reported to the antitrust agencies under the Hart-Scott-Rodino Act,[38] which Congress passed in order to give the agencies an opportunity to enjoin problematic mergers. Where a merger is not reported, either through non-compliance or because the merger is not subject to a reporting requirement, the agencies are left after the fact to try to prevent continuing harm, with time working in the prospective defendant's favor.[39] Federal antitrust enforcement is largely an all-or-nothing world of extreme penalties or no punishment at all.

If nothing else, it seems odd for two agencies to have such a bi-modal approach to punishing. Were one coming at the issue afresh, one would expect to see a graduated series of sanctions.

As it stands now, the system's extreme divergence in consequences has costs. For instance, the agencies may stretch to fit questioned activity within the category of activities for which there are serious sanctions in order that a punishment will be imposed. Where there are very serious sanctions, however, courts are (quite properly) hesitant to find violations.[40] (Indeed, some might take comfort in courts' reluctance to find violations except where wrongdoing is

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1995), *available at* <http://www.usdoj.gov/atr/speeches/95-02-23.txt>. *See generally* ANTITRUST SECTION, *supra* note 20, at 662-65 (citations omitted):

> [T]he Division has a long-standing policy of seeking indictments only where it believes it can prove a clear, purposeful violation of the law. The vast majority of cases prosecuted criminally under the Sherman Act have involved allegations of per se violations of section 1, including horizontal price fixing, bid rigging, and market or consumer allocation.
>
> [C]riminal indictments are unlikely where: the state of the law is unclear, there are novel issues of law or fact, there is confusion caused by prior prosecutorial action, or there is clear evidence the defendants did not appreciate the consequences of their actions.

The distinction between criminal and antitrust standards was carefully drawn by Assistant Attorney General Baker. *See* Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978). In a current example of Division line-drawing, Assistant Attorney General Joel Klein explained that the Division did not proceed criminally against a horizontal arrangement affecting price in NASDAQ because the arrangement was "really an industry practice" that was followed only "as a matter of custom," which made the agreement "thin." Joel I. Klein, Criminal Enforcement in a Globalized Economy, Address at the Advanced Criminal Antitrust Workshop (Feb. 20, 1997), *available at* <http://www.usdoj.gov/atr/speeches/jik97220.htm>.

37. For the rare exceptions, see *infra* notes 181-186 and accompanying text.

38. 15 U.S.C. § 18a (1994).

39. *Cf.* United States v. Archer-Daniels-Midland Co., 781 F. Supp. 1400 (S.D. Iowa 1991) (1982 transaction upheld based significantly on post-transaction developments); In re Coca-Cola Bottling Co., 1996 FTC LEXIS 387 (Sept. 9, 1996) (dismissing 1988 complaint challenging a 1984 acquisition because, "in light of the age of the challenged transaction, the limited size of the market, and the age of the record evidence regarding the competitive impact of the challenged acquisition, further expenditure of resources on this case would not be in the public interest"). *But cf.* Automatic Data Processing, Inc., No. 9282 (FTC Oct. 20, 1997) (consent order), *noted in* 5 Trade Reg. Rep. (CCH) ¶ 24,285 (divestiture ordered to resolve post-acquisition challenge to 1995 transaction).

40. *See* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

sufficiently clear to justify serious penalty.) If an enforcement agency, without the alternative of a modest penalty, has tried to justify a high penalty, cases may be lost that perhaps should have been won.

For instance, one wonders whether the Antitrust Division would have brought that troubled case against General Electric if it could have pursued some punishment short of criminal conviction.[41] Similarly, in 1990 the Antitrust Division fired a shot across the bow of all professionals considering fixing prices when it indicted a group of Tuscon, Arizona, dentists.[42] That shot rebounded back against the Division when the trial judge acquitted two dentists and granted the third a new trial.[43] Although the Ninth Circuit vacated the acquittals, the Court expressed grave discomfort at the prospect of punishing dentists' practice-related conduct with criminal convictions,[44] and the Division settled the cases.[45] Assistant Attorney General Klein has noted that, if nothing else, the Ninth Circuit doubted the exercise of prosecutorial discretion.[46] The Division many not have felt compelled to take such a dramatic step if a lesser but still punitive option were available.

Pushing questionable cases into the high-sanctions category surely results in some firms being penalized more severely than they ought to be. One hopes that enforcement agencies will never bring unfounded suits, but error is human, so the best of agencies surely make mistakes. Although many prosecutorial errors are corrected in litigation, many cases are not litigated, but rather are set-

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41. *See* United States v. General Elec. Co., 869 F. Supp. 1285 (S.D. Ohio 1994). In *General Electric*, the Division sought to prove a criminal price-fixing conspiracy despite the absence (for lack of jurisdiction) of three of the four named defendants and many potential witnesses. In the end, the Court viewed the case as an "information exchange case" that should be subject to the rule of reason, rather than a *per se* price-fixing conspiracy where criminal culpability had been shown. *Id.* at 1301; *see also* William W. Horne, GE Crushes the Trustbusters, AMERICAN LAWYER, Jan.-Feb. 1995, at 57.

42. *See* United States v. Alston, No. CR90-042-TUC (D. Ariz. 1990). The indictments are discussed in Phillip A. Proger, *Application of the Sherman Act to Health Care: New Developments and New Directions*, 59 ANTITRUST L.J. 173, 189-90 (1990). Proger quotes Assistant Attorney General Rill's "strong, but necessary words:" "'[W]hen professionals fix prices, they will be pursued and prosecuted for the crime.'" *Id.* at 189. Proger cautioned that "[w]e still do not know how juries will react to allegations against professionals and their predictable defenses based on quality and patient welfare." *Id.*

43. *See* United States v. Alston, 1991-1 Trade Cas. (CCH) ¶ 69,366 (D. Ariz. 1990), *vacated in part*, 974 F.2d 1206 (9th Cir. 1992). The litigation's "checkered history" up to the appeal is chronicled in Neil P. Montenko, *Health Care Developments*, 60 ANTITRUST L.J. 639, 639-41 (1992).

44. *See* United States v. Alston, 974 F.2d at 1214:

> Finally, we are told that this is the first criminal antitrust prosecution of health care professionals in half a century. *See* Brief for the ADA and the AMA as *Amici Curiae* at 4. While it is not our place to question the government's motives in elevating to the criminal level a dispute normally handled as a civil enforcement matter, the crushing consequences of a criminal conviction on the lives and careers of the defendants singled out for such treatment makes it all the more important that the district judge spell out with specificity what the jury must find in order to convict.

45. *See* United States v. Alston, No. CR-90-042-TUC (D. Ariz. Jan. 15, 1993). Charges against the three dentists and one professional corporation were dismissed with prejudice. One sole-shareholder professional corporation entered a no contest plea and agreed to pay $5,000 and perform 250 hours of community service.

46. *See* Klein, *supra* note 36.

tled (or not contested), resulting in cases in which overly severe remedies are imposed.[47]

Finally, but most obviously, the limitation of penalties to very selected cases may result in insufficient deterrence. To be sure, the antitrust agency agenda is not limited to deterrence; in particular, modern merger review is a largely regulatory process designed to isolate and excise offending aspects of otherwise benign or pro-competitive mergers. At times, however, the antitrust agencies enforce rules that are reasonably clear and intended to prevent harmful conduct, yet relatively ineffectual because enforcement is unaccompanied by penalties. The likelihood of suboptimal deterrence is discussed below.

## IV

## REFLECTIONS ON CORPORATE COMPLIANCE ISSUES AND ANTITRUST AGENCY PENALIZING PRACTICES

Some leading current corporate-compliance issues were reviewed above in Part II. Having now considered the structure of deterrence at the Antitrust Division and the FTC, I reflect on these issues—individual liability, entity liability, criminal liability, and carrots—in light of the experience of the antitrust agencies.

### A. Individual Liability

Government antitrust officials hold individuals responsible for criminal wrongdoing, but for little else. With a few exceptions, in each of the past seventeen fiscal years, the Division has won indictments against almost as many individuals as corporations:[48]

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47. The lack of intermediate sanctions may impose costs even for cases brought under civil authority. One worries about whether the all-too-human temptation to seek to punish someone who has done wrong does not manifest itself in order provisions that may be designed, if only subconsciously, to impose costs. Thus, for many years the FTC had a policy of insisting on an order if a firm litigated a merger–even if the firm abandoned the merger before the appeals process was exhausted. This led to the discomforting spectacle of the FTC expending massive resources to adjudicate a challenge to a long-abandoned merger by Coca-Cola, all because Coca-Cola would not agree to an order. One has to guess (and for me it is only a guess) that each side thought the other utterly unreasonable: Coke because the FTC sought an order of little practical significance, the FTC because Coke wouldn't agree to that same order. In 1995, the FTC abandoned its policy of routinely requiring prior approval clauses in orders resolving litigated but abandoned mergers. *See Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions*, 4 Trade Reg. Rep. (CCH) ¶ 13,241 (June 21, 1995). The FTC resolved its dispute with Coca-Cola by consent. *See* 5 Trade Reg. Rep. (CCH) ¶ 28,822 (May 18, 1995) (prior approval required before buying Dr. Pepper).

48. *Antitrust Division's Workload Data for Past 10 Years*, 72 Antitrust and Trade Reg. Rep. (BNA) 117 (Jan. 30, 1997); 60 Antitrust and Trade Reg. Rep. (BNA) 133 (Jan. 24, 1991). 1997 data courtesy of Antitrust Division.

TABLE 2
DOJ ANTITRUST DIVISION INDICTMENTS

| Fiscal Year | Individuals | Corporations | Individuals as a percentage of Corporations |
|---|---|---|---|
| 1981 | 83 | 74 | 112% |
| 1982 | 103 | 113 | 91% |
| 1983 | 113 | 122 | 93% |
| 1984 | 104 | 131 | 79% |
| 1985 | 36 | 50 | 72% |
| 1986 | 60 | 69 | 87% |
| 1987 | 116 | 119 | 97% |
| 1988 | 78 | 89 | 88% |
| 1989 | 76 | 88 | 88% |
| 1990 | 72 | 88 | 82% |
| 1991 | 58 | 70 | 83% |
| 1992 | 65 | 64 | 102% |
| 1993 | 50 | 62 | 81% |
| 1994 | 50 | 55 | 91% |
| 1995 | 32 | 40 | 80% |
| 1996 | 22 | 41 | 54% |
| 1997 | 29 | 24 | 121% |

Yet the Division very rarely names individuals as defendants in civil suits. In calendar years 1995 through 1997, for instance, excluding actions alleging failure to report mergers, the Division did not file a single civil action against an individual.[49]

The FTC brings only civil cases and, like the Division's apparent civil-case policy, names relatively few individuals in competition complaints. Of 115 merger final consent orders, from fiscal year 1990 through October 31, 1997, only three named individuals.[50] Of 102 non-merger final consent orders during the same time period, only fifteen named individuals.[51] Individuals were espe-

49. Source: Volume 6 of CCH ¶ 45,096 has 1996 Trade Regulation Summaries of DOJ complaints; ¶ 45,097 has 1997 data.

50. *See* Letter from Pat Foster, Management Information Specialist, FTC Bureau of Competition, to Stephen Calkins, Professor of Law, Wayne State University (Nov. 4, 1997) (on file with author).

51. *See id.*

cially likely to be named in health care matters where relief considerations made it important that orders apply to individuals (who could otherwise engage in the same conduct with a different entity).[52]

Just as the Division's civil practice stands in sharp contrast to its criminal practice, the FTC's competition practice contrasts sharply with its fraud practice. The FTC routinely names individuals in federal fraud suits.[53] It regularly wins strong relief against several individuals per proceeding.[54]

The Division policy of pursuing individuals[55] is sound; indeed, if anything, the Division should pursue more individuals more regularly.[56] If a corporation has engaged in sufficiently hard-core price fixing or market division to justify criminal condemnation, it would seem inevitable that one or more individuals in those corporations had, as well. That individual liability is essential flows logically from the same economics of deterrence that is at the source of much of the current debate.

It is now accepted that one can vary the level of penalty with the likelihood of being apprehended and punished. If an entity faces a ten percent chance of being caught, it is important that its prospective punishment be dramatically greater than the actual harm it imposes. This conclusion applies to entities and to individuals within entities.

Unfortunately, none of a corporation's usual array of employee punishments—denied promotions, demotions, discipline, and even termination—comes anywhere near the proper level of punishment for serious, hard-core

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52. *See, e.g.*, Home Oxygen & Med. Equip. Co., 118 F.T.C. 661 (1994) (organization and 13 doctors); Certain Home Oxygen Pulmonologists, 118 F.T.C. 685 (1994) (four doctors); Homecare Oxygen & Med. Equip. Co., 118 F.T.C. 706 (1994) (organization and 11 doctors); Trauma Assoc. of N. Broward, Inc., 118 F.T.C. 1130 (1994) (organization and 10 doctors); Diran M. Seropian, 115 F.T.C. 891 (1992); Southbank IPA, Inc., 114 F.T.C. 783 (1991) (two organizations and 23 doctors); Medical Staff of Dickinson County Mem'l Hosp., 112 F.T.C. 33 (1989) (consents from medical staff, two medical societies, 10 members of an executive committee, and another staff member); Rochester Anesthesiologists, 110 F.T.C. 175 (1988) (34 doctors). For a discussion of the legal standards governing the naming of corporate officers, directors, and employees in FTC administrative orders, see STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 11.08 (1995).

53. According to its Annual Report, the FTC named individuals in 97% of the consumer cases it brought in fiscal 1996, for a total of 76 individuals named in 35 cases. *See* <http://www.ftc.gov/os/ar96/append7a.htm#Consumer Redress>; *see also* Amy Travel Serv., Inc., 875 F.2d at 573 ("Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them. . . . The FTC must then demonstrate that the individual had some knowledge of the practices."); Gem Merchandising Corp., 87 F.3d at 470 (following *FTC v. Amy Travel Serv., Inc.*); Career Assistance Planning, Inc., 7 Trade Reg. Rep. at ¶ 71,948 (following *Gem Merchandising*); FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282, 1292 (D. Minn. 1985) ("In addition, the FTC must show that the defendants directly participated in the acts or had the authority to control the conduct. Authority to control a company is evidenced by active involvement with business matters and corporate policy including assumption of officer duties.") (citations omitted).

54. *See* Federal Trade Comm'n, *Fighting Consumer Fraud: The Challenge and the Campaign*, *supra* note 28.

55. *See, e.g.*, Bingaman & Spratling, *supra* note 36 ("I want to underscore something that individuals should think about before they engage in price fixing or bid rigging. . . . People go to jail for these offenses.").

56. *Cf.* Roger D. Blair, *A Suggestion for Improved Antitrust Enforcement*, 30 ANTITRUST BULL. 433 (1985) (urging emphasis on liability of individuals, who may maximize their personal utility at the expense of the firm).

covert price fixing of a substantial part of commerce.[57] Conceivably, in the extraordinary case, a corporation could fire an employee with such fanfare that other firms would ostracize him or her (thus inflicting a substantial loss of lifetime earnings), but such cases seem unusual in an age when candid evaluations are the exception and redemption continues to be in fashion.

Entities, in short, need the government to promise individual punishments so severe that price-fixing is deterred. Without the threat of a substantial penalty, a corporation's only alternative is to expend resources to increase the likelihood of detection (which may or may not be efficient). This alternative, which emphasizes monitoring, inspections, and the like, is costly to the corporation in real terms and seems likely to injure morale by sowing seeds of unnecessary distrust.[58] It also seems doomed to fail. Under current law, a corporation that discovers wrongdoing runs considerable risk in going public with that information, because it then could incur punishment through government or private challenges.[59] Employees may count on a corporation's hesitancy, figuring that severe punishment for price-fixing is quite unlikely since any such punishment likely would prompt the employee to make public the price-fixing.[60] Without the threat of individual liability, a corporation could not raise an employee's perceived chance of discovery sufficiently high to deter price-fixing, given the limited penalties the corporation can impose. The threat of individual liability also is important because employees are quite mobile today. A corporation can do little to a former employee.

The Division's preference for incarceration, as opposed to individual fines, also seems sensible. It seems highly unlikely that individual fines alone would

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57. Firms also may face institutional constraints on their ability to choose an option that trades little monitoring for draconian penalties. It has been observed that firms expend surprising resources to detect employee theft and shirking, perhaps because an alternative use of very large penalties might adversely affect employee attitudes and performance, and a firm's public image. *See* William T. Dickens et al., *Employee Crime and the Monitoring Puzzle*, 7 J. LABOR ECON. 331, 341 (1989). The threat of a very large externally imposed penalty poses some, but not all, of these problems, because the decision to punish is external to the firm.

58. It has been suggested that employees would insist on compensation to reflect the expected value of any penalties they would incur. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 464 (5th ed. 1998). Even if true, this point does not detract from the point made in the text. At least where liability rules are clear, employees can attach an extremely low probability to the chance of paying any penalty at all, simply by intending to obey the law.

To offer an illustrative anecdote, a friend of mine who is the chief executive officer of a $400 million company tells me that training, supervision, monitoring, and review were nowhere near as effective in deterring speeding and illegal parking by company drivers as the simple institution of a policy that the individuals pay the fines. "[T]he role of private antitrust practitioners in counseling clients is made substantially easier if business executives recognize that the Antitrust Division has the will and capacity to identify and convict most price fixers." *Report of the ABA Antitrust Law Section Task Force on the Antitrust Division of the U.S. Department of Justice*, 58 ANTITRUST L.J. 737, 764 (1989).

59. It was in recognition of this concern that the Antitrust Division expanded its Corporate Leniency Policy into a guaranteed amnesty program if certain criteria were met. *See* Gary R. Spratling, The Corporate Leniency Policy: Answers to Recurring Questions, Address at the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), *available at* <http://www.usdoj.gov/atr/speeches/1626.htm>; Anne K. Bingaman, Change and Continuity in Antitrust Enforcement, Address at the Fordham Corporate Law Institute 8-9 (Oct. 21, 1993), *available at* <http://www.usdoj.gov/atr/speeches/93-10-21.txt> (describing new policy).

60. *See* Arlen & Kraakman, *supra* note 4, at 712-17.

rise to the level needed to deter price-fixing without additional deterrence, such as incarceration. This assumption stems from two reasons. Fines are unlikely to rise, and high fines would not work anyway. Professor Joseph C. Gallo and his colleagues found that never in antitrust history have individual fines averaged even $100,000 annually in 1982 dollars.[61] Even in nominal terms, fines since 1990 (when the maximum was raised) have ranged from a low of $37,580 in fiscal year 1994 to a high of $98,250 in fiscal year 1996.[62] Nor does it seem likely that were incarceration eliminated these numbers would go substantially higher, or at least not higher by the necessary order of magnitude. And, in any event, were the numbers raised sufficiently high, the great majority of individual defendants would be unable to pay.[63] Accordingly, individual criminal liability for hard-core price fixing seems warranted.[64] Indeed, it would seem desirable to make greater use of it by increasing the number of individual compared with corporate indictments. Now company officials may be unduly eager to sacrifice shareholder interests by settling civil cases without imposing individual liability in order to prevent friends and colleagues from paying a personal price.[65] It is important to shareholders in general that individual wrongdoers pay a substantial personal price, and this means that the Division must resist attempts by corporations to resolve cases without imposing such personal prices.

The FTC's frequent charging of individuals with fraud also represents sound general policy. Often, the corporations engaged in this activity are little more than vehicles for individuals to perpetrate schemes, and it makes sense to charge the real party. Where the individual who bears or shares principal responsibility for causing such serious harm can be identified, there is no reason not to proceed against him or her.[66]

Given the comparative frequency with which the Division proceeds criminally against individuals believed to have engaged in naked cartel activities, and how commonly the FTC charges individuals with civil fraud, it is striking how

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61. *See* Gallo et al., *supra* note 22. Relatively small individual fines are consistent with the Division's policy to prefer incarceration, so it is impossible to be sure what fines would result from a change in policy. 1982 dollars were used merely as a control year.

62. Calculated from ANTITRUST DIVISION: WORKLOAD DATA FOR THE PAST 10 YEARS (Jan. 1997).

63. For the suggestion that inability to pay damages awards can partly explain the surprising (to some) lack of private litigation following-on government litigation, see Gregory L. Werden, *Price-Fixing and Civil Damages: Setting the Record Straight*, 34 ANTITRUST BULL. 307, 328-29 (1989). Any suggestion that prison should be reserved for those who lack sufficient assets is a political non-starter that does not deserve serious discussion except as an interesting academic exercise.

64. *See* Blair, *supra* note 56, at 440-41 (also noting that imprisonment has the advantage of being incapable of being shifted to the firm).

65. *Cf.* Coffee, "*No Soul to Damn: No Body to Kick*," *supra* note 12, at 448 n.165 (describing what were then known as "Westinghouse settlements" in which the corporation pleads guilty but charges are dropped against individuals).

66. The black letter law permits the FTC great discretion as to whom it should charge for a corporation's wrongs. My personal view is that the FTC should refrain from charging individuals with derivative liability unless it reasonably expects to be able to show responsibility in fact for the wrongs and the harms caused.

rarely the Division and the FTC's Bureau of Competition include charges against individuals in civil suits brought against entities.

B. Entity Liability

Largely for reasons canvassed in the literature,[67] the antitrust agencies appear on sensible ground in imposing responsibility for violations on entities. Such responsibility is the only alternative in that large part of the agencies' program where they do not charge individuals. The FTC's hard-core fraud program attacks entities organized to violate the law, so it would be odd to challenge selected individuals and not the entity itself.

Even for price-fixing, however, where individuals are indicted and sent to prison, it makes sense to proceed against the entity as well. As noted above, the Division currently indicts fewer than one person per indicted corporation. It seems unlikely that price-fixing is the responsibility entirely of solo rogue employees. Other individuals likely participated or assisted (if only by inattention), and entity liability is necessary if there is to be any hope of indirectly punishing them. The government proceeds only against individuals with great responsibility, where the evidence is clear-cut. Lesser wrongdoers also need punishment, and the government can and should work indirectly to cause them to be punished.

More generally, companies have the ability to try to influence if not entirely control the amount of price-fixing in which their employees engage, and it is important to provide a corporate incentive for firms to do so. Corporations can design compliance programs and consciously send the subtle, important signals that they take compliance seriously (even making compliance matters part of annual reviews and something factored into compensation decisions). The above discussion of individual criminal liability emphasized that the prospect of individual jail time is an essential component of a corporate compliance program. It is only part, however; corporate responsibility for price-fixing helps make sure that the message gets out.

The case for individual criminal liability flows easily from the above discussion, since incarceration is by definition criminal. Corporate criminal liability does not lead to incarceration, but merely to paying fines and perhaps corporate probation. Since the same dollars could be paid by the same company to the same U.S. Treasury, commentators have legitimately asked whether it makes any sense (and any difference) to collect the money criminally rather than civilly. They have pointed out that criminal enforcement can be more expensive and difficult and (by hypothesis) yields no greater payment. Other commentators have worried about the entire concept of criminal corporate liability, and have asked how a corporation really can have the *mens rea* that we require for criminal liability.[68]

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67. *See generally* Arlen & Kraakman, *supra* note 4.

68. *See, e.g.*, Pamela H. Bucy, *Organizational Sentencing Guidelines: The Cart Before the Horse*, 71 WASH. U. L.Q. 329 (1993) (arguing that corporate intent should be an essential element of criminal liability); Vikramaditya S. Khanna, Is the Notion of Corporate Fault a Faulty Notion?: The Case of

One simple response to these arguments, for purposes of the antitrust laws, is that Congress has provided for criminal corporate liability and not for civil liability. The Antitrust Division can punish corporations criminally.[69] Given the Division's apparently well-founded belief that international cartels are of increasing concern,[70] it is hard to fault their view that they should use the tools Congress had provided to them.

Another response is to doubt that, as some have suggested, a civil fine has the same deterrent effect as a criminal fine.[71] The stock-market studies of this issue are inconclusive.[72] My discussions with officers and lawyers for a series of substantial companies, however, are decidedly one-sided: Criminal is different.[73] As one CEO told me, if his company pays a moderate civil fine, it is five minutes at a regular board of director's meeting; were that same fine a felony, there is a special board meeting. One CEO worried about customers that would rather not purchase from a tainted source; an inside counsel worried about recruiting new employees; another inside counsel worried about the effect on existing employees.[74] The persons with whom I talked disagreed so strongly with the suggestion that criminal and civil fines are equivalent that I am loath to assume that they are, absent some clear supporting evidence.[75]

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Corporate *Mens Rea* (unpublished manuscript) (arguing that corporate *mens rea* standards are generally undesirable); William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 729 (1994) (arguing that criminal liability should depend on the corporate "mental state"); Parker, *supra* note 7, at 384-85.

69. Note that the FTC has considered expanding its seeking of consumer redress in competition cases. *See infra* notes 181-186 and accompanying text.

70. *See, e.g.*, Joel I. Klein, Anticipating The Millennium: International Antitrust Enforcement at the End of the Twentieth Century, Address Before the Fordham Corporate Law Institute (Oct. 16, 1997), *available at* <http:/www.usdoj.gov/atr/speeches>; Klein, *supra* note 36 ("international cartels will be an ever-increasing problem"); Gary R. Spratling, Criminal Antitrust Enforcement Against International Cartels, Address Before the Advanced Criminal Antitrust Workshop (Feb. 21, 1997), *available at* <http:/www.usdoj.gov/atr/speeches> (noting that international cartels may be the Division's highest priority).

71. *See, e.g.*, Parker, *supra* note 7, at 387-88 (arguing that punitive civil sanctions make corporate criminal liability unnecessary).

72. Compare, for example, Block, *supra* note 7, with Jonathan M. Karpoff & John R. Lott, *The Reputational Penalty Firms Bear*, 36 J. L. & ECON. 757 (1993).

73. *See* Khanna, *supra* note 7, at 1509 (providing anecdotal evidence that criminal proceedings have greater reputational effects). *Cf.* James Lyons, *Tough Guys*, FORBES, Apr. 15, 1991, at 94 ("A Word of Warning to anyone even thinking about price-fixing or bid-rigging these days: The Justice Department's version of Dirty Harry may be on your case."); Ian P. Murphy, *P-O-P Marketers Warned About Antitrust Violations*, MARKETING NEWS, May 26, 1997, at 14 ("'They are criminal violations that cheat the consumer . . . .'" (quoting Antitrust Division attorney)).

The Division's press release announcing Archer-Daniels-Midland's $100 million fine used the word "criminal" three times in its first two sentences. *See Archer-Daniels-Midland Co. to Plead Guilty and Pay $100 Million for Role in Two International Price-Fixing Conspiracies* (modified Oct. 15, 1996) *available at* <http://www.usdoj.gov/atr/press_releases/1996press/508at.htm>.

74. This last counsel also speculated that the Wall Street Journal would cover a criminal conviction or plea more prominently than a civil fine. I share that speculation. This may be a testable hypothesis (and may have been tested, although it is very hard to isolate out the criminal label from the rest of the package).

75. *Cf.* BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS ch. 16 (1983) (chronicling how General Electric was harmed by publicity associated with notorious electrical equipment conspiracies); Melissa S. Baucus & David A. Baucus, *Paying the Piper: An Empirical Examination of Longer-Term Financial Consequences of Illegal Corporate Behavior*, 40

If criminal fines are, by definition, more punitive than equal civil fines, then that would be reason enough for the Division to oppose conversion of historically criminal antitrust fines to civil fines. Gallo and his colleagues have carefully compared actual and optimal antitrust fines, and concluded that actual fines fall woefully short of the ideal. More specifically, Gallo computed that fines imposed between 1955 and 1993 represented barely more than four-tenths of one percent of optimal fines.[76] Subsequent research has found that firms were easily capable of paying dramatically larger fines, such that the actual fines paid and even the maximum fines permitted by the statute may not deter price-fixing behavior.[77] Even substantially increasing maximum criminal corporate fines, as the Division has requested, will not raise them to a level where the Division is likely to conclude that equal civil fines would provide sufficient deterrence.

Apart from pure deterrence, the Division likely remains loyal to criminal fines because it views the Sherman Act's long-time status as a criminal statute as an important expression of societal norms. Law Professor John C. Coffee has reminded us that criminal laws communicate beliefs and values.[78] Plus, the Antitrust Division has a long history of emphasizing that price fixing is a crime. Even if it were more sensible to have proceeded with civil corporate sanctions at one time, it would send a troubling message to de-criminalize price-fixing now. Conceivably one could retain criminal individual liability while moving to civil corporate liability, but politicians are not likely to want to appear to be favoring companies over individuals. Thus, there seems little chance that corporate price fixing will be de-criminalized, and—at least at currently contemplated levels of fines—keeping the status quo seems sound.

### B. Carrots

The current structure of penalties offers two different and important "carrots" for corporate compliance. First, the Division has a widely touted amnesty program for the first person to report a conspiracy.[79] Second, the Sen-

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ACAD. MGMT. J. 129, 146 (1997) (although short-term consequences are indeterminate, a sample of firms found liable for serious wrongdoing showed consistently poorer long-term performance than a control group; the authors speculated that such a finding "may stain a firm's image, sending a warning signal to stakeholders, or prompt stakeholders to reassess relationships with the firm").

76. *See* Joseph C. Gallo et al., *Criminal Penalties Under the Sherman Act: A Study in Law and Economics*, 16 RES. L. & ECON. 25, 59 (1994). Even adjusting for jail time served, penalties were limited to four one-hundredths of one percent of optimal fines. *See id.* at 58.

77. *See* Catherine Craycraft et al., *Antitrust Sanctions and a Firm's Ability to Pay*, 12 REV. INDUS. ORG. 171 (1997) (100% of firms in sample, 1955-93, could pay actual and maximum fine from cash on hand plus short term securities; 42% of firms could pay the optimal fine (an average of over $1.9 billion) without being technically bankrupt).

78. *See generally* Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 7; Coffee, "*No Soul to Damn: No Body to Kick*," *supra* note 12, at 447. For a thoughtful economic argument that criminal law works by shaping preferences as well as opportunities, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1.

79. *See* Anne K. Bingman, Remarks Before the House Appropriations Subcommittee on the Department of Commerce, Justice and State, the Judiciary and Related Agency, (Mar. 24, 1995); Gary R. Spratling, The Experience and Views of the Antitrust Division, Address at Corporate Crime in America: Strengthening the "Good Citizen" Corporation (Sept. 8, 1995); Gary R. Spratling, The Trend To-

tencing Guidelines offer lessened penalties when corporations have "effective" compliance programs.[80]

The Division has been quite emphatic about its opposition to considering corporate compliance activities as part of the determination of liability,[81] and rightly so. Indeed, the case for substantially reducing corporate penalties for an "effective" compliance program that happened to have failed seems less than overwhelming.[82]

In a market economy, society usually provides incentives and then relies on market participants to seek out the most efficient response. A generation of economists have shown that incentives are superior to commands and controls,[83] yet somehow this learning has been ignored. The results are all too predictable.

A company has a wide array of ways to increase its compliance with various laws. It can emphasize the quality of its people, by hiring honest employees, encouraging them to live healthy lives, and taking care of them in time of need. It can create good incentives, by tying compensation to long-term results, by refraining from exerting undue pressure, and by paying supra-competitive wages employees will not want to risk losing. It can teach and remind. It can monitor and audit. And it can threaten with whatever draconian consequences are in its power (including, perhaps, turning employees over to government law enforcers). Some companies will be better at one approach, some at another, most at some mix; but it would be surprising were the same approach right for all.

Accordingly, it would seem self-evident that government should set out penalties for violating the law and leave it to firms to determine how best to respond to those penalties.[84] That is not the approach of the Sentencing Guide-

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wards Higher Corporate Fines: It's a Whole New Ball Game, Address at the Eleventh Annual National Institute on White Collar Crime (March 7, 1995).

80. *See id.*

81. *See, e.g.*, James F. Rill, The Importance of Deterring Antitrust Crime: Corporate Compliance Programs and Federal Antitrust Enforcement, Remarks at the Symposium on Antitrust and Association Law of the D.C. Bar Ass'n 1 (Feb. 20, 1992), *available at* <http://www.usdoj.gov/atr/speeches> ("executives too often fail to understand that the true benefit of a compliance program in fact is to prevent the commission of antitrust crimes, and not simply to avoid being prosecuted for them"); Spratling, The Experience and Views of the Antitrust Division, *supra* note 79.

82. The Division was criticized in connection with the *ADM* settlement for not insisting on a court-supervised compliance program. This failure allegedly meant that the "Division gave up the opportunity to make a significant statement about the need for antitrust compliance programs." Gregory J. Wallance, *The Terms of Archer-Daniels-Midland's $100 Million Plea Agreement Suggest that Justice May Be Emphasizing Fines, Not Future Compliance*, NAT'L L.J., Nov. 4, 1996, at B4. In reality, of course, there may be no more effective statement about the importance of genuinely effective antitrust compliance than the *ADM* proceeding. Nonetheless, compliance programs are becoming a regular part of probation. *See, e.g.*, Michael J. Woods, *Environmental Compliance Programs as a Condition of Organizational Probation*, 8 FED. SENTENCING RPTR. 209 (1996). This trend is lamented in Mark A. Cohen, *Environmental Sentencing Guidelines or Environmental Management Guidelines: You Can't Have Your Cake and Eat it Too!*, 8 FED. SENTENCING RPTR. 225 (1996).

83. *See, e.g.*, STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982).

84. It is striking, in this regard, how widespread corporate compliance programs had become before the Sentencing Guidelines supplied additional incentive and the Delaware courts added their encouragement, and without the additional reward of special immunities. *See, e.g.*, Pitt & Groskaufmanis, *supra* note 9, at 1654 n.257 (noting that surveys show that 75% to 95% of U.S. firms have written codes of conduct or ethics).

lines, which have emphasized government-designed compliance programs. Inevitably, the quixotic effort to define the good yet unsuccessful compliance program has stumbled. Some want further to define good programs.[85] Others worry that potential liability may prevent the auditing and monitoring that is part of a good program, thus they urge the creation of immunities to encourage a good program. My own inclination is to resist the campaign to reward unsuccessful programs that meet externally-created standards.

Mine is only an inclination, however, and not a firm conclusion. Two arguments favoring a "carrot" approach give me pause. The first is the suggestion that corporate *mens rea* should not be considered proven, for criminal liability, if the corporation as an institution has taken sufficiently strong (albeit unsuccessful) steps to attempt to comply with the law.[86] This is a troubling proposition. It is a creature solely of criminalization of corporate liability. Corporate criminality might be justified on operationalist grounds (it's effective) or as sending a signal about society's values, but much of corporate criminal liability is about liability based exclusively on a wrongful act, without regard to what individuals subjectively intended. Rewarding good faith but unsuccessful efforts to comply with the law in part appeals to those with underlying concern about corporate criminality,[87] but it undermines some of the bright-line benefits of making certain actions criminal for a corporation.

The other argument that gives pause is the sophisticated attempt by Arlen and Kraakman to show that only a composite approach, with a mix of strict liability penalties and conduct-oriented incentives, can achieve the optimal level of deterrence. They begin with the twin premises that strict liability often will provide correct incentives but that strict liability may have the perverse effect of discouraging policing. The solution to this dilemma, they conclude, will often be a "composite liability" scheme that separately punishes an entity's wrongdoing and its "failure to discharge its policing duties."[88] Arlen and Kraakman erect an impressive theoretical structure, but they slide too easily over a weakness in their structure's foundation. That weakness is that a legal system can punish failures to police (or, which is the same thing, reward policing) only very imperfectly. Arlen and Kraakman acknowledge that our ability to reward policing is an issue,[89] but in the end they assume rather than prove

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85. *See, e.g.*, Gruner & Brown, *supra* note 12; Walsh & Pyrich, *supra* note 12.

86. The Justice Department's Criminal Division has indicated that a good corporation's compliance program may lessen the chances that the Division will file a criminal case:

> The Department knows that no compliance program can eliminate all criminal activity committed by rogue employees, according to [the Criminal Division's Robert] Litt. "We are not going to prosecute a corporation every time an employee commits a crime," he said. "A company with a compliance program is less likely to be prosecuted for acts of rogue employees."

Matthew J. Merrick, *Sentencing Commission Takes on Corporate Crime*, 8 FED. SENTENCING RPTR. 238, 243 (1996) (summarizing U.S. Sentencing Commission symposium, Sept. 7-8, 1995).

87. *See generally* Pitt & Groskaufmanis, *supra* note 9 (advocating a modified due diligence standard).

88. *See* Arlen & Kraakman, *supra* note 4, at 726.

89. *Id.* at 711. "The ability of duty-based liability regimes to regulate firms' policing measures thus depends largely on how competently lawmakers and judges can articulate and assess the optimal

that courts can, for instance, determine whether a firm "performs all of its policing duties optimally."[90] In my view, they underestimate the difficulty of designing and then shoe-horning companies into approved compliance models, and of distinguishing genuinely effective (although unsuccessful) programs from ones that merely appear to be effective. Rewards for an approved policing program may create their own suboptimal incentives if it would otherwise be more efficient for a firm to deter crime by hiring carefully, adjusting compensation incentives, establishing a culture of compliance, or increasing penalties for non-compliance, for instance. Rewarding approved policing would lessen otherwise prospective punishments for law violations, and I doubt that the tradeoff is often worth it.

## V

## THE ROLE OF PRIVATE LITIGATION

In an earlier paper, I identified and reviewed three potentially positive roles for civil antitrust class actions: supplemental deterrence, compensation, and identification of wrongdoing.[91] Those roles are potentially more important for private litigation, as is discussed below. Private litigation contributes in other ways that are worthy of attention. In particular, private litigation is important to the evolution of legal doctrine, to provide a safety valve, and to contribute to protecting the actual and perceived integrity of the antitrust system.[92]

### A. Supplemental Deterrence

Private antitrust enforcement was once viewed as essential to the punishing of wrongful behavior identified by an antitrust agency. The antitrust agencies lacked meaningful ability to punish, so without follow-on private litigation there could be no significant punishment.[93]

Increased federal penalties for criminal antitrust violations obviously reduce the importance of deterrence through follow-on litigation. As noted earlier,[94] authorized penalties have soared in size and may increase further, and penalties as applied very recently have risen sharply. Similarly, perpetrators of hard-core fraud risk serious consequences from litigation brought by the FTC and allied federal agencies and state attorneys general.[95]

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scope and forms of monitoring." *Id.* at 716 (footnote omitted). "Of course, a duty-based regime can solve the credibility problem only if the court can determine whether the firm has implemented efficient enforcement measures." *Id.*

90. *Id.* at 727; *see id.* at 711 (noting difficulty of evaluating monitoring).

91. *See* Calkins, *supra* note 3, at 437-44.

92. Although the same roles of deterrence, compensation, and identification that are potentially important for class actions are perhaps even more important for private litigation generally, private litigation contributes in other ways that are worthy of attention. In particular, private litigation is important for evolution of legal doctrine, to provide a safety valve, and to contribute to protecting the actual and perceived integrity of the antitrust system.

93. *See* Calkins, *supra* note 3.

94. *See id.*

95. *See id.*

The increase in federal criminal penalties has not eliminated the need for supplemental deterrence of hard core price fixing, at least. (The jury is still out on consumer fraud.[96]) Until very recently, government penalties for price-fixing were so far removed from optimal levels that they could not be considered an effective deterrent at all.[97] That has changed, yet optimal levels for price-fixing may be sufficiently high that there is little risk that penalties will achieve that level. The Division's current push to ratchet penalties up by another factor of ten[98] is an implicit recognition that its current authority to penalize cannot result in the efficient imposition of adequate fines. Historically, antitrust courts have imposed little in the way of penalties;[99] so one cannot be confident, even with new legislation, what the pattern of penalization will be in the future.

One special role for private antitrust, however, is the imposing of adverse consequences on persons who engage in misconduct falling short of being criminal or fraudulent. The Antitrust Division and the FTC regularly file civil challenges alleging conduct that appears fairly clearly illegal. These are civil cases, however, and the agencies almost never seek or obtain anything more than a prospective order to end and prevent recurrence of the challenged conduct. Nonpunitive prospective relief orders are not designed to deter misconduct.

Two recent Justice Department consent decrees illustrate the situation. *United States v. Tom Paige Catering Co.*[100] concluded a singularly offensive episode (if the allegations are true). The only two bidders on the meal contract offered by the Cleveland Head Start program, 1992-94, ended their competition by forming a "joint venture."[101] Prices increased; cold lunches that cost $1.01 in 1993 cost sixty-eight percent more in late 1994, when competition had ended.[102] In spite of this sorry tale, the Division agreed to settle the matter for merely an injunction assuring future competition.[103]

Similarly, when IBM and StorateTek allegedly contractually eliminated competition between them over the multibillion-dollar disk-storage subsystems for mainframe computers, thus slowing the previously rapid decline in prices, the Division settled the matters for a consent order that may or may not restore

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96. *Cf.* Federal Trade Comm'n, *supra* note 28 (preliminary assessment).

97. *See supra* notes 14-26, 76-77 and accompanying text.

98. *See supra* note 21 and accompanying text.

99. *See supra* notes 25, 76.

100. No. 1:97CV3268 (N.D. Ohio filed Dec. 16, 1997), *noted in* 6 Antitrust & Trade Reg. Rep. (CCH) ¶ 45,097.

101. United States v. Tom Paige Catering, Inc., Competitive Impact Statement, 62 Fed. Reg. 67,897, 67,900 (1997).

102. *Id.*

103. *Id.* at 67,900-901 (effect of proposed judgment on competition). Although *Tom Paige* is a good example of a case of clear wrongdoing that may go unpunished, it may not be an example specifically of the potential for private litigation to supplement civil governmental enforcement. It appears that the victim in *Tom Paige* was the government itself. Perhaps the government refrained from seeking the treble damages to which it was entitled, 15 U.S.C. § 145a (1994), because of the small size of the conspiracy. C*f.* 62 Fed. Reg. at 67,899 (annual value of contracts was between $300,000 and $500,000).

competition.[104] The Division considered seeking damages on governmental purchases, but elected not to because further litigation would delay ending the anticompetitive agreements.[105]

The FTC also regularly challenges conduct apparently violative of the core of antitrust. In each of the past two years, the FTC found that certain horizontal restraints among trade associations were illegal *per se*. The FTC condemned the California Dentist's Association for banning truthful price advertising and the International Society of Conference Interpreters for limiting price competition.[106] Earlier, the FTC prevailed in important cases challenging horizontal restrictions by Indiana dentists[107] and Detroit auto dealers.[108] In each instance, the FTC entered only prospective relief (usually ordering an end to the challenged conduct).

The FTC also challenges without punishing fairly clearly illegal conduct as part of its consumer protection mission. The most recent example concerns the advertising of premium gasoline, which, despite its substantially greater cost, is of little benefit to most engines.[109] In 1992, the FTC filed a complaint and accompanying consent order that challenged Sun Company's allegedly unsupported claims that its high-octane gasolines "provide superior engine power and acceleration."[110] Two years later, the agency filed a complaint and accompanying consent order that challenged Unocal Corporation's allegedly unsupported claims that its high-octane gasoline "provides superior engine performance and longevity."[111] Another two years later, the agency filed a complaint

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104. *See* United States v. IBM, No. 97-3040 (D.D.C. filed Dec. 18, 1997), *noted in* 6 Trade Reg. Rep. (CCH) ¶ 45,097; *see also* 63 Fed. Reg. 1499 (1998) (competitive impact statement and notice of proposed relief).

105. *See* 63 Fed. Reg. at 1507. For another important civil Division challenge to restrictive licenses, see United States v. General Elec. Co., 1997-1 Trade Cas. (CCH) ¶ 71,765 (D. Mont. 1997).

106. *See* International Ass'n of Conference Interpreters, 5 Trade Reg. Rep. (CCH) ¶ 24, 235 (Feb. 19, 1997); California Dental Ass'n, 5 Trade Reg. Rep. (CCH) ¶ 24,007 (Mar. 25, 1996) (invoking per se rule and truncated rule of reason), *aff'd*, 128 F.3d 720 (9th Cir. 1997) (based solely on truncated rule of reason), *petition for cert. filed*, 66 U.S.L.W. 3668 (U.S. Apr. 3, 1998) (No. 97-1625).

107. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).

108. *See In re* Detroit Auto Dealers Ass'n, 111 F.T.C. 417 (1989), *aff'd in part, rev'd in part*, 955 F.2d 457 (6th Cir. 1992).

109. *But cf.* David Ivanovich, *Exxon Feels the Burn of Its Gas Ads*, HOUSTON CHRONICLE INTERACTIVE (June 24, 1997), *available at* <http://www.chron.com/content/archive/> (American Petroleum Institute concluded that "'Overbuying of premium gasolines is not prevalent, if it occurs at all.'"). *See, e.g.*, Tom Magliozzi & Ray Magliozzi, *Car Talk*, STAR TRIBUNE, Oct. 25, 1997 ("High-octane gasoline is absolutely no benefit to the vast majority of cars.").

110. Sun Co., 115 F.T.C. 560, 561 (1992). Commissioner Owen dissented because she viewed the remedy as insufficient. *Id.* at 569. As Commissioner Owen noted 20 years earlier, the FTC had condemned Sun Co. for misrepresenting the benefits of what it then described as its "custom blended" gasoline, which purportedly meant that all of its gasoline were unusual because they were "blended with action of Sunoco 260, the highest octane gasoline at any station, anywhere." Sun Oil Co., 84 F.T.C. 247, 249 (1974) (complaint paragraph 10A). After trial, the Administrative Law Judge entered an order barring certain misrepresentations, which was not appealed by Sun and became final. The ALJ rejected complaint counsel's request for corrective advertising because, given the energy crisis then being endured, he found that "it is not likely that power and high octane ratings will be advertised in the near future." *Id.* at 279.

111. Unocal Corp., 117 F.T.C. 500, 503 (1994). The FTC's order also was imposed (by consent) on Unocal's advertising agency, Leo Burnett Company, Inc. *Id.* at 509-11.

and accompanying consent order, this time challenging Amoco Oil Co.'s allegedly unsupported claim that, among other things, its premium gasoline is "superior . . . with respect to engine performance and environmental benefits."[112] Less than twelve months later, the FTC filed yet another complaint, challenging Exxon Corp.'s claims about its premium gasoline.[113] Exxon agreed to a consent order the following year.[114]

By itself, this pattern of company after company being sued for essentially the same violation is remarkable. The remarkable becomes the extraordinary when one compares the challenged advertisements, which are eerily similar.[115]

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112. Amoco Oil Co., No. 932-301161, 1996 FTC LEXIS 40 (Jan. 2, 1996) (consent agreement), *order entered*, 61 Fed. Reg. 30,613 (1996).

113. *See* Exxon Corp., No. 9281 (F.T.C. filed Sept. 11, 1996), *noted in* 5 Trade Reg. Rep. (CCH) ¶ 24,106.

114. *See* Exxon Corp., 62 Fed. Reg. 25,816 (1997) (proposed consent agreement), *order entered*, 5 Trade Reg. Rep. (CCH) ¶ 24,288 (Sept. 12, 1997). The proposed *Exxon* order is somewhat narrower than the orders previously entered, but Exxon would be ordered to run a 15-second "consumer education" commercial about octane and to distribute a specified brochure on the subject. *See* 5 Trade Reg. Rep. (CCH) ¶ 24,117 (analysis to aid public comment). Commissioner Azcuenaga dissented from this tradeoff. *Id.* (Azcuenaga, Comm'r, dissenting in part). She found the commercial "uninspired at best" and unlikely to be effective. *Id.* at 24,188. *See generally Exxon, FTC Reach Settlement on Ads for High-Octane Gas*, WALL ST. J., June 25, 1997, at A6 (reporting settlement, noting that "[b]oth the FTC and Exxon described the required advertising as "educational" rather than corrective); *Exxon, FTC to Settle Advertising Dispute*, GREENSBORO NEWS & RECORD, June 25, 1997, at B4 (noting that "[s]ome industry analysts had predicted the FTC would ask for 'corrective advertising'"); David Segal, *Taming the Octane of the Ads*, WASH. POST, June 25, 1997, at C11 (reporting settlement).

115. Excerpts from ads quoted in the complaints are as follows:

From Sun Co. (1992):

> 1. Announcer: When you car's your baby. . . . (Sing: Nothin's too good for my baby. . . .) No other gasoline can give your car better acceleration. Because no other gasoline has 94 octane–the highest octane under the sun. . . .
>
> Announcer: What's so special about Sunoco Ultra 94? No other gasoline can give your car better acceleration. Because no other gasoline has 94 octane–the highest octane under the sun. . . . Come to Sunoco and fill up with Ultra 94–for maximum power and performance.

115 F.T.C. at 561.

From Unocal Corporation (1994):

> 1. With the high cost of falling in love these days you can't trust your investment to just any gasoline. That's why Seventy-Six developed our Ninety-two Unleaded. It's the highest level octane you can buy to help your car run better, longer. Because after all isn't love supposed to last forever? . . .
>
> 3. . . . Unocal's 89 unleaded is two octanes higher than regular unleaded to keep your car running better, longer. . . . Compared to regular unleaded, our 89 octane will give your car smoother starts and stops, help reduce engine knocks and pings.

117 F.T.C. at 50102.

From Amoco Oil Co. (1996):

> Amoco Ultimate is the only premium refined an extra step to remove harmful impurities other premiums leave in. Impurities that can rob your engine of performance and pollute the air.. . .
>
> It's your car. Your baby. Your one and only. Everything about it has to be as good as gold. And when you're running on Amoco Ultimate, you're running clean. Amoco Ultimate is refined an extra step for quality. . . .
>
> One fill-up of Amoco Ultimate will clean up [your] clogged fuel injectors just like that. And [you] won't run as sluggish as [you] do now. . . .
>
> Higher octane Amoco Silver can bring back the acceleration. Bring back the power.

Complaint paragraph 4.

From Exxon Corporation (1997):

It appears almost as though the FTC's complaints and orders provided creative inspiration instead of sobering deterrence.

Given the similarity of these advertising campaigns, it is clear that the threat of an FTC investigation and lawsuit provided relatively little deterrence, compared with the prospective gains from the proposed commercials.[116] It is also clear that the prospect of Lanham Act litigation,[117] which one competitor can bring against another, was of little deterrence. Although optimal deterrence is difficult to measure, it seems unlikely that the FTC provided the socially optimal level of deterrence of exaggerated advertising of premium gasoline, an expensive product of little value to most consumers.[118]

When government agencies challenge conduct that appears to be clearly illegal, and yet the only punishment (other than the cost and inconvenience of litigating) is living with a prospective nonpunitive order, then private litigation has a deterrence role to play.[119] The Antitrust Division's civil program, and the FTC's competitive and nonfraud-based consumer protection programs, challenge without punishing what the agencies see as misconduct. Questionable proposed mergers are a (very large) special category: Deterrence is not an issue because so many mergers are procompetitive and questionable mergers are almost always disclosed to the agencies for advance review. Some other challenged conduct is borderline (and some may be lawful, and wrongly challenged), but other challenged activity is sufficiently wrong that it merits deterrence. Under the current approach of federal enforcers, private litigation is the only available source of deterrence.

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Announcer: New Exxon 93 Supreme keeps your engine cleaner.

Woman 2: Clean is good.

Announcer: So it can help drive down maintenance costs. . . .

Woman 2: Gas that can save you money.

Announcer: For more reliable performance.

Complaint Paragraph 4.

116. *See* Laney Salisbury, *Exxon to Refute Previous Gasoline Claims in FTC Deal* (June 24, 1997), *available at* <http://biz.yahoo.com/finance/97/06/24/xon_z0009_2.html> ("Traders and analysts say premium earns twice as much in profits as regular and it is unlikely oil companies will give it up anytime soon.").

117. *See* 15 U.S.C. § 1125 (1994).

118. For the classic study finding that firms whose advertising is challenged by the FTC suffer losses in the product, advertising, and capital markets, see Sam Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403 (1981). Whether or not Peltzman was (and continues to be) right, it is obvious that the FTC does not deter all misleading advertising (nor would society want such a high level of deterrence), and the experience with premium gasoline suggests that even a fairly clear risk of FTC action does not deter clearly misleading ads likely to contribute significantly to profits. Additional deterrence seems warranted, albeit on impressions rather than hard empiricism.

119. Federal enforcement also can be supplemented by state action. For instance, last fall, an FTC administrative law judge found that Toys 'R' Us had violated the FTC Act. *See* In re Toys "R" Us, No. 9278 (F.T.C. Sept. 30, 1997), *available at* <http://www.ftc.gov/os/9709/toysrus.pdf> (initial decision). Within days of the decision, the state of New York filed a suit against the firm, thus joining class actions filed in three federal courts. *See* Victoria Slind-Flor, *Toys 'R' Us Could Become Suits 'R' Us*, NAT'L L.J., Oct. 20, 1997, at B1. Any lack of punitive provisions in the judge's order could be offset by the related litigation. (Of course, if the FTC's suit is unmerited, or if the challenged conduct should be changed but not punished, the related litigation imposes additional unfortunate costs.)

B. Compensation

Compensation becomes a more important feature of private antitrust litigation once one expands beyond class actions. Antitrust plaintiffs continue to win (or achieve through settlement) substantial, hard-money recoveries.[120] If deserved, recoveries are particularly valuable since they compensate for harms that are probably not insurable.

Whether these recoveries are always deserved is another matter. Commentators regularly have worried about the abuse of antitrust litigation, particularly by competitor plaintiffs.[121] Antitrust courts have responded with procedural and substantive decisions that facilitate the early disposition of unmeritorious cases,[122] but worries remain.[123] What remains uncontroverted is that plaintiffs do win substantial recoveries and thus earn compensation for real or perceived injuries.

C. Identification of Wrongdoing

My earlier paper[124] explained that class actions, rather than just following behind government efforts, have helped initiate the challenging of questionable activities. For instance, the massive *NASDAQ*,[125] *Brand Name Prescription Drugs*,[126] and *Insurance Antitrust Litigation*[127] proceedings all had origins in class actions separate from federal antitrust initiatives. Any suggestion that class actions merely follow where the federal government has led[128] cannot withstand the evidence of current practice.

When one considers private actions more generally, and not just class actions, the role of private antitrust in identifying alleged wrongdoing is even more pronounced. Eighty percent or more of antitrust cases do *not* follow on government actions.[129] The heart of antitrust continues to be private litiga-

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120. *See, e.g.*, In re NASDAQ Market-Makers Antitrust Litig., No. 94 Civ. 3996 (filed Dec. 31, 1997), *noted in* Antitrust & Trade Reg. Rep. (BNA) 31 (Jan. 15, 1998) (preliminarily approving settlements totaling more than $1 billion, which were expected to be the largest antitrust settlement ever); s*ee also* Calkins, *supra* note 91, at 419-23 (possible renaissance of antitrust class actions).

121. *See, e.g.*, William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985); Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991). *But cf.* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989).

122. *See* Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S U. L. REV. 1 (1998).

123. *See, e.g.*, Thomas C. Arthur, *The Costly Quest for Perfect Competition:* Kodak *and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 60-62 (1994) (worrying that *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992), might stimulate efficiency-reducing litigation).

124. *See* Calkins, *supra* note 3.

125. In re NASDAQ Market-Makers Antitrust Litig., 7 Trade Reg. Rep. (CCH) ¶ 71,981 (S.D.N.Y. Oct. 16, 1997) (preliminary approval of settlement).

126. In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997).

127. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993); *see also Insurance Companies Settle Multistate Conspiracy Charges*, Antitrust & Trade Reg. Rep. (BNA), No. 1684, at 434 (Oct. 13, 1994).

128. *Cf.* Coffee, "*No Soul to Damn: No Body to Kick," supra* note 12, at 435.

129. *See* Thomas E. Kauper & Edward A. Snyder, *Private Antitrust Cases That Follow On Government Cases, in* PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING, 329, 358 (Lawrence J. White ed., 1988).

tion.[130] Unless those cases are unmeritorious, there are far more antitrust wrongs than federal enforcers are funded to handle.

### D. Evolution of Legal Doctrine

Private antitrust litigation has been essential to the development of modern antitrust doctrine. This contribution of private antitrust is fairly recent, and it is sometimes unappreciated.[131] As a small, unscientific experiment, I took the newest antitrust law school casebook[132] and examined the sixty principal cases. Of the thirty-seven issued before 1977 (the watershed year of *Continental TV, Inc. v. GTE Sylvania*[133]), only seven, or nineteen percent, were private suits. Of the twenty-three opinions issued starting that year, seventeen, or seventy-six percent, were private suits—and that figure does not include the Court's most recent opinion, *State Oil Co. v. Khan*.[134] Without private cases, there would be no antitrust case books. The leading modern cases to which one looks for guidance about monopolization,[135] attempted monopolization,[136] resale price maintenance,[137] sole outlets,[138] territorial limitations,[139] vertical agreements,[140] tying,[141] price discrimination,[142] and exemptions[143] are almost entirely private cases. An-

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130. During the 12-month period ending March 31, 1997, 569 private antitrust suits were filed in federal district courts, compared to only three civil antitrust suits by or against the United States. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: 1997, at 40-41 (1997). During the 12-month period ending September 30, 1996, the comparable figures are 647 and 42, respectively. *See* LEONIDAS R. MECHAM, JUDICIAL BUSINESS OF THE U.S. COURTS: 1996 REPORT OF THE DIRECTOR 136 (1996).

131. *But cf.* Daniel J. Gifford, *The Jurisprudence of Antitrust*, 48 SMU L. REV. 1677, 1692-94 (1995) (noting relative increase in importance in private litigation).

132. PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS (5th ed. 1997).

133. 433 U.S. 36 (1977).

134. 118 S. Ct. 257 (1997).

135. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Eastman Kodak Co. v. Image Technical Serv., 504 U.S. 451 (1992); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983).

136. *See* Spectrum Sports v. McQuillan, 506 U.S. 447 (1993).

137. *See* State Oil Co. v. Kahn, 118 S. Ct. 275 (1997); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

138. *See* Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957).

139. *See* Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977).

140. *See* Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

141. *See* Eastman Kodak Co. v. Image Technical Serv., 504 U.S. 451 (1992); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

142. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Texaco v. Hasbrouk, 496 U.S. 543 (1990); Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428 (1983). *But cf.* Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979); FTC v. Morton Salt Co., 334 U.S. 37 (1948); Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988).

143. *See* Brown v. Pro Football, Inc., 518 U.S. 231 (1996); Professional Real Estate Investors, Inc., v. Columbia Pictures Indus., 508 U.S. 49 (1993); City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Parker v. Brown, 317 U.S. 341 (1943). *But cf.* FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985).

titrust law is, in large part, law crafted through private litigation. The field is richer, and counselors can give advice with more precision and confidence, because of the existence of private-litigation-generated case law. Those areas of antitrust that have been the subject of substantial litigation have achieved notably more certainty and predictability.[144]

To be sure, nothing prevents the antitrust agencies from litigating more cases and contributing more to the judicial development of the law. Assistant Attorney General Klein has spoken of the importance of litigating cases and developing doctrine in the courts,[145] so the Division may bring more cases. The FTC has streamlined its adjudicative rules so as to facilitate the efficient adjudication of disputes.[146] Yet the agencies thus far have litigated few civil non-merger cases, and this seems unlikely to change dramatically. During the past seven fiscal years, the FTC has filed a total of only eight administrative competition complaints (merger and non-merger).[147] Between 1980 and 1996, the CCH Trade Regulation Reporter shows a total of only ten civil Antitrust Division cases (merger or non-merger).[148] Between fiscal years 1981 and 1997, the Division filed a total of only eight Sherman Act section 2 cases, and six of those cases were filed in the last six years. In only three of the past ten fiscal years did the Division file more than three Sherman Act civil section 1 cases. In the other years, the Division averaged only 1.7 complaints a year.[149]

Government antitrust litigation is unlikely to increase dramatically, for many of the same reasons that it has declined. Those reasons include the fearfully high cost of litigation and the interest in preserving benign aspects of proposed transactions.[150] Even if the antitrust agencies do consider the "positive externality" of law development when computing the costs and benefits of pro-

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144. *See generally* Calkins, *supra* note 91. The antitrust agencies have contributed greatly to the development of antitrust theory and doctrine through the use of guidelines, reports, speeches, and consent orders (although consent orders are tea leaves requiring considerable interpretation). The leading two-volume antitrust text includes excerpts from four statutes covering 40 pages, *see* ANTITRUST SECTION, *supra* note 20, at 1357-1406, and from seven sets of guidelines covering 223 pages, *id*. at 1407-1623. In recent years, the antitrust agencies have enhanced access to these materials by making them available on agency internet home pages. *See* <http://www.usdoj.gov/atr/>; <http://www.ftc.gov/>. But guidelines, reports, speeches, and consent orders lack the power of case law, as is discussed elsewhere. *See id*.

145. *See* John R. Wilke & Bryan Gruley, *Trustbuster Joel Klein, Once Viewed as Timid, Faces a Very Full Plate*, WALL ST. J., May 15, 1998, at A1, A10.

146. *See* Robert Pitofsky, Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary of the U. S. House of Representatives Concerning An Overview of FTC Antitrust Enforcement (Nov. 5, 1997), *available at* <http://www.ftc.gov/os/9711/oversigh.htm>. *See generally* Calkins, *supra* note 91.

147. The last fiscal year in which more than two such complaints were filed was 1990, with five complaints. These figures exclude court complaints, in which the FTC has sought a preliminary injunction against a merger, but they include the companion administrative complaints challenging those mergers. Complaints of matters that were not litigated to a conclusion also are included.

148. Computed from tables listed under "U.S. Litigated Antitrust Cases" in the back of published CCH volumes from calendar years 1980-96.

149. *See* ANTITRUST DIVISION, *supra* note 62. In fiscal years 1994-96, the Division filed eight, 12, and 14 civil section 1 complaints, respectively. *See id.*

150. *See generally* Calkins, *supra* note 122.

spective litigation (as they should),[151] it seems unlikely that government litigation can increase sufficiently to displace the law-development role of private cases.[152]

## E. Safety Valve

Private antitrust also plays a special role as something of a safety-valve. Persons injured by what they reasonably believe to be illegal conduct can have their day in court. Assuming that the law is reasonably clear—and private litigation has contributed substantially to clarifying the law—it can be invoked by big firms and little alike.

The alternative would be to rely on government enforcers. This is not a realistic alternative for the foreseeable future because of resource constraints. Beyond that, it is healthy that firms unable to interest a government agency in their cause can, if they deem the cause sufficiently important, proceed to a tribunal. That option also contributes to the healthy functioning of the antitrust system, for reasons that follow.

## F. The Integrity of the Antitrust System

Antitrust has become a form of economic regulation. "The Regulatory Character of Modern Antitrust Policy" was the topic for one of the January 1998 programs sponsored by the antitrust and economic regulation section of the Association of American Law Schools. As has been chronicled elsewhere, the antitrust agencies have left their gun-slinging, "we're just law enforcers," image behind.[153] This has important consequences for private litigation.

It was almost inevitable that government antitrust became more regulatory, beginning in 1976 when the Hart-Scott-Rodino Act was passed. Between fiscal years 1992 and 1997, the number of mergers reported to the agencies more than

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151. *See id*.

152. One reason government cannot entirely displace private litigation's role in law-creation is because law develops in part when plaintiffs lose. Indeed, many of the cases that have clarified antitrust have been cases lost by plaintiffs, and rightfully so—cases the government should not have brought. Indeed, because "big bounties" can "make bad law," Coffee, "*No Soul to Damn: No Body to Kick*," *supra* note 12, at 438, it is important for government agencies to work as *amici* for defendants (as the two agencies did in *State Oil Co. v. Khan*, 118 S. Ct. 275) as well as for plaintiffs.

153. *See* Calkins, *supra* note 122; Harry First, *Is Antitrust "Law"?*, 10 ANTITRUST 9, 9 (Fall 1995) (increased use of consent decrees); Thomas E. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83 (1990); A. Douglas Melamed, *Antitrust: The New Regulation*, 10 ANTITRUST 13, 13 (Fall 1995) (arguing that evolution of antitrust law into a form of regulation is in part a by-product of the increasing use of consent decrees as the primary means of antitrust enforcement); Michael L. Weiner, *Antitrust and the Rise of the Regulatory Consent Decree*, 10 ANTITRUST 4, 4 (Fall 1995) (practical importance of trend toward consent decree resolutions); *see also* John R. Wilke & Bryan Gruley, *Merger Monitors: Acquisitions Can Mean Long-Lasting Scrutiny By Antitrust Agencies*, WALL ST. J., Mar. 4, 1997, at A1 ("Today's lawyers prepare for negotiations by trying to figure out how to satisfy the enforcers, not the law."). The Antitrust Division recently formed an International Competition Policy Advisory Committee to advise it on international antitrust policy issues. *See Justice Department Forms New Group to Advise Division on Antitrust Policy*, 73 Antitrust & Trade Reg. Rep. (BNA) 517 (Nov. 27, 1997). Such reaching out to eminent advisers is entirely consistent with a regulatory perspective.

doubled, from 1,589 to 3,702.[154] Some of these mergers—such as the telecommunications transactions investigated by the Antitrust Division, and the Time Warner/Turner Broadcasting and Boeing/McDonnell Douglas mergers investigated by the FTC—are extraordinarily complex. Evaluating them is a massive undertaking.[155]

Where possible, the antitrust agencies seek to preserve the procompetitive or benign parts of proposed transactions.[156] The agencies recognize that mergers can generate efficiencies and enhance competition.[157] Yet litigation is costly and uncertain, and the courtroom is a poor place to practice the kind of detailed surgery needed to excise objectionable parts of proposed mergers. Similarly, the antitrust agencies have shown considerable interest in permitting the unobjectionable aspects of coordination among competitors to continue.[158] In a wide variety of situations, agencies can accomplish more by negotiation than confrontation.[159]

The antitrust agencies and the antitrust system nonetheless pay an inevitable price for becoming more regulatory. The "I'm a law enforcer" shield was a

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154. *See* Pitofsky, *supra* note 146; Leslie Wayne, *Wave of Mergers Is Recasting Face of Business in U.S.*, N.Y. TIMES, Jan. 19, 1998, at A3.

155. For a skeptical examination of the changed nature of antitrust merger practice, see Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Litigation*, 65 ANTITRUST L.J. 865 (1997).

156. A singular example is provided by Shell Oil Co., No. 971 0026 (Dec. 19, 1997) (proposed consent agreement), *noted in* 5 Trade Reg. Rep. (CCH) ¶ 24,362 (analysis to aid public comment). The FTC tentatively approved creation of the largest refiner and marketer of petroleum products in the U.S., *see* FTC, *Press Release* (Dec. 19, 1997), *available at* <http://www.ftc.gov/opa/9712/shell.htm>, in return for some divestitures (which is normal) and entry of a highly regulatory 10-year supply agreement (which is not). The FTC's analysis to aid public comment argues that the joint venture would permit the new interest to control a heated pipeline near San Francisco, the source of crude oil for that pipeline, and substantial part of the capacity to receive that oil and make asphalt for Northern California, which would harm competition by disadvantaging the only other substantial Northern California asphalt supplier (which buys crude oil transported through that pipeline). The FTC states that the consent order "eliminates this risk" through a 10-year supply agreement at prices approved by the FTC. It seems more likely, however, that the consent order would prevent price increases for ten years. Presumably, the FTC decided to sacrifice competition in subsequent years in exchange for efficiency gains from the venture. (Since the FTC is not explicit about this trade-off, we cannot know whether the efficiency gains were in this market or some other market.)

157. *See* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992 Merger Guidelines, revised April 8, 1997, to clarify treatment of efficiencies.)

158. *See, e.g.*, William J. Baer, New Myths and Old Realities, Perspectives on Recent Developments in Antitrust Enforcement, Remarks Before the Bar Association of the City of New York (Nov. 17, 1997), *available at* <http://www.ftc.gov/speeches/other/bany.htm> ("Where intervention is necessary [in innovation market transactions], we seek to craft relief carefully to remedy the competitive problem without interfering with the incentives and ability to engage in other R&D."); Joel I. Klein, Statement Before the Antitrust, Business Rights and Competition Subcommittee, Senate Judiciary Committee (Feb. 26, 1998), *available at* <http://www.usdoj.gov/atr/testimony/1581.htm> ("The majority of mergers do not threaten to harm competition and consumers; often, they can increase efficiency, improve research and development, and lower prices to consumers. Because of these benefits, even when we do have reason to believe a merger as proposed may be anticompetitive, we look for a way to prevent the anticompetitive aspects of the merger from going forward, while not prohibiting parts of the deal that do not raise anticompetitive concerns.").

159. *Cf.* John T. Scholz, *Cooperation, Deterrence, and the Ecology of Regulatory Enforcement*, 18 L. & SOC'Y REV. 179 (1984).

powerful (if not entirely effective[160]) way to deflect political and quasi-political attempts to influence enforcement decisions. Once the shield is lowered, there are sure to be more attempts to exert influence over the agencies.

One can discern an increasingly wide-spread belief that antitrust enforcement is just as susceptible to public pressure as other forms of regulation.[161] Microsoft is chided for not playing the Washington regulatory game,[162] and even confesses that it may have erred in how it presented its position (although, obviously, not in its position itself).[163] Microsoft's opponents rally the faithful to lobby the Justice Department.[164]

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160. *Compare* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970) (political party in power does not affect quality or quantity of enforcement), *with* Malcolm B. Coate et al., *Bureaucracy and Politics in FTC Merger Challenges*, 22 J.L. & ECON. 463 (1990) (political pressure increases FTC merger challenges). For a recent review of the politics of antitrust, see Declan McCullagh, *In God We Antitrust*, THE NETLY NEWS (Jan. 9, 1998) *available at* <http://cgi.pathfinder.com/netly>. One of the more notorious examples of alleged interference occurred when, after Intentional Telephone & Telegraph contributed heavily to the 1972 Republican Convention, President Richard Nixon intervened in its favor. "'I don't know whether ITT is bad, good or indifferent,' he said on April 19, 1971, White House tapes reveal. "But there is not going to be any more antitrust actions as long as I am in this chair . . . g-d—- it, we're going to stop it.'"

161. *Cf., e.g.*, E-mail from Robert S. Frank to <AT-MEMBERS@abanet.org> (Feb. 9, 1998) (on file with author) (claiming that you cannot understand why two hospitals in Manchester, N.H., were permitted to merge "unless and until you talk with the then-current political representatives from the State of New Hampshire"); E-mail from Charles Mueller to <antitrust@essential.org> (Jan. 5, 1998) (on file with author) (crediting the FTC's preventing Staples and Office Depot from merging to the "coaching" and "cheerleading" of James Love of the consumer Project on Technology) ("Would that Staples/OD merger would have been stopped without his efforts? I don't think so."). For an earlier discussion of this theme, see generally Calkins, *supra* note 122.

162. *See* David Segal, *Five Ways to Blow it With the Feds: At Justice or FTC, A Little Respect Goes a Long Way*, WASH. POST, Nov. 4, 1997, at C1 (Suggesting that Microsoft had offended the Antitrust Division by boasting that the consent decree entered against it would have no effect: "Veterans of the game say that corporations and their lawyers often forget that antitrust law, especially as it is practiced in Washington, is both science and art, a few parts data and a few parts diplomacy."); *see also* David Segal, *Setting Up the Showdown*, WASH. POST, May 17, 1998, at H1 (describing what are seen as Microsoft's missteps).

163. *See, e.g.*, Declan McCullagh, *Which Way the Windows*, THE NETLY NEWS (Jan. 13, 1998), *available at* <http://cgi.pathfinder.com/netly/editorial/0,1012,1685,00.html> (senior Microsoft executives roamed Washington, D.C., apologizing for their previous arrogance and saying they had been misunderstood).

164. *See* Statement by Ralph Nader on DOJ's Microsoft Action, forwarded by James Love to <antitrust@essential.org> (Oct. 20, 1997) (on file with author) ("The Consumer Project on Technology recently circulated a letter about the browser issue on the Internet. . . . Over 1,500 computer users and high tech businesses urged the Department of Justice to take steps that could prevent Microsoft from using anticompetitive practices to monopolize the Browser market . . . ."). Charles Mueller, writing to a Ralph Nader-affiliated internet list, urged on what he viewed as his allies:

> Why can't each of us write . . . a letter to Reno . . . that sums up our sense of the facts involved in Microsoft's monopoly, our appraisal of its costs, and our concerns as to what it means for the future of the industry and the country? . . . Why can't we, at a minimum, write her a note with an attachment—the attachment being what we consider the two or three more best posts to this list?
>
> You bet she'll read them. And, bureaucracy being what it is, she'll pass them down to Joel Klein and his 300 lawyers and economists in the Antitrust Division with a note suggesting rather strongly that they, too, read them.
>
> The last time I checked this list had only 270 members. A dozen good letters could have a profound effect at Justice.

E-mail from Charles Mueller to <antitrust@essential.org> (Nov. 11, 1997) (on file with author). Microsoft spokesman Mark Murray has complained about the current lobbying: "It's absolutely clear

Pressure is brought to bear on the Antitrust Division and the FTC both directly and indirectly, by lobbying Congress. Butterworth and Blodgett hospitals managed to persuade the Senate that it should deny the FTC funding for an adjudication the hospitals were not sure they could win.[165] Before the full Congress could act, the FTC saved them the trouble by dismissing the adjudicative complaint.[166] When the FTC was adjudicating a claim that New Balance was claiming its shoes were "made in America" without meeting the traditional "all or virtually all" test, New Balance responded by protesting to the New England congressional delegation, which even asked chairman designate Robert Pitofsky about the issue during his confirmation hearings.[167] The FTC stayed the proceedings and scheduled public workshops to consider whether to fashion a new standard, more appropriate for an increasingly independent world economy.[168] The FTC withdrew its complaint against New Balance in exchange for what a dissenting commissioner attacked as an "eviscerated" order,[169] and the FTC proposed a new, more permissive standard.[170] Then the public, labor unions, and members of Congress protested the proposed new standard, and the FTC abandoned it.[171]

The unhappy lesson suggested by incidents such as these is that political influence is a necessary tool in the arsenal of weapons employed by antitrust and

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that our competitors are spending an enormous amount of time and money trying to whip up anti-Microsoft sentiment in Washington, D.C. For the past year, Netscape, Sun, and other competitors have been crawling all over Washington, D.C., trying to use the government as a weapon against Microsoft–rather than competing head-to-head in the marketplace." McCullagh, *supra* note 160.

165. *See* S. Res. 1022, 105th Cong. (1997) ("Provided further, That, for a period of one year, none of the funds made available to the Federal Trade Commission shall be spent on an administrative proceeding concerning them merger of two hospitals where the commission has already sought injunctive relief under 15 U.S.C. § 53(b), and prior to July 98, 1997, a court of appeals has affirmed the denial of the injunctive relief requested by the Commission unless further review overturns by the decision by the court of appeals."); *see* SECTION OF ANTITRUST LAW, AMERICAN BAR ASS'N, REPORT ON S. RES. 1022 (1997) (reviewing and strongly opposing the measure).

166. *See* Butterworth Health Corp., 5 Trade Reg. Rep. (CCH) ¶ 24,334 (Sept. 25, 1997) (dismissing complaint).

167. *See FTC Nomineee Assesses Competition Policy, Domestic-Content Labeling in Global Market*, 68 Antitrust & Trade Reg. Rep. (BNA) 85 (Jan. 26, 1995); *see also Consumer Outpouring Prompts Return to Tough "Made in U.S.A." Standard*, F.T.C. WATCH, No. 490 (Dec. 8 , 1997) ("The [FTC] staff used the 'all or virtually all' standard when it fought 'Made in the U.S.A.' claims until members of the Massachusetts delegation in Congress, prodded by shoemaker New Balance, hammered the FTC for using what it deemed an 'outmoded' standard. Their criticisms prompted the FTC to reevaluate its policy.").

168. *See* New Balance Athletic Shoes, Inc., No. 9268 (July 10, 1995) (order staying proceedings and to show cause why the complaint should not be amended or dismissed), *noted in* 5 Trade Reg. Rep. (CCH) ¶ 23,857; *see generally* Federal Trade Comm'n, *FTC to Conduct Comprehensive Review of Consumer Perception of "Made in U.S.A." Claims* (July 11, 1995), *available at* <http://www.ftc.gov/opa.9507/hyde2.htm>.

169. In re New Balance Athletic Shoe, Inc., 1996 FTC LEXIS 676, at 6 (Dec. 2, 1996) (Starek, Comm'r, dissenting); *see also* In re New Balance, 1996 FTC LEXIS 228 (May 14, 1996) (withdrawing matter from adjudication); 1996 FTC LEXIS 676, at 3 (Dec. 2, 1996) (decision and consent order barring New Balance from misrepresenting "[t]he quantity of footwear it exports" and "[t]hat footwear made wholly abroad is made in the United States").

170. *See* 62 Fed. Reg. 25,020 (1997).

171. *See* FTC WATCH, supra note 167. *See generally Enforcement Policy Statement on U.S. Origin Claims*, 62 Fed. Reg. 63,756 (1997) ("the Commission will continue to enforce the Commission's current 'all or virtually all' standard").

trade regulation lawyers. This is not to suggest that politics is all that matters, or that it is important even in many cases. The observation is merely that, with the increasingly regulatory nature of antitrust and trade regulation, observers perceive that politics is commensurately increasing in importance.

Private litigation is a valuable antidote to concerns arising from the increasingly regulatory nature of antitrust and trade regulation. Private litigation contributes strongly to the certainty and predictability of antitrust law. Time and again we have seen courts be unwilling to allow a perceived treble damage windfall to turn on some vague admonition.[172] Standards of conduct that would be acceptable in Europe, where a single agency can exercise prosecutorial discretion, would be unimaginable here. Private antitrust contributes to the existence of clear signals, which, in turn, minimize charges that antitrust enforcement is unduly political.[173]

Private antitrust also makes possible the extremely healthy response that, if someone objects to a firm's conduct and cannot interest the government, the party often can file suit individually. Were an antitrust agency ever to be captured by the special interests so widely discussed in the media, and were the agency wrongfully to refrain from proceeding against a favored firm, others could step in. It is liberating to be able to say to someone asking for enforcement action that the agency does not see a law violation but the petitioner is free to proceed alone if it desires. The very existence of private litigation alternatives likely lessens the frequency with which charges of influence arise. Private litigation thus helps preserve the actual and perceived integrity of the antitrust system.

## VI

## POSSIBLE MODEST IMPROVEMENTS

The above review covers a series of big issues that could call for big responses. Some would urge ending corporate criminal liability, some would urge increasing carrots. The suggestions I make are more modest. They are set forth and applied with respect to antitrust and trade regulation, but may also have more general application.

### A. Recognize the External Benefits of Litigation

The antitrust agencies, private litigants, and the antitrust system all benefit when the agencies can and do litigate. Litigation, and its preservation as a vi-

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172. Many of the cases mentioned above as contributing to the evolution of antitrust doctrine reflect the search for increasingly objective standards.

173. The converse is also true, of course. Private causes of action interfere with evolution of law through non-enforcement. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 660 (5th ed. 1998) (public monopoly of enforcement makes possible the prosecutorial nullification of laws or particular applications thereof). Dean Sullivan presciently described the increase in power for regulatory enforcers to shape antitrust law by non-enforcement. *See* E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997 (1986). At least until the past decade or so, the American antitrust enforcement system had opted in general for clarity and evolution through the judiciary.

able alternative to settlement or dismissal, keeps enforcers and defendants honest and fair. Litigation establishes universally enforceable standards. And litigation preserves the capability of litigating, which is essential for the system to function effectively.

Litigation thus yields benefits far in excess of any improved outcome in a particular case. Although no agency should litigate an unmeritorious case, or litigate without hope of an improved outcome, the cost-benefit analysis employed to decide whether to expend resources litigating should recognize not just the potential benefit in the case at issue, but also the externality benefit to the system as a whole.

Both antitrust agencies should factor in this externality benefit. In addition, the FTC, which can adjudicate its own cases, should continue its work making administrative adjudication a viable alternative to the federal courts.[174] At the same time, the agencies need to continue monitoring judicial developments in private cases, and participate where they can contribute to improvements in the law.[175]

### B. Develop Noncriminal Sanctions for Law Violations

The agencies' bi-modal approach to sanctions is unfortunate, for the variety of reasons discussed above. Expansion of "middle ground" deterrence would be of significant benefit.

Despite the FTC's now-common use of its authority to win consumer redress and other equitable relief,[176] there is surprisingly little established, helpful wisdom about when such remedies are permitted and appropriate. The hallmarks of a "proper case," for which a permanent injunction and/or other ancillary relief may be sought, remain "ill-defined."[177] The many cases in which the FTC has achieved consumer redress are typified by the apparent existence of serious consumer fraud,[178] but this does not appear to be a legal limitation,[179]

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174. *See supra* notes 145-46 and accompanying text.

175. Both antitrust agencies have implicitly recognized the importance of this role by making their *amicus curiae* briefs available through the internet. *See* <http://www.usdoj.gov/atr/app.html>; <http://www.ftc.gov/ogc/briefs.htm>.

176. The grounds on which the FTC seeks consumer redress are set out *supra* note 32.

177. ANTITRUST SECTION, *supra* note 20, at 604; *see also* 15 U.S.C. § 53(b) (1994) ("[I]n proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."). Section 19(b), which authorized a federal court follow-on to a FTC proceeding that condemned an act or practice that "a reasonable man would have known under the circumstances was dishonest or fraudulent," offers a somewhat clearer standard, *see supra* note 32, but the FTC rarely brings litigated Section 19(b) cases.

178. *Cf.* Paul, *supra* note 32, at 145 (FTC's General Counsel lauded increased use of Section 13(b) as "the most efficacious way to obtain quick and effective relief for, at a minimum, hard core unfair and deceptive practices.").

179. The principal legislative history describes only when the FTC can seek a permanent injunction (without discussing redress or other equitable relief), and it is not a model of clarity even on that issue:

> Provision is also made in section 210 for the Commission to seek and, after a hearing, for a court to grant a permanent injunction. This will allow the Commission to seek a permanent injunction when a court is reluctant to grant a temporary injunction because it cannot be assured of a [sic] early hearing on the merits. Since a permanent injunction could only be granted after such a hearing, this will assure the court of the ability to set a definite hearing

and, even if it were, "fraud" is an ill-defined term.[180] So, any fraud limitation may be more a matter of FTC restraint than statutory language or judge-crafted doctrine. The FTC could increase deterrence and enhance the rule of law were it to enunciate some standards for seeking redress or other ancillary relief, and then litigate those standards until they achieve judicial acceptance or rejection. Deterrence can be achieved only when persons expect consequences.

The FTC's experience with redress is limited almost entirely to consumer protection cases, but there are a few exceptions. The FTC first achieved consumer redress in an antitrust case in 1980, when crayon manufacturers accused of coordinating prices agreed to pay $1.2 million in restitution for expected use by public school systems.[181] Although FTC Director of the Bureau of Competition Alfred Dougherty opined that "the agreements are significant because they reflect the importance of including consumer redress in the [FTC]'s antitrust arsenal,"[182] the FTC has rarely visited that part of its arsenal. The FTC's

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> date. Furthermore, the Commission will have the ability, in the routine fraud case, to merely seek a permanent injunction in those situations in which it does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order.

S. REP. 93-151, at 30-31 (1973), *quoted in* FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982). The Ninth Circuit early held that "a routine fraud case is a proper case" for seeking a permanent injunction. *Id.* (affirming grant of preliminary injunction and asset freeze). That Circuit subsequently declined to limit section 13(b)'s authorization to seek permanent injunctions to cases of routine fraud. *See* FTC v. Evans Prods. Co., 775 F.2d 1084 (9th Cir. 1985) (dictum; denial of injunction affirmed because challenged practices were not likely to recur). The court viewed the Senate Report as contemplating permanent injunctions in "routine fraud" cases but also where courts were reluctant to grant preliminary relief because of concern about the timeliness of any hearing on the merits. *Id.* It accepted the FTC's argument that a "proper case" was shown whenever a violation of a law enforced by the FTC was threatened sufficiently. *Id.* The Seventh Circuit, reviewing the same issue, concluded that there was a "substantial argument" that the FTC can invoke section 13(b)'s reference to permanent injunctions "for any violation of a statute administered by the FTC," and it was "quite clear that Congress at least expected that the FTC could rely on this proviso when it sought to halt a straightforward violation of section 5 that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings." FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1028 (7th Cir. 1988).

Few cases have further parsed the issue, which rarely arises. One early case suggested that section 13(b)'s authority to order rescission should be read with the standards of section 19, and limited to dishonest or fraudulent conduct. *See* FTC v. International Diamond Corp., 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,705 (N. D. Cal. 1983). More recent cases have taken a more expansive approach. *See, e.g.*, FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994) ("A corporation is liable for monetary relief under section 13(b) if the F.T.C. shows that the corporation engaged in misrepresentations or omissions of kind usually relied on by reasonably prudent persons and that consumer injury resulted.") (citation omitted) (district court wrongly refused to award unjust enrichment where respondent falsely advertised anti-baldness product); FTC v. Kitco of Nev., Inc., 612 F. Supp. at 1291 ("Conduct which violates Section 5 of the FTC Act, 15 U.S.C. § 45, is a proper case for consumer redress under Section 13(b).").

180. *Cf.* World Travel Vacation Brokers, Inc., 861 F.2d at 1028 (advertising $29 coupon for travel to Hawaii, when actual cost of ticket was buried in other costs imposed on consumer, was "routine fraud"); FTC v. H.N. Singer, Inc., 668 F.2d at 1111 (false promises and false and misleading representations in connection with sale of franchises was "routine fraud").

181. *See* Binney & Smith, Inc., 96 F.T.C. 625 (1980) (consent order); Milton Bradley Co., 96 F.T.C. 638 (1980) (consent order); American Art Clay Co., 96 F.T.C. 809 (1980) (consent order).

182. Milton Bradley Co., [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21, 698, at 21,880; *see also* Benjamin S. Sharp, *FTC Antitrust Remedies: In the Classic Tradition*, 50 ANTITRUST L.J. 83, 92-93 (1982) (deputy director of the FTC's Bureau of Competition set out case for using section 19 to win redress in antitrust proceedings).

maiden use of Section 13(b) of the FTC Act to obtain antitrust restitution occurred in 1992, when two leading U.S. manufacturers of infant formula agreed to give 3.6 million pounds of powered infant formula to the U.S. Department of Agriculture for use in the Special Supplemental Food Program for Women, Infants, and Children.[183] Then-Chairwoman Janet Steiger described antitrust restitution as "a useful tool," and added that "you may see it used more."[184] It was not used again, however, until 1997, when the FTC and the Commonwealth of Puerto Rico extracted $300,000 (for the Department of Health) from the College of Physician-Surgeons of Puerto Rico as part of a settlement with that entity and three physician groups that allegedly had engaged in a group boycott to coerce the Commonwealth into raising reimbursement rates for a Commonwealth program for providing health care to the uninsured.[185] William Baer, director of the FTC's Bureau of Competition, characterized the admittedly "somewhat novel" restitution as "wholly appropriate," and added that this remedy "should be considered in other cases where we can identify an appropriate recipient of restitution and the amount of harm."[186]

With respect to competition cases, as with consumer protection cases, clarity would be desirable. One court has recognized the FTC's right to use Section 13(b) to win restitution in competition cases, but only against "'a straightforward violation of section 5 of the FTC Act that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings.'"[187] At one time, this was the FTC's litigating position.[188] Perhaps the FTC should evaluate the standards governing Section 19 of the FTC Act consumer redress provision (would a reasonable person have known that the act or practice was "dishonest or fraudulent") as possibly applicable by analogy to other cases.[189] Some announced policy would help. A clearer policy on when to seek monetary relief would enhance the FTC's ability to win such relief in

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183. *See* FTC v. Mead Johnson & Co., No. 92-1366 (D.D.C. June 11, 1992) (consent decree), *noted in* [FTC Complaints and Orders-1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,209); FTC v. American Home Prods., No. 92-1367 (D.D.C. June 11, 1992) (consent decree), *noted in* [FTC Complaints and Orders-1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,209. The third leading infant formula firm failed to persuade the district court that this was an inappropriate kind of case for the FTC to file, *see* FTC v. Abbott Lab., 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. Oct. 13, 1992) (denying motion to dismiss), but succeeded in persuading the court that the FTC had failed to sustain its case, *see* FTC v. Abbott Lab., 853 F. Supp. 526 (D.D.C. 1994).

184. Michael L. Denger et al., *60 Minutes with the Honorable Janet D. Steiger, Chairman, Federal Trade Commission*, 63 ANTITRUST L.J. 277, 300 (1994). For an earlier, over-optimistic forecast of the use of section 13(b) in antitrust cases, see Andrew J. Strenio, Jr., *Why Thirteen Should be a Lucky Number for Victims of Price-Fixing*, 57 ANTITRUST L.J. 149 (1988).

185. *See* FTC v. College of Physicians and Surgeons, No. 972466 (D.P.R. Oct 2, 1997).

186. William J. Baer, New Myths and Old Realities: Perspectives on Recent Developments in Antitrust Enforcement, Remarks Before the Bar Association of the City of New York, at 10 (Nov. 17, 1997), *available at* <http://www.ftc.gov/speeches/other/banyhtm>.

187. FTC v. Abbott Lab., 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. 1992) (denying motion to dismiss) ("Federal Courts have shied away from accepting direct court actions by the Commission, such as this, if the offending conduct interjects the court into areas of Commission expertise involving the creation and monitoring of new concepts of unfair competitive trade practice.").

188. *See* FTC v. International Diamond Corp., 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,705-06 (N.D. Cal. 1983) (summarizing FTC position but rejecting it as too expansive).

189. *Cf. id*. at 69,705 (reading one authority in light of the other).

competition cases. It also would reassure observers that the FTC is choosing between monetary penalties and other alternatives based on firm principles and not just litigation exigencies.

Development of FTC-imposed monetary consequences for anticompetitive acts seems eminently desirable, and might give the FTC a comparative advantage over the Antitrust Division in challenging non-criminal anticompetitive acts.[190] It is less obvious how, without legislation, the Division should begin constructing "middle ground" deterrence. Perhaps the Division should follow the FTC's lead by seeking to obtain consumer redress as ancillary relief to permanent injunctions. Alternatively, perhaps the Division should, at some point in a civil proceeding against a clear violation, consider referring the matter to the FTC.

Development of civil government-initiated consequences for antitrust violations might have benefits beyond deterrence. It could lay the groundwork for making practicable a rethinking of the use of corporate criminal antitrust penalties. At present, criminal penalties are the only viable deterrent. Until the use of civil penalties is expanded, debates about reducing criminal penalties[191] will be exclusively academic.

### C. Continue to Emphasize Individual Liability

As a matter of theory and fact, penalizing individuals is singularly effective. Further, criminal individual liability carries with it none of the awkwardness of corporate criminality. Good things follow when individuals need to worry that fixing prices may make them a felon, and that playing a leading role in causing fraud may have serious personal consequences.[192]

Insisting on individual liability is not always easy. Many corporations resist "sacrificing" high-ranking individuals. Companies may be more willing to inflict a comparatively trivial financial penalty on every shareholder (most of whom are anonymous) than a massive punishment on one particular individual, especially if that individual is a long-valued and appreciated leader. Conversely, government agencies that wage annual appropriations fights may suspect that their budget woes are more likely to be eased through huge corporate fines[193] than through imprisonment or much smaller individual fines. The Antitrust Division, which has consistently emphasized the importance of individual criminal liability and has indicted about as many individuals as corporations,[194] should be commended for proceeding in litigation against individuals involved

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190. Development of competition-based consumer redress would also permit the FTC to draw upon its consumer protection expertise to enhance its competition program. For an innovative prescription for further blending these two programs, see Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997).

191. *See supra* notes 6-8 and accompanying text.

192. *See supra* text accompanying notes 53-66.

193. *See supra* note 23. Any connection between receipt of fines and budget relief is only indirect, since fines are paid by the U.S. Treasury and are included in general federal revenues.

194. *See supra* Table 2.

in the Archer Daniels Midland matter,[195] and it should be encouraged to maintain and improve its commitment to indict individuals. It would be unfortunate were the Division's desire to reach more substantial firms to lead it to relax its commitment to reach more than merely the firms. Similarly, the FTC should continue to seek remedies against the individuals who play leading roles in causing serious consumer fraud.[196]

### D. Coordinate Sanctions

From a deterrence perspective, it make no difference whether payments are made to the U.S. Treasury, states, or consumers.[197] It is unfortunate that the Sentencing Guidelines failed to recognize this and do not permit coordination of penalties.[198] Given that federal and state enforcers are increasingly allied,[199] the only sensible course is to seek to coordinate penalties.

The obvious benefits of coordinating penalties have not gone unrecognized. The Antitrust Division conditions its grant of corporate leniency on, among other things, a corporation's making "restitution to injured parties" where possible.[200] The Division thus seeks to ensure that a corporation cannot confess to wrongdoing while retaining the fruits thereof. Conversely, it is when remedial action by private parties of state attorneys general is not likely to be forthcoming that FTC antitrust restitution is most appropriate, in the view of FTC Chairman Steiger.[201]

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195. *See Former ADM official Is Indicted for Defrauding Lysine Firm of $9 Million*, 72 ANTITRUST & TRADE REG. REP. (BNA) 78 (Jan. 23, 1997).

In a breakthrough capitulation, Archer-Daniels-Midland pled guilty to participating in international conspiracies to fix the prices of lysine and citric acid, and paid a $100 million corporate fine—the largest criminal antitrust fine in history. *See* U.S. Dep't of Justice, *Archer-Daniels-Midland Co. to Plead Guilty and Pay $100 Million for Role in Two International Price-Fixing Conspiracies* (Oct. 15, 1996) *available at* <http://www.usdoj.gov/atr/press_releases/1996press/573at.htm>; *see also* Klein, Anticipating the Millennium, *supra* note 70 (reviewing the Division's food additives price-fixing investigation).

196. Because many of the firms the FTC attacks for having perpetrated frauds have little existence beyond their principals, there is less need to trade-off and individual penalties. The real question confronting the FTC is often only how far down the chain of corporate control to go.

197. *See, e.g.*, Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 392 (1970) (noting that it is "difficult to disentangle the deterrent effects" of criminal penalties and the punitive portion of treble damages).

198. Mark Cohen found that, in his 1984-90 sample, judges imposed slightly smaller criminal penalties when expected civil penalties were large. Cohen, *supra* note 3, at 405-06.

199. Coordination can also occur at the permissive end of the sale, if the FTC uses Section 5, which does not confer a private right of action, to challenge activity that harms competition but for which it would be dangerous to permit private suits seeking money damages.

200. *See* U.S. Dep't of Justice, *Corporate Leniency Policy* (Aug. 10, 1993), *available at* <http://www.usdoj.gov/atr/Guidelines/lencorp.txt>); *see also* Spratling, *supra* note 59 (elaborating on this requirement).

201. *See* Denger, et al., *supra* note 184, at 300 (describing her vision of the ideal case for FTC antitrust restitution, which would also have clear, measurable consumer injury from a serious violation). Fudging the question of timing, Chairman Steiger first said their should be "a possibility that the party is not subject to any other kind of remedial action," and then explained that she would want a situation where private litigation "would not correct the problem and where the [s]tates could not act as parens patriae." *Id.* A similar list of factors was set out six years earlier by Commissioner Strenio. *See* Strenio, *supra* note 184, at 154-55.

The FTC took an important step toward increased coordination of penalties in *Blue Coral, Inc.*[202] The agreement that tentatively resolved this false advertising case expressly reserved to the FTC the right to seek consumer redress, without respect to any usual statutes of limitation, if the respondents did not make available consumer redress with a retail value of at least $10 million pursuant to class action lawsuits challenging the questioned advertising.[203] The FTC also reserved the right to intervene in any such class action lawsuit to oppose a proposed settlement that the FTC "does not deem to be in the public interest" (with the important exception that the FTC may not object to the amount of any settlement for which the "aggregate retail value" is at least $10 million).[204] The FTC's resolution of this dispute thus allowed the agency to play an important role in identifying and ending misleading advertising, while letting private litigants take the lead in extracting compensation and, in theory, imposing penalties on the wrongdoers, with the FTC standing by in case the private litigation failed to accomplish this objective.[205]

There will be times when private or state attorney general litigation may be a superior vehicle for aiding persons injured by illegal activity;[206] there will be times when the efficient course is entirely federal. The important thing is that there be sufficient (but not excessive) total deterrence.[207]

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202. No. 9280 (Dec. 9, 1997), *available at* <http://www.ftc.gov/os/9712/bluecora.d&o.htm>.

203. *See* Blue Coral, Inc., No. 9280, at 1-2 (July 23, 1997) (agreement containing consent order to cease and desist), *available at* <http://www.ftc.gov/os/9707/bluecora.htm>.

204. *Id.* at 6.

205. The penalizing of wrongdoers may turn out to be more theoretical than real because the FTC's agreement unfortunately allows the respondents' goods and services (although not exclusively for the engine treatment the advertising of which had been questioned). *See id. See generally* Calkins, *supra* note 91, at 442 (controversy over coupon-based settlements).

206. *Cf.* David J. Morrow, *Transporting Lawsuits Across State Lines*, N.Y. TIMES, Nov. 9, 1997, at A1 (quoting Eileen Harrington, FTC Associate Director of the Bureau of Consumer: "'The states have become our most valuable law enforcement partners. Sometimes we follow them on certain issues and then they follow us on others.'"). The increased use of state *parens patriae* authority is discussed in Calkins, *supra* note 3, at 433-37.

207. *See, e.g.*, Karpoff & Lott, *supra* note 72 (where corporate frauds have few external effects, optimal penalties, which include sanctions and reputation effects, should equal the social cost of the fraud); *see also* Becker, *supra* note 8 (theory of optimal deterrence).