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WHY IS THE UNITED STATES SO DIFFERENT FROM THE REST OF THE WORLD IN IMPOSING SERIOUS CRIMINAL SANCTIONS ON INDIVIDUAL CARTEL PARTICIPANTS?[1]

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I. INTRODUCTION

The energetic American approach to prosecuting individual cartel participants has gradually evolved over more than a century into a powerful program that remains unique. Its success appears to be based on some politics and public psychologies that our foreign friends may well regard as peculiarly American. Anyway, for whatever reasons, it is indisputably different. What still seems to distinguish the United States is public willingness—almost without debate—to treat individuals who participate in cartels as serious criminals who should be treated in the same way as embezzlers, stock swindlers and other economic thieves.

The Department of Justice ("DOJ") efforts to imprison antitrust conspirators (including foreigners residing abroad) has been continuing and growing without serious controversy, during more than three decades of alternating Republican and Democratic Administrations. At the same time, it is important to recognize that this current situation is relatively new and has evolved from some fairly humble beginnings 120 years ago.

Meanwhile, in some other important countries a lively public dialogue is underway about whether to incarcerate individuals who engage in conspiracies to fix prices, rig bids, or allocate markets. Such individuals, once caught, are usually contrite, and do not pose physical dangers to the society. Is their conduct so bad as to really justify imprisoning them? Is the public benefit sufficient to justify the cost of doing so? Wouldn't a suspended sentence combined with some high-visibility castigation be good enough?

This is the same type of debate that the DOJ Antitrust Division helped to trigger in the US during the latter half of the 1970s. I remember it well—for indeed I was in the middle of it.[3] Today, we have moved beyond that stage in the United States. Antitrust

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3 *See* Donald I. Baker & Barbara A. Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619, 623 (1977).

liberals and conservatives in the U.S. generally agree that cartels are bad at any level—local, national, or international—and that severely punishing the individuals who conspire is critical to discouraging potential conspirators in the future. Thus, because some distinctive cultural assumptions and political traditions have been so important in shaping in process, the American experience may provide less useful guidance than other countries might like to have as they decide whether or how to embark on the process of criminalising anti-cartel enforcement.

My purpose here is to sketch how the Sherman Act went from being a modest, seldom-used criminal remedy against individual wrongdoers to a dynamic weapon that now results in tens of thousands of days of jail sentences being imposed on price-fixers, bid-riggers and other antitrust felons every year. A major part of the story is the belief, shared by the enforcers and many enlightened business leaders as well, that highly visible jail sentences are the most effective way to deter cartel activities. Still these successes would not have been achieved had not the potential culprits' perceived risk of being caught been substantially enhanced by large public appropriations for criminal antitrust enforcement, energetic efforts by the DOJ enforcers, and an amnesty program that strongly encourages conspirators to rat on each other and race to the government to avoid the risk of jail for themselves.

II. A LONG SLOW ROAD

Subjecting individual wrongdoers to criminal liability was a feature in the original Sherman Act in 1890,[4] but it would not become a pillar of modern antitrust enforcement for at least seventy years. The original statute, making antitrust violations misdemeanors, imposed a maximum jail time of one year and a maximum fine of $5,000.[5] Those same sanctions remained in place until 1974 and jail sentences were still uncommon. Today, everything is totally different. Sherman Act violations are felonies for which an individual can be subjected to a fine of US$1,000,000 and or to ten years in jail.[6] In addition, an antitrust felon may be disqualified from holding various licenses, voting, or serving in various offices.

A vital breakthrough on criminal liability for individuals came with the famous *Electrical Equipment* indictments and pleas in the late 1950s.[7] These cases exposed an extraordinarily broad set of conspiracies that resulted in electrical utilities paying hundreds of millions of dollars too much for equipment and consumers ultimately paying even more for electricity purchased from rate-base regulated utilities. The size of the conspiracy and the prominence of the companies involved caught the public attention. A number of

4 Anti-monopoly fervor in the US exploded during the latter half of the 19th century as a result of the Industrial Revolution. *See* John J. Flynn, "*Criminal Sanctions Under State and Federal Antitrust Laws*," 45 Tex. L. Rev. 1301, 1302 (1967). By 1889, many states had enacted their own antitrust laws, and many of those laws imposed criminal penalties. *Id.* When the Sherman Act was passed in 1890, it was essentially a foregone conclusion among legislators that antitrust violations should be subjected to criminal penalties. *Id.* Ironically, Senator Sherman himself was the only identifiable voice against criminalization. *See* 21 Cong. Rec. 2604 (1890). Thus, the Sherman Act, which included criminal penalties as a principal means of punishment, passed by a vote of 51-1 in the Senate and 242-0 in the House of Representatives.

5 Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. Sections 1-3 (1994)).

6 15 U.S.C. Sections 1-2 (2004). In 1974, the violations were elevated to felonies and the maximum individual fine was increased to US$100,000, and the maximum corporate fine was increased to US$1million. *See* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, Section 3, 88 Stat. 1706, 1708 (1974) (current version at 15 U.S.C. Sections 1-3 (1994)). In 1990, the maximum individual fine was increased to US$350,000, and the maximum corporate fine was increased to US$10million. *See* Antitrust Amendment Act of 1990, Pub. L. No. 101-588, Section 4, 104 Stat. 2879, 2880 (1990) (codified at 15 U.S.C. Sections 1-3 (1994)). The increase in jail sentences to 10 years and fines to US$1million for individuals were contained in Antitrust Criminal Penalty Enhancement and Reform Act of 2004,Pub. L. 108-237 (2004), 118 Stat. 665 (2004). The maximum corporate fine was also increased to US$100million.

7 *See* Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GWLR 693, 705 (2001). Although the first jail sentence for a Sherman Act violation was slightly earlier, the *Electrical Equipment* cases were the watershed, because they were so highly visible to the business public and their lawyers.

individual participants—executives of some of America's most prominent manufacturing companies—were publically dispatched to federal penitentiaries based on guilty pleas. The business press widely covered the whole process, and, for the first time, potential price fixers perceived themselves as being at risk of actually going to jail.[8]

This perceived risk of incarceration is critical. In the mid-1970s, with the passage of the 1974 felony statute[9], the DOJ began to place a heavy emphasis on indicting individuals and seeking jail sentences, for the very purpose of emphasizing to wrongdoers and potential wrongdoers that they were seriously at risk. As the head of the DOJ Antitrust Division at the time, I was at the centre of this effort and very much believed in it[10]

The stakes went up even further with the passage of the Sentencing Guidelines in 1987.[11] These Guidelines treated antitrust felonies as very serious offenses. Based on the "point system" used to punish corporate criminal behavior, the Guidelines make imprisonment the normal remedy for the sentencing court in an antitrust case. As with corporate defendants, different factors may affect the fine or the number of months (or years) that the individual defendant is sentenced.[12] Finally, in 2004, Congress seriously raised the stakes again for individuals engaged in Sherman Act with a new maximum jail sentence of 10 years and the maximum individual fine of $1million (from $300,000)

It is interesting to note that all of the key criminalization landmarks (in 1890, 1974 and 2004) were signed by Republican Presidents and the ten year jail term for antitrust felons was in enacted 2004 when Republicans controlled both House and Senate.

III. POLITICS AND PUBLIC PSYCHOLOGY

Competition is not necessarily a popular political cause among many elements in a democratic society. It can disrupt the existing interests of enterprises and their employees, while the consumers and innovators who benefit from more open markets are often not overly aware about competition as the source of their benefits.

In Europe, of course, competition has been a central public goal for over half a century since the Treaty of Rome was adopted, because it was seen by European leaders as a rational way of breaking down national frontiers and other historic barriers to cross-border integration and efficiency. At the same time, cartel activities (long assumed to be a way of life) have tended to be viewed by the public and the politicians as a "*regulatory" problem* subject to regulatory remedies (i.e., fines and prohibition orders against the participating enterprises).[13] Nor does there seem to be any general political sense that often smaller

8 For a detailed report on the *GE/Westinghouse/Allen Bradley, et al* price-fixing trial and outcome, *see* Richard Austin Smith, "The Incredible Conspiracy," *Fortune*, April 1961: 132-137; May 1961: 161-164; *see also* Charles A. Bane, *The Electrical Equipment Conspiracy: The Treble Damage Actions* (New York Legal Publications, 1973).

9 Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, Section 3, 88 Stat. 1706, 1708 (1974) (current version at 15 U.S.C. Sections 1-3 (1994)).

10 *See* Justice Department speech by Donald I. Baker, "To Make the Penalty Fit the Crime: How to Sentence Antitrust Felons," 20 Nov. 1976, *reprinted in* Antitrust & Trade Rep. No. 790, at D-1 (Nov. 23, 1976).

11 U.S. Sentencing Commission, Sentencing Guidelines and Policy Statements (1987).

12 *Id*. Section 2R1.1(b)-(d).

13 "Organization for Economic Co-operation and Development, Report on Hard Core Cartels 46 n.13 (2000) (Observing that some countries have adopted the approach, recommended by the 1930 London Interparliamentary Union, that countries should even permit, but regulate, cartels since prohibiting them would be futile). Modern anticartel enforcement in the EU and elsewhere has tended to be based on *administrative* enforcement in which the agencies imposed serious fines against *enterprises*, but little or no enforcement against individual employees. *See supra* fn. 2, B. Vesterdorf, "Are fines the final answer to cartels in Europe?", Concurrences No.25915 pp. 1-2(April 2009) *("Vesterdorf")* (the author had just spent 18 years as President of the European Court of First Instance (the tribunal primarily responsible for reviewing the European Commission's fining decisions).

businessmen executives who fix prices in local markets deserve to be treated as serious criminal targets, as they now are in the US.[14]

In the US, the political dynamics are different because antitrust has always had a strong moral dimension less apparent in the rest of the world. Populist frustrations have generated key political support for creation and enforcement of antitrust law in the US at various critical times. That type of populist-driven antitrust reform was clearly reflected in the crucial 1974 upgrade of Sherman Act[15] violations to million dollar felonies (punishable by three year jail terms) and in recurring Congressional efforts to pressure DOJ to bring cases against OPEC.

Interestingly, the DOJ Antitrust Division, which has become such a visible advocate of criminalization internationally, was not a major voice in the earlier political process by which the Sherman Act violations were converted from relatively modest misdemeanors into serious felonies in the last 40 years. In 1974, DOJ had not recommended the felony statute that passed so quickly. Rather the twentyfold increase in corporate fines and trebling after maximum jail term for individuals were a Congressionally-developed response to the torrent of public outrage against the newly emergent OPEC cartel which was seen as a major source of the highly visible inflation that gripped the country. In 2004, DOJ did not publically support the political effort to increase the fines and jail sentences for individuals, but it is reported to have worked quietly to raise the stakes for antitrust felons.[16]

IV. MAKING THE PENALTY FIT THE CRIME

The fundamental US conception of jail for white collar criminals as *deterrence vis-à-vis future violators,* as reinforced by the Federal Sentencing Guidelines, is simply less well accepted outside the US. Even where European criminal penalties exist for white collar crimes (e.g., for embezzlement, bid-rigging and frauds), jail sentences are apparently less routinely imposed or are shorter compared with the US practice. In Ireland, which has enacted antitrust criminal provisions, the authorities have secured several convictions against cartel participants, but so far the judges have always entered suspended sentences.[17]

For a majority of Americans, imbued with the "robber barons" lore, price-fixing is seen as *covert theft*—and thus sending antitrust conspirators to jail, like other white collar thieves, is seen as the right remedy. Moreover, American jurors would apparently be more likely than Europeans or Asians to assume that a conspiracy was *inherently* improper and hence the only relevant question in a trial is whether any particular defendant actually conspired with others.

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14 *See, e.g.*, *U.S. v Foley*, 598 F.2d 1323 (4th Cir. 1979) (affirming convictions and jail sentences for price fixing by local real estate brokers).

15 When Congress was considering raising the cartel offense to a felony in 1973, "most witnesses testifying [before Congress] on the proposed penalty changes did not question the desirability of antitrust criminal penalties but directed their attention to whether the proposed increases were sufficient to deter would be antitrust violators." David Eckert, *Sherman Act Sentencing: an Empirical Study, 1971-1979*, 71 J. Crim. L. & Criminology 244, 244 n. 7 (1980). (*citing* The Hearings on S. 782 and S. 1088 Before the Subcomm. On Antitrust and Monopoly of the Senate Comm, on the Senate Sherman Act Felony hearings, 93d Cong., 1st Sess. (1973)). Also absent from the legislative histories of the statutes imposing and increasing criminal sanctions is any substantial protest from the business community. *See id.; see also infra* fn. 34.

16 "The Antitrust Division was very circumspect about the legislation increasing penalties; it did not appear to publicly promote the increases—but there was absolutely no doubt that the "technical assistance" it said it provided was, in fact, being the architect of the legislation." Donald Klawiter &.Jennifer M. Driscoll, "Sentencing Individuals in Antitrust Cases: The Proper Balance", 23 *Antitrust* (Spring 2009) 75, 79 n. 12 (2009)(*citations omitted*).

17 The same thing has apparently been true in Canada, which has had criminal antitrust liability for even longer than the US, but Canadian judges have generally entered suspended or other non-custodial sentences. In Ireland, there is apparently one case in which an individual was sentenced to imprisonment for contempt of court in an antitrust case.

V. THE BASIC ISSUE OF DETERRENCE

The accepted wisdom in the US is that we impose jail sentences against those who commit antitrust violations as a painful remedy for them and to deter similar conduct by others.[18] As an apparent consequence, we do not tend to see serial violators (those individuals who repeat the same offence after having been caught once). Rather, we see some different individuals and enterprises violating the law because they think they can get away with it, while projecting some significant economic advantage to themselves and or their employers in trying to do so.

Any system that is based on deterrence—and fairness—must have clear rules. Ordinary business actors must be able to understand the difference between right and wrong, and their lawyers must be able to give unequivocal legal advice. The basic anti-cartel rules against price-fixing and bid-rigging (and even market allocations) meet this required standard of clarity and predictability.

Effective deterrence also requires that those who might be tempted to take illegal action believe that there is some reasonable probability of their being caught and that, if so, the consequences are likely to be grave. Risk of conviction and imprisonment also provides a powerful inducement for one coconspirator to inform on her other coconspirators. Moreover, the US has provided a fairly high level of funding for antitrust criminal enforcement by the DOJ and a uniquely advantageous prosecutorial system of grand jury investigations. Having more DOJ staff armed with a secretive process favoring the prosecutors clearly increases the government's chance of catching covert conspirators and thereby raises the stakes for those rationally contemplating price-fixing or other cartel activities.

Consistency and comprehensiveness in enforcement are very important. For criminal laws against individual cartel participants to really matter, enforcement must be frequent and highly visible. It has taken almost a century in the US for incarceration to become routine for cartel participants who are caught. By contrast, having a criminal law against a profitable activity is unlikely to be effective as a deterrent if the normal prosecutions are so infrequent as to appear more like random lightning strikes or prosecutorial vendettas.

VI. THE WISDOM OF INCARCERATING INDIVIDUALS

Many countries now severely punish enterprises for cartel violations, but what distinguishes the US is its serious commitment to punishing individual conspirators. The case for punishing individual wrongdoers seems relatively strong to those of us who have been involved in the process. First, illegal conspiracies do not exist in the abstract; active participation by particular individuals is essential to the success of any conspiracy. Second, the participating individuals (and sometimes those who supervise them) presumably anticipate higher compensation (such as salary, bonuses, or commission) based on inflated cartel-generated economic performance, or, at the least, expect corporate advancement if the cartel efforts are successful in enhancing the revenues and profits to the individuals' business

18 It appears that even members of the US business community recognize the wisdom of jailing cartel participants. In 2000, a high level committee reporting on international competition issues promoted cartel criminalization and praised US enforcement of its criminal cartel laws. The committee's 12 members included the chief executives of three public corporations (including Merck & Co. and Xerox), a prominent Wall Street investment banker, and a Harvard business school professor. *See* Final Report, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, 163-190 (2000) (hereinafter "*ICPAC Report*") *available at* http://www.justice.gov/atr/icpac/finalreport.htm.

unit(s).The deterrence-based rationale for imprisoning individuals for cartel violations seems to remain a largely US phenomenon. Outside the US, there may be a stronger (and perhaps sometimes more appropriate) assumption that a company's leaders have participated, or have at least encouraged subordinates to participate, in some clearly illegal cartel activities in order to enhance corporate profits.

However, most of my experience has been essentially different. I have often seen that such conspiratorial activities are hidden from the company's senior management and in-house lawyers by their wrongdoing employees—who are generally ambitious individuals seeking promotions, reputation enhancement, bonuses or other indirect gains from appearing to have been more successful commercially than they really were. Thus, if I am correct, these antitrust conspirators' psychology may be analogous to that so famously illustrated by the rogue traders at Barings and Société Générale, who apparently would not have been the immediate financial beneficiaries if their fraudulent gambles had succeeded, rather than failed.[19]

The cartel conspirators to whom I have been exposed never seem to have worried about the corporate shareholders being socked with large fines and civil damages as a result of their activities. Rather, to the extent that they have worried, their concern has been about being exposed and punished themselves.

Even assuming the correctness of my belief that many corporate conspirators try to hide their activities from their corporate superiors, I still believe it is important that the employing enterprise be seriously sanctioned too, in order to maximize its incentives to effectively educate, supervise, monitor and discipline its employees.[20] However, I also believe, that beyond a point, increasing corporate fines is likely to have limited utility as a tool for in increasing deterrence.[21]

Interestingly, former President Bo Vestdorf of the EU Court of First Instance (now the General Court) has "question[ed] whether it makes any real difference in terms of deterrence that a [corporate] fine as a result of increasing the general level of fines will be set at for instance 375 millions of euros instead as before 325 millions. It makes a difference for the bottom line at the end of the year, but does it create more deterrence?"[22]

This is why I have long believed that requiring jail sentences for cartel participants should be a central feature of the DOJ criminal antitrust enforcement program. After I had stepped down as head of the DOJ Antitrust Division, a senior corporate executive friend (who would go on to become CEO of one of America's largest enterprises) once told me in the late 1970s: "you've got it absolutely right on jail sentences…as long as you are only talking about the money, the company can at the end of the day take care of me—but once you begin talking about taking away my liberty, there is nothing that the company can do for me."[23]

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19 *See* David Gauthier-Villars, Carrick Mollenkamp and Alistair MacDonald, "French Bank Rocked by Rogue Trader, Société Générale Blames $7.2 Billion in Losses On a Quiet 31-Year-Old." The Wall Street Journal. Pg. A1. Fri. Jan. 25, 2008.

20 Interestingly, the European news reports on the recent sentencing of the wrongdoing Societe Generale trader have emphasized the court's failure to impose any meaningful punishment on the bank for its failure to implement proper controls and supervision. Jerome Kerviel was sentenced to 3.5 years in prison and to repay the 4.9 euros the bank allegedly lost. Nicola Clark, "Trader, not bank, gets blamed", *International Herald Tribune,* October 6, 2010 p. 1; "SocGen's scandal—Record fine on trader distracts from internal controls," *Financial Times,* October, 2010 p. 12 (editorial); John Gapper,"Kerviel is a symptom of a banking malaise", October 7, 2010, p. 11 ("rogue trading is not only a matter of bad controls being evaded by one criminal").

21 The deterrent effect of corporate fines may be greater in situations where the enterprises are smaller and more likely to be owned by the conspiring individuals (e.g., in local services markets).

22 *Vesterdorf, supra.*

23 *See supra* fn. 21, *ICPAC Report.*

VII. ENFORCEMENT DIMENSIONS

Familiar institutional arrangements and enforcement tools that we take for granted are generally not available to antitrust enforcers elsewhere, or thus leaving them with an even more difficult task, even if a criminal anti-cartel statute is adopted.

The drafters of the Sherman Act clearly intended to create a *common law* system of antitrust enforcement (rather than a code-centered *administrative* system). Prosecutors and generalist federal judges applying vague statutes were left with huge discretion in defining legal wrongs in pragmatic terms, while fact-finding was to be done by juries of ordinary citizens. This fundamentally different from the code-centered administrative systems that are the antitrust enforcement systems that generally prevail in most of the rest of the world.

Combined Functions. It also turns out to be significant that the antitrust civil and criminal enforcement functions were combined in the Attorney General's hands when the Sherman Act was passed in 1890 and this arrangement has remained unchanged. The first budget for anti-trust enforcement was enacted a in 1903 under the leadership of President Theodore Roosevelt (who was an avid champion of antitrust enforcement) and Antitrust Division was finally created by the new FDR Administration in the 1933. The Division makes its own prosecution decisions and does not need the concurrence of the local U.S. Attorney to empanel a grand jury or bring a case in his or her District. Elsewhere in the world, civil and criminal law enforcement responsibilities have usually been divided when criminal cartel and bid-rigging penalties were enacted. Civil enforcement and investigational responsibilities are entrusted to an *administrative* agency, while ultimate responsibility for bringing and trying a *criminal* case are with a public prosecutor's office. This logical division can have some important institutional implications—because it will almost inevitably dilute a competition agency's influence vis-à-vis the business community and the bar. Traditional prosecutors (with whom the competition agency may or may not have a positive working relationship) are likely to be more cautious in bringing criminal prosecutions against antitrust conspiracies—given unfamiliarity with competition law issues, other enforcement priorities, or understandable concerns about the higher burdens of proof required in a criminal case.

Investigational Tools. DOJ prosecutors have investigational tools that are unlikely to be available to prosecutors elsewhere. Most notably, the secretive US grand jury system enables DOJ to piece together a credible criminal cartel case even when documentary evidence is limited or benign.[24]

Prosecutors use the grand jury process by playing individual targets off against each other. Only the government lawyers know exactly what information they have and from whom it came, and what information they still need to make a case—or to make a stronger or broader case. The result is definitely a "dog eat dog" environment highly favorable to the prosecutors.

Other investigational tools are also available. For example, in 2006, Congress amended the wiretapping statute to include antitrust violations to the list of crimes that could be investigated by court-authorized wiretaps.[25]

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24 Use of the grand jury in the US is guaranteed by the Bill of Rights ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury").

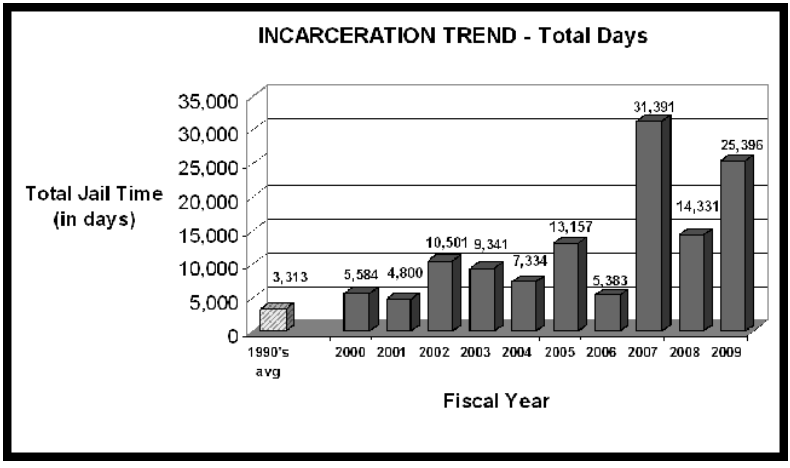
25 USA PATRIOT Improvement and Reauthorization Act of 2005 Section 113(g)(3), Pub. L. No. 109-177, 120 Stat. 192, 210 (2006); *see* 18 U.S.C. Section 2516(1)(r) (Supp. IV 2004).

Encouraging Whistleblowing. Since it was adopted in 1993, the Antitrust Division's corporate amnesty program has been much copied around the world, but the effectiveness of this program for DOJ has been seriously enhanced because it is coupled with such an effective criminal enforcement program against individual executives.[26]. The "stay out of jail" card available only to the first-in leniency applicant adds an intensely personal dimension for some of those senior corporate officials who are likely to be involved in making the decision whether the corporation should turn in its allies and seek amnesty

Thus, the US process appears quite different from that in countries that only punish enterprises for cartel violations. There the involved individuals have little incentive to work hard to recall awkward facts about meetings and understandings; instead they, like their employers, hope that the whole thing blows over without serious fines being imposed. This basic reality helps explain why the DOJ investigators are generally in a better position than many foreign agency case handlers to piece together the details of a conspiracy in situations involving very little documentary evidence of what transpired and when.

VIII. VIGOROUS DOJ ENFORCEMENT: RAISING THE STAKES AND EXPANDING THE PERCEIVED RISKS FOR POTENTIAL PARTICIPANTS

The statistics on the level of prison sentences imposed and served for antitrust violations are impressive—and surprisingly unknown to the general public. . The number of people sentenced to jail and the amount of time served has continued to increase dramatically. In any event, the statistical story is depicted in the chart below underscores both the vigorous enforcement efforts of the Antitrust Division and the practical impact of the 2004 statute increasing the maximum jail term from three to ten years:



Source: *Hammond 2010 Update*[27]

26 U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), available at http://www.justice.gov/atr/public/guidelines/0091.htm

27 DOJ Chart, *Incarceration Trend – Total Days;* Deputy Assistant Attorney General Scott D. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," speech 25 February 2010 ("*Hammond 2010 Update*"), 9 (*available at* http://www.justice.gov/atr/public/speeches/255515.htm

Thus, in DOJ's 2007 fiscal year, the Antitrust Division obtained 31,391[28] days of jail sentences for Sherman Act and related offenses! This was more than double the second highest prior year (13,157 days in 2005) and over 9 times as high as the average during the 1990s (3,313).[29] Nor was 2007 a random statistical spike; it was succeeded by sentences of 14,331 days in the following year and 25,396 in fiscal 2009.[30] There was also more consistency in custodial sentencing: 87% of criminal defendants were sentenced to jail in 2007, as opposed to 50% in 2003 and 37% during the 1990s.[31] These successes were no doubt significantly helped by Congress' 2004 action of increasing the maximum Sherman Act sentence from 3 to 10 years.[32] Thus, the average sentence was for 31 months in 2007, as opposed to 8 months during the 1990s and 16 months during 2000-2003.[33]

The Antitrust Division is also making a big effort to apprehend, convict and sentence foreign individuals—which is not so surprising, given that foreign corporations have dominated the list of major corporate fines.[34] Traditionally, DOJ has offered foreign individuals lesser "no jail" sentences in plea negotiations, but apparently that is no longer the case. As DOJ's top criminal enforcer, Deputy Assistant Attorney General Scott Hammond, has recently emphasized, "Culpable foreign nationals, just like US co-conspirators are expected to serve jail sentences in order to resolve their criminal culpability."[35] He then added, "The [Antitrust] Division's policy of placing indicted international fugitives on a 'Red Notice' list maintained by INTERPOL, and seeking to extradite any apprehended fugitive defendant, has raised the stakes for foreign executives who hope to avoid prosecution by remaining outside the United States."[36] The net result of this vigorous approach was that the average US jail sentences for foreign defendants rose to 12 months in FY2007, as compared to an average of about 3.5 months during 2000-2003.[37] Most of these results, for both periods, were based on plea bargains rather than jury verdicts—thus underscoring the increased vigor with which DOJ is pursuing such foreign culprits in order to enhance deterrence in the international cartel area.

Today, potential international cartel participants may have to live with the growing risk of ending up in a US jail, if caught. These risks should grow if more countries adopt criminal antitrust laws and have extradition arrangements with the United States.

IX. THE RECENT U.K. EXPERIENCE

American assumptions about the importance of criminal sanctions against individual wrongdoers seem to be gaining some political traction elsewhere—especially in common law countries.[38] These deterrence based ideas also seem to be generating some

28 *Hammond 2010 Update*, 9. These statistics include the jail sentences that the Antitrust Division obtained under other federal statutes (including frauds, perjury, obstruction of justice, etc), and thus they somewhat overstate the Sherman Act criminal sentences. They also underscore the reality that, once the Antitrust Division starts an investigation into a suspected cartel, it has a range of weapons in its arsenal and is willing to use them.

29 *Id*.

30 *Id*.

31 *Id*. at 8.

32 Antitrust Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237 (2004), 118 Stat. 665 (2004).

33 See *Hammond 2010 Update*, 9.

34 See Chart, "Sherman Act Violations Yielding a Corporate Fine of $10 Million or More," ("*DOJ Chart - Corporate Fines*", February 2010) available at http://www.justice.gov/atr/public/criminal/225540.htm.

35 Scott D. Hammond, "Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program", speech, 26 March 2008 *("Hammond 2008 Update"*), 7.

36 *Id.*

37 *Id.* at 8.

38 The Australian Parliament established a criminal cartel offense in 2009. *See* Australian Competition and Consumer Commission, New Cartel Laws Introducing Criminal Sanctions, *available at* http://www.accc.gov.au/content/index.phtml/itemId/882220#h2_26. Other jurisdictions, including Chile, the Czech Republic, Greece, Mexico, the Netherlands, New Zealand, Russia, and South Africa have also recently adopted, or are considering, legislation that will criminalize cartel offenses. *See* Scott D. Hammond, "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades," speech 25 February 2010 ("*Hammond 2010 Update*"), 11 (citations omitted). Belinda A. Barnett, Senior Counsel to the Deputy Assistant Attorney General, "Criminalization of Cartel Conduct – the Changing Landscape," speech 3 April 2009, 4-8. Also *see* Caron Beaton-Wells & Ariel Ezrachi (eds), CRIMINALIZING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT (Hart Publishing 2011).

illuminating analysis among thoughtful antitrust enforcement officials, even in jurisdictions that are not presently contemplating antitrust criminalization.[39]

The most important example is the U.K., which in 2002 enacted a criminal provisions for individuals participating in a cartel, while retaining an administrative system for prosecuting enterprises.[40] In April 2010, when the UK began its first trial of four alleged cartel participants under the new criminal prohibitions, a partner in a major London solicitors firm predicted that, "Making individuals responsible for competition law infringement is likely to become increasingly common…There is a growing feeling that imposing ever larger fines on businesses is neither sustainable nor effective in ensuring compliance with the competition law rules."[41]

A month later, after this initial case had resulted in the high-visibility acquittal of the four British Airways executives because the prosecutors had been unable to produce some critical late-discovered documents in time[42], the Chairman of the Office of Fair Trading responded that, "Lessons have already been learnt" and emphasized that, "[T]he OFT does not regret bringing these proceedings. They have sent an important signal to business of the risks of engaging in cartel activity and hopefully have helped practitioners to convince their clients that the risks of of criminal charges in hardcore cartel cases are real, not imaginary. Research indicates the *very significant deterrent effect of the prospect of criminal sanctions*."[43]

Some other experienced observers have drawn broader negative inferences from OFT's unfortunate defeat in the *British Airways* prosecution. One former EC cartel enforcement official argued that, "The [British Airways] trial exposed a deep fault line running through the whole [UK] criminalization project, linking the requirement of dishonesty and built-in reliance on immunity as the driver of investigations and prosecution."[44] His point is that the statute provides that, "An individual is [only] guilty of an offense if he *dishonestly agrees* with one or more other persons to make or implement [a defined set of cartel violations]"[45]; and the question of "dishonesty" is a question for the jury under whatever contemporary moral standard it accepts as controlling. The author (who is English) then adds, "Such shared standards may still exist when it comes to stealing or fraud, but as surveys show, there is no community consensus that price fixing equals turpitude."[46] While the author recognizes that "[a] strong case can be made for criminalizing

39 For a particularly insightful and detailed example, *see* Wouter P.J. Wils, "Is Criminalization of EU Competition Law the Answer?" in A.Heineman, A Kellerhals, R. Zach (eds), THE DEVELOPMENT AND PERSPECTIES OF COMPETITION LAW (Edward Elgar 2009); and the author's earlier paper with the same title in *World Competition* 28(2) 117-159 (2005) The author, Wouter Wils, is the newly appointed Hearing Officer at the European Commission.

40 That the UK, adopted its first criminal antitrust statue so recently may help to explain why so much public debate and controversy has been generated in the UK by the efforts (of the Home Office and the US authorities) to extradite a British citizen and resident in a DOJ cartel investigation. This particular case has gone all the way to the House of Lords (the UK's highest court), which denied extradition based on the lack of a parallel antitrust criminal statute in the UK at the relevant time (although the government argued that conspiracy to defraud had long been a common law crime). *Norris v Government of the United States of America* [2008] 2 WLR 673. (H.L.). Ultimately, Ian Norris was extradited to the US for obstruction of justice, based on document destruction, rather than for antitrust misdeeds, where the US Government was ultimately unsuccessful before the British courts.

41 "BA Executives Begin Cartel Trial", GLOBAL COMPETITION REVIEW, 12 April 2010 (electronic edition), *www.globalcompetitionreview.com/news/article/28258/*

42 *See, e.g.*, "Trial collapses of four senior British Airways executives accused of price-fixing with Virgin", *MailOnLine* (Daily Mail), May 10, 2010 available at *www.dailymail.co.uk/news/article-1276179.*

43 Philip Collins, "New decade, new Government—Reflections on possible evolution of the UK's competition and consumer regimes," speech in London, May 20, 2010 (emphasis added).

44 Julian Joshua, "Shooting the Messenger: Does the UK Criminal Offense Have a Future?", *The Antitrust Source* (August 2010) 1, 2 ("*Joshua").*Mr. Joshua recognizes that, "A strong case can be made for criminalizing cartels" (at 19), but questioned the implementation of the idea in the UK.

45 Section 188(1) of the Enterprise Act 2002 (emphasis added)

46 *Joshua* at 5, *citing* Adreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain,* 5 COM.L.REV. 123 (2008)

cartels," he questions whether the 2002 Act, with its "dishonesty" requirement, is an effective way of reaching that goal.[47] As I suspect is obvious, I hope that he is wrong in this negative conclusion.

X. CONCLUSION

The American experience in regularly jailing price fixers and bid riggers seems to have worked well in raising the sensitivities of U.S. individuals and their employers. Sending individuals off to jail gets a lot of attention in the business community and generates significant restraint among potential wrongdoers. This experience has made US antitrust enforcers very keen advocates of criminalizing cartel violations around the world

Being enthusiasts, the American criminalization champions may sometimes seem to overlook the basic truth that law in general, and criminal law in particular, must reflect the generally accepted values of a society. The United States famously relearned this basic lesson during the fourteen years of Prohibition (1919-1933) when it sought to criminalize the sale or possession of alcohol.[48] Instead, the US created widespread disrespect for law and many profitable entrepreneurial opportunities for bootleggers and speakeasy operators.[49] I strongly believe in the basic lesson from Prohibition: *it is better to have no law than a law that cannot be enforced (or where the society is unwilling to fund enforcement)*.

With this reality in mind, it is important that I and other Americans be realistic and recognize that enacting criminal sanctions for cartel violations would be unwise in any country where such prohibitions would run counter to its culture and probably would not be effectively enforced by the normal criminal prosecutors. Happily, the UK, Ireland, Canada, Brazil, and Australia now offer the opportunity to prove that criminalization and incarceration can be effective enforcement tools outside the US.[50] The current enforcement success in the US rests on having gradually gotten the message across to potential domestic wrongdoers that "this is serious, risky stuff, because anybody involved may turn you in—and if that happens, you are more likely than not to end up in a federal penitentiary." Thus today among well-known US companies one rarely sees the kinds of domestic conspiracies that were still around 40 years ago when I was at the DOJ. The message has been less effective among executives in major foreign companies – which may explain why (i) only foreign carriers and their employees have been charged in DOJ's *International Air Cargo* investigation and (ii) foreign corporations have paid well over 80% of the corporate fines of $10 million or more ever collected by the DOJ Antitrust Division.[51]

It is too early to tell whether the US is simply a few years ahead of some other (or many other) major countries in using criminal enforcement or whether the US has gone

47 *Joshua* at10.
48 This unwise nationwide prohibition was mandated by the 18th Amendment to the US Constitute ratified in 1919.
49 During the 1920s, the American writer Ring Lardner offered a number of wonderfully cogent observations about this great American experiment, "After all, Prohibition is better than no liquor at all." (1924); and "7 or 8 years ago…most cities had a law that you must close your saloon at 11 o'clock or 12 o'clock or 1 o'clock. Now days according to the law, they ain't no saloons so they can and do stay open as long as they feel like." (1923).
50 Whether substantial administrative fines against individuals is an alternative that deserves further attention, especially in countries where criminal enforcement against cartel participants runs counter to their culture. *See* Donald I. Baker, *An Enduring Antitrust Divide Across the Atlantic Over Whether to Incarcerate Conspirators and When to Restrain Abusive Monopolies*, 5 (1) European Competition J. 145 at 166 (2009).
51 The Division has regularly published its list of the corporate defendants that had ever paid antitrust fines of at least $10 million. According to the most recently available version (in April 2011), the top fifteen on the list (with fines ranging from $110million to $500million) were all foreign corporations engaged in international cartels. Of the 83 corporations on the $10million fine list, only 13 were US corporations and 5 more were US subsidiaries of foreign parents. The list revealed only 4 instances involving geographic markets that the Division labeled "domestic" (and only one of those cases was since 1998). *See* DOJ Antitrust Division, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More* (April 2011), available on *www.justice.gov/atr/public/criminal/sherman10.html*

well beyond what many other parliaments may be willing to enact and enforce, at least in terms of sending cartel conspirators to jail. In meantime, non-US consumers appear to have benefited from the aggressive US approach to individuals who participate in international cartels and those who employ them.