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The Paper Label Sentences: An Evaluation*

Charles B. Renfrew†

In October 1974, I imposed unorthodox and somewhat controversial sentences upon five corporate executives convicted of conspiring to fix prices in the paper label industry† in violation of § 1 of the Sherman Act.2 Besides giving the defendants suspended jail sentences ranging from three to six months and fining them from $5,000 to $15,000 each, I required, as a special condition of probation, that each defendant "make an oral presentation before twelve (12) business, civic or other groups about the circumstances of this case and his participation therein" and "submit a written report to the Court giving details of each such appearance, the composition of the group, the import of the presentation, and the response thereto."3

Although at the time that I imposed these sentences I believed they were fitting, I could not be certain that they were the wisest alternative. Indeed, one of the burdens of the sentencing responsibility is that the judge never knows whether the purposes of his sentences are appropriate, let alone whether the purposes will be achieved. The erosion of many of our assumptions about wise penal policy has created a crisis of confidence in the administration of justice, which no one feels more keenly than a sentencing judge. Yet crimes continue to be committed, convictions continue to be obtained, and judges continue to be faced with the problem of fashioning appropriate sentences for individual defendants.

This article describes the reasoning underlying my imposition of

* I wish to express my gratitude to my law clerks, Jane E. Genster, Daniel H. Bookin, Tyler A. Baker, and Paul W. Sugarman, for their invaluable assistance in the preparation of this article.
† Judge, United States District Court for the Northern District of California.
2. 15 U.S.C. § 1 (Supp. V 1975) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."
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the paper label sentences. It also discusses my effort to assess the impact of the sentences by eliciting comments from those who heard the defendants speak and from other members of the legal and business community. The purpose of the article is to contribute to the body of knowledge concerning the efficacy of sentencing decisions and to encourage other judges to become more active participants in evaluating the sentences they impose.

I. The Paper Label Sentences

A. The Offense

The paper label case involved a classic violation of the antitrust laws. The paper label industry manufactures the paper labels that are affixed to the containers of a variety of canned and bottled products. Many of the companies in the industry are small in comparison to their customers. The possibility that purchasers will shift to another more competitive supplier forces companies in the industry to keep their costs and prices as low as possible. In general, this is the type of economic situation that the competitive economic model predicts and that the antitrust laws seek to encourage.

Although such a market structure engenders remarkable efficiency, it places the businessmen involved under constant pressure to retain their market positions. As a result, no matter how strongly businessmen support competition in theory, they often tend to be considerably less enthusiastic when the competition is directed against their own companies. Manufacturers of paper labels responded to the competitive conditions in their industry by expanding casual social contacts at trade association meetings to include the exchange of increasingly explicit information concerning pricing decisions and policies. These exchanges of information eventually resulted in a division of the market through pricing agreements. The scheme collapsed when a disgruntled former employee revealed the illegal practices, leading to a number of private treble damage actions and a criminal indictment.

The indictment charged that the nine corporate and eight individual defendants had agreed, inter alia, "to obtain, prior to submitting a bid or price quotation to a particular account, information regarding bids, price quotations, or prices currently in effect at that account from the member of the conspiracy who has previously submitted bids or price quotations to, or is currently supplying, that account" and further, "to refrain from competing for all or part of the label business of customers supplied by another member of the
conspiracy. Before trial, all eight of the individual defendants moved to change their pleas from not guilty to nolo contendere. Because the private civil actions had preceded the criminal action in this case, and because the Government did not object to the change of plea, I accepted the new pleas and proceeded to consider suitable sentences.

B. The Sentencing Decision

For me, this classic violation posed an extremely difficult sentencing decision. A sentencing judge's recognition that imprisonment may be a necessary response to criminal activity often creates a tension between his sense of duty to society and his concern for the individual defendant. In the instant case, this tension was especially great because, in my view, the only theory of punishment that could justify imprisoning the defendants was one of general deterrence.

All of the defendants were community leaders of previously unsullied reputation who held top executive positions in their corporations. My personal observation of the impact of the prosecution on these defendants convinced me that they did not present a threat of continued violations. Thus, imprisonment could not be justified in terms of such typical sentencing objectives as specific deterrence and isolation. Similarly, in-prison rehabilitation was not at issue because

5. In addition, eight of the nine corporate defendants pleaded nolo contendere, and the ninth was found guilty at trial. The corporate defendants were fined from $10,000 to $50,000 each. The three individual defendants who were not required to make speeches were fined from $4000 to $7500 and received suspended jail sentences ranging from three to six months.

My exclusion of these three defendants from the speechmaking requirement did not stem from an assessment of their relative culpability for the price-fixing activity. As this article makes clear, the obligation to give presentations was designed not to punish those convicted but rather to promote general deterrence. Because I felt that these three defendants could not effectively communicate the message that I wanted conveyed, I did not impose the same duty upon them as upon the others.

6. Had the criminal action preceded the private civil suits, I would have been less inclined to accept pleas of nolo contendere. Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (Supp. V 1975), provides that a final judgment against a defendant in a government antitrust enforcement suit shall be prima facie evidence against that defendant in a subsequent suit by another party. See Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951). Antitrust plaintiffs may not, however, use a prior judgment as prima facie evidence if the defendant pleaded nolo contendere. See City of Burbank v. General Elec. Co., 329 F.2d 823, 834 (9th Cir. 1964); Note, Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions, 85 YALE L.J. 541, 561 & n.81 (1976).

7. In my experience the Government regularly opposes the entry of nolo contendere pleas to offenses that it believes are particularly serious. Thus, the Government's agreement to such pleas cannot help but have an important impact on the sentencing decision.
the defendants needed neither psychological counseling nor vocational training.

Retribution did not mandate the incarceration of the defendants because the hardship resulting from the prosecution itself and the fines that I intended to impose constituted sufficient expiation for the violations that had occurred. Being prosecuted placed a considerable emotional burden on the defendants. Furthermore, the cost of counsel had been great and had been borne individually, and the fines that I would impose were large relative to the defendants’ ability to pay. According full weight to the societal importance of the antitrust laws—an importance emphasized by the recent enactment of the Antitrust Procedures and Penalties Act, which makes such violations felonies rather than misdemeanors—8—I believed that the monetary exactions alone constituted firm and proportionate punishment.

Determining whether these fines would best serve general deterrence was for me the hard issue. Given the difficulty of detection and proof of criminal violations of the antitrust laws, a judge must use every sentencing opportunity to maximize the deterrence of potential violators. The sentences should be sufficiently harsh to discourage similar criminal activity; too lenient a sentence might depreciate the seriousness of the offense and encourage other violations.

Prior to sentencing in the paper label case, I tried to gauge the impact the imposition of fines would have on the community at large, and particularly on the business community, where other price-fixing violations might occur. Although I considered the prospective monetary penalties punitive, I was concerned that the leniency of the fines, compared to incarceration, might actually have a provocative effect on those who learned of the sentences. This possibility troubled me, particularly because the potential offenders were primarily businessmen, individuals who customarily calculate expectation of profit as compared to risk of loss. To the extent that certain of these individuals


Despite the seriousness of antitrust violations, I find a blanket comparison between these crimes and other felonies inappropriate. I believe that crimes of violence are, in general, much more destructive of the fabric of society than are nonviolent commercial crimes. The butcher who routinely charges his customers an extra quarter for the weight of his thumb on the scale surely abuses his position. Over time, his activities may result in an economic loss to his customers far exceeding the “take” of an average bank robbery, and, if discovered, his dishonesty would undoubtedly create mistrust and anger among his customers. Yet, however reprehensible the butcher’s conduct may be, I feel certain that it entails a smaller social cost than would result if each of his customers were stopped at gunpoint and robbed of a quarter several times a week for the same period of time. Violent crime massively disrupts and distorts the daily social intercourse among human beings upon which any viable society depends. While the two kinds of crime may have a similar economic impact, and may both instill some apprehension in the public, the psychological effect of violent crime is clearly more pernicious.
are otherwise disposed to violate the law, a perceived diminution in
the sanction could have the effect of encouraging violations.\(^9\)

General deterrence requires both that an unpleasant punishment be
imposed upon wrongdoers and that the public have a relatively high
degree of knowledge about the activities proscribed by law and the
sentences imposed for its violation. After careful consideration, al-
though not without reservation, I decided that the sentences I
eventually imposed met these requirements. The emotional and
financial burden of the prosecution, the fines imposed, and the de-
fendants' embarrassment in appearing before groups of their peers as
convicted criminals would supply the deterrent sting. The require-
ment that the individual defendants give speeches about their ex-
periences promised greater public awareness of the demands of the
law and the consequences of its violation. I expected that media
coverage of the sentences would convey the same message to an even
wider audience. Indeed, the communicative possibilities of the sen-
tences struck me as their most desirable feature.

I would never advocate that a sentence be fashioned solely to create
publicity. I do believe, however, that publicity can serve some of the
more fundamental purposes of a criminal sentence. In cases such as
this, where general deterrence is the principal purpose of a sentence,
it is only logical to attempt to ensure that as many people as possible
learn of the prosecution and punishment of the defendants. Violations
may be deterred by increasing community awareness that a particular kind of unlawful conduct will be detected and that prosecu-
tion and conviction will follow. Moreover, the need for general de-
terrence appears particularly acute in the field of antitrust, for there
seems to be a widespread feeling in the business community that anti-
trust violations often escape undetected and unpunished.

Of course, I could not be certain what general deterrent effect the
paper label sentences would have. Without data to aid me, I relied on
my own experience and judgment in designing the sentences I imposed.

II. Evaluating the Sentences

A. The Inquiry

During the months subsequent to the sentencing, my actions were
publicized in numerous news reports and feature articles—some highly

\(^9\) Of course, corporate crime, like individual crime, is not always based on a rational
calculus. See Note, Decisionmaking Models and the Control of Corporate Crime, 85 YALE
L.J. 1091 (1976) (arguing that perception of corporate crime as rational action is in-
adquate and discussing legal implications of other models of corporate decisionmaking).
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critical. Although the amount of publicity far exceeded my expectations, it failed to satisfy my curiosity about the impact of my sentences on the audiences who had listened to the defendants speak and on the legal and business community at large. Therefore, in the fall of 1975 I began systematically to gather evidence pertinent to an evaluation of the sentences.

I designed a questionnaire and sent it to all business, civic, and educational groups that heard one of the presentations. The questionnaire attempted to probe six principal areas: (1) the respondent's prior knowledge about the antitrust laws in general, (2) the respondent's understanding of the speaker's specific offense and sentence, (3) the respondent's attitude toward antitrust violations, particularly as compared to other forms of unlawful activity, (4) the respondent's views with respect to the type and severity of sentence that should be imposed upon antitrust violators, with particular attention to his assessment of the sentences imposed in the paper label case, (5) the respondent's recollection of the content of the speech he heard and of the speaker's attitude toward his offense and sentence, and (6) the impact of the presentation upon the respondent's business practices. I also solicited by letter the views of many individuals who did not hear the defendants but who are involved with and concerned about antitrust. These included the attorneys of record in the paper label case, other private practitioners, government officials, a number of former Assistant Attorneys General in charge of the Antitrust Division, judges, and law professors.

I received 99 completed questionnaires out of a total of approximately 2700 audience members. To facilitate analysis of the data, the questionnaire respondents were divided into two categories.


11. Each defendant was required to estimate the number of people who attended each of his presentations. It is disappointing that less than four percent of the estimated total number of audience members responded. I attribute this in part to the method used to distribute the questionnaires. Because I did not know the names of the audience members, I wrote the individual who had arranged for the defendant to address his group and asked him to distribute the questionnaires to the members of his group. At times
"Category one" included those employed in the business or financial communities; "category two" included attorneys, academics, students, editors, and others less likely to be affected directly by the antitrust laws in the conduct of their own affairs. Fifty-seven respondents constituted the first category and 42 the second. In addition, I received replies to my letter from 18 of the attorneys in the case, 7 other attorneys, 7 federal judges, and 12 law professors. These nonaudience responses were examined separately from the more structured responses elicited by questionnaire.

My inquiry did not employ statistically rigorous techniques of data collection and interpretation. The results, therefore, should not be taken for more than what they are: an impressionistic canvass of the views of people in various walks of life about the sentencing of white-collar criminals. Despite the limitations of the inquiry, I think the opinions it elicited are worth considering. The more significant insights gleaned from the responses to my questionnaires and letters are examined in the following pages.12

B. The Questionnaire Responses

The questionnaire responses indicate that the publicity engendered by the sentences did not go unnoticed. Of the persons who responded to the questionnaire, about 40% in the business category and 50% in the nonbusiness category had heard of the defendants' offenses. This may have been difficult, if not impossible, e.g., where the group consisted of students who had since graduated.

Another reason for the low response rate is that the questionnaires were not sent out until several months after the defendants had completed the bulk of their speech-making. Although most of the speeches were given during the first six months of 1975, I did not decide to evaluate the sentences until that fall. Because it took time to collect the names and addresses of the persons who had arranged the 60 lectures, the questionnaires were not distributed until late 1975. Several respondents commented about the passage of time, indicating that their remarks would have been more complete and detailed had they received the questionnaires earlier. It seems likely that more prompt distribution would have ensured not only better recall but also a wider response. Indeed, one respondent wisely suggested that the speaker should have distributed the questionnaires at the end of his speech.

12. In tabulating the data for this article, I have engaged in some subjective evaluation of the responses. Because individuals sometimes answered a given question in an unexpected place on a questionnaire, and because some answers that were ambiguous in themselves could be readily understood only when read in the context of the whole questionnaire, a simple counting evaluation would have been misleading. Every effort has been made to include both the favorable and the unfavorable comments. The frequent variation between the number of reported responses to a particular question and the total number of survey respondents is due to the respondents' frequent failure to answer all questionnaire inquiries.

Many of the persons who responded to my inquiries are authorities of national reputation. The comments are published without attribution, however, because these individuals may not have intended their remarks for publication. The questionnaire and letter responses that are quoted in this article are on file in my office.
fore attending a speech. These percentages undoubtedly would have been lower had more traditional sentences been imposed. A considerable amount of other information was gathered by the questionnaires; I shall discuss it under three categories: (1) the respondents' knowledge of the antitrust laws; (2) the respondents' attitudes toward antitrust violations and penalties; and (3) the effect of the sentences on the respondents' business practices.

1. The Respondents' Knowledge of the Antitrust Laws

Perhaps in part because of the prior publicity given the sentences, most questionnaire respondents considered themselves cognizant of the proscriptions of the antitrust laws before they heard a defendant's speech. All but one stated that they knew prior to the presentation that price fixing by competitors is illegal; more than 75% said that they were also aware that under some circumstances the discussion of pricing information by competitors is illegal.

Other information elicited by the questionnaires, however, suggests that the respondents may, in fact, be somewhat unsure of the content and scope of the antitrust laws. Many apparently have great difficulty relating the general requirements of the antitrust laws to specific factual contexts. Numerous respondents emphasized how surprised they were to learn that the type of activity in which the defendants had engaged constitutes a violation of the antitrust laws, subjecting a corporate executive to criminal prosecution and severe sanctions. Especially surprising for many was the revelation that specific intent to violate the antitrust laws is not a requisite element of a price-fixing violation. As one respondent, an insurance broker, wrote: "I was impressed by the fact that price fixing, as defined in the law, was not something that just huge corporations did intentionally. Any businessman in any competitive business could do it, intentionally or not."

Many of those who attended the speeches left with a heightened awareness of the requirements and complexity of the antitrust laws. Some were dismayed to discover that businessmen—especially small

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13. Of course, it is impossible to ascertain whether the potential increased deterrence value of the sentences due to their publicization was offset by their perceived leniency.

14. The standard jury instruction on the question of specific intent in a prosecution for price fixing is as follows:

In order to establish the offense charged in the indictment, the proof need not show that the accused acted willfully, or with specific intent or bad purpose either to disobey or to disregard the law.

The element of intent as to the offense charged is established, if the evidence in the case shows beyond a reasonable doubt that the act or acts of the accused were voluntary and intentional—that is, that they were knowingly done.

businessmen—are uncertain about what conduct would subject them to antitrust liability. Some attributed this uncertainty to inexperience or ignorance in the business community: “I believe there are many very small businessmen who have almost no knowledge of how price fixing laws specifically apply to their business operation.” Others blamed the confusion created by many overlapping, complex laws and regulations affecting every facet of business conduct.

A very common reaction to the speeches was a renewed appreciation of the need for legal advice in the field of antitrust. One individual wrote, for example, that the main point he felt the speaker had made was that “the antitrust laws are so complex and confusing to the average businessman that nothing should be done without constant legal advice.” Nevertheless, some remained convinced that nothing could resolve the businessman’s uncertainty about the applicability of the antitrust laws in a given instance. As the president of a small company wrote,

No matter how moral, ethical or highly-principled a businessman you may be, in today’s modern business, the laws are so detailed and complex that it is impossible to run a business without constant legal advice on every decision, and even this may not be sufficient to make one secure in the legal sense.

Thus the speeches evidently served a useful purpose by impressing those who attended with the seriousness of antitrust violations, the complexity of antitrust law, the need for all businessmen to operate within the limits set by law, and the importance of competent legal counsel.

15. This case heightened my awareness of the need to inform corporate employees at all levels of the strictures of the antitrust laws. As a result, the consent decree I entered in the Government’s civil enforcement action requires each corporate defendant to take affirmative steps (including written directives setting forth corporate compliance policies, distribution of this Final Judgment, and meetings to review its terms and the obligations it imposes), to advise each of its officers, directors, managing agents and employees who has responsibility for or authority over the establishment of prices or bids by which said Defendant sells or proposes to sell any paper labels, and all paper label salesmen and saleswomen of its and their obligations under this Final Judgment and of the criminal penalties for violation of [the requirements of this consent decree]. In addition, each Defendant shall, for so long as it remains in the business of selling any paper labels, cause a copy of this Final Judgment to be distributed at least once each year to each of its officers responsible for the conduct of such business and all paper label salesmen and saleswomen.


16. One of the defense counsel in the case expressed his reservations about the help-
Some of these worthwhile impressions, however, may have resulted from misinformation provided by the defendants in their presentations. When asked if the speaker had made clear the nature of his violation, 78 out of 90 respondents answered in the affirmative. Yet the textual comments in the responses suggest that many, if not most, of the respondents failed to grasp the true dimensions of the speaker's unlawful activity. Frequently the comments stressed the complex, technical nature of the antitrust laws as they were explained by the speakers, and the trap that the laws set for ignorant, albeit well-intentioned, businessmen. Several respondents, in fact, remarked that the speaker had felt victimized by those laws. Note the following responses concerning the attitude of the speaker toward his offense:

He was the victim of a vague law which he did not understand.
Everyone else did it. All occurred innocently enough. Fell into it by succumbing to his friends.
Humiliated—but felt “everyone” does it—so—why me? Why should I be “hung out to dry”?

At least one respondent even believed that the defendants were held criminally liable under some theory of vicarious liability: “He was the President of a company that violated the law and as the President must bear the responsibility. . . . He had not been on top of the dealings that were going on in his company and he was responsible as President.”

If that in fact was the picture painted by the defendants about their particular offenses and their participation in the price-fixing conspiracy, it is a markedly distorted one, not supported by the defendants’ statements to the court at the time of entry of the nolo contendere pleas. As noted above, the indictment in this case charged a widespread conspiracy to fix prices by exchanging specific pricing information about specific customer accounts and by agreeing to refrain from competing for the business of certain of a competitor’s customers. These are per se violations of § 1 of the Sherman Act, conduct that all

fulness of typical legal advice in the antitrust field. He pointed out that a prominent commentator on the antitrust laws advises in his treatise that competing businessmen may discuss information gathered by trade associations concerning such matters as the cost of a product, the volume of production, the price history of the product, the amount of inventory, and transportation costs. See E. Kintner, An Antitrust Primer: A Guide to Antitrust and Trade Regulation Laws for Businessmen 32 (2d ed. 1973). As counsel stressed,

While the distinction [the commentator] makes may be correct as a matter of law, as a matter of evidence it raises serious problems. With advice like this can the lawyers (judges) now condemn the clients? No doubt these issues will be even more serious as we commence to have felony price fixing trials.
but one respondent knew to be unlawful even prior to attending the presentation. The defendants were not charged with violating the far less clear proscriptions against monopolizing or attempting to monopolize that are embodied in § 2 of that Act. To be sure, the defendants’ unlawful activity evolved gradually, a point rightly emphasized by the speakers and recalled by many respondents. But if the speakers left the impression that they were the unwitting victims of a vague and technical statutory scheme, they failed to make clear the true nature of their unlawful conduct.

Similarly, none of the defendants was charged on a theory of respondeat superior. All of the defendants held positions of authority in their corporations, and I would not have accepted any defendant’s plea if I had not been convinced that he either knew of or engaged in the unlawful activity. Certainly, therefore, it is disturbing to hear that a respondent could leave a presentation with the belief that the speaker “was held responsible for the crime even though he did not order such [activity] and was not aware of it until after it was committed. . . . [T]he question of whether the party was truly guilty of any crime comes to mind . . . .” To the extent the presentations created a false impression of the defendants’ conduct and the character of the antitrust laws, they were counterproductive.

2. The Respondents’ Attitudes Toward Antitrust Violations and Penalties

The questionnaire was designed not only to illuminate the respondent’s perceptions of the antitrust laws but also to elicit the respondent’s opinions about antitrust violations and about the appropriate sentences for antitrust violators. Questions on these latter points generated some contradictory responses. When asked specifically to rate the seriousness of antitrust violations, all but four respondents stated that they considered such violations serious or moderately serious. When asked to compare the stigma of antitrust violations with that of other crimes, however, many consistently found antitrust violations

18. Respondents were asked, "Do you feel that violations of the antitrust laws such as price fixing are serious, moderately serious, relatively unimportant, or unimportant?" The responses were as follows by category:

<table>
<thead>
<tr>
<th>Category</th>
<th>One</th>
<th>Two</th>
<th>Total</th>
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<tbody>
<tr>
<td>Serious</td>
<td>35</td>
<td>31</td>
<td>66</td>
</tr>
<tr>
<td>Moderately serious</td>
<td>15</td>
<td>8</td>
<td>23</td>
</tr>
<tr>
<td>Relatively unimportant</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Unimportant</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
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</table>
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less stigmatizing. Moreover, half the respondents stated that they believed antitrust violators should be treated more leniently than other violators of the law.

Similarly, when asked directly whether antitrust violators deserve imprisonment, 62% of the persons in category one and 62% in category two responded affirmatively. Yet, when asked for their reaction to the sentences imposed in the paper label case, an overwhelming proportion of the persons who replied to that question—81 out of 93—

19. Respondents were asked, “Do you feel that a stigma or some social disgrace attaches to a person who is convicted of violating the antitrust laws?” The responses of those who answered affirmatively were tabulated as follows to the next part of the question, which asked whether they felt the stigma associated with antitrust violations is more or less severe than that associated with:

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<thead>
<tr>
<th></th>
<th>More</th>
<th>Less</th>
<th>About the Same</th>
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</thead>
<tbody>
<tr>
<td>Embezzling from your employer?</td>
<td>7</td>
<td>32</td>
<td>16</td>
</tr>
<tr>
<td>Bribing a government official?</td>
<td>6</td>
<td>22</td>
<td>27</td>
</tr>
<tr>
<td>Evading federal income taxes?</td>
<td>9</td>
<td>20</td>
<td>26</td>
</tr>
<tr>
<td>Bank robbery?</td>
<td>3</td>
<td>49</td>
<td>3</td>
</tr>
<tr>
<td>Defrauding purchasers of a product?</td>
<td>7</td>
<td>17</td>
<td>31</td>
</tr>
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<thead>
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<th></th>
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<tbody>
<tr>
<td>Embezzling from your employer?</td>
<td>2</td>
<td>26</td>
<td>11</td>
</tr>
<tr>
<td>Bribing a government official?</td>
<td>2</td>
<td>26</td>
<td>11</td>
</tr>
<tr>
<td>Evading federal income taxes?</td>
<td>5</td>
<td>14</td>
<td>20</td>
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<tr>
<td>Bank robbery?</td>
<td>2</td>
<td>32</td>
<td>5</td>
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<td>14</td>
<td>34</td>
<td>46</td>
</tr>
<tr>
<td>Bank robbery?</td>
<td>5</td>
<td>81</td>
<td>8</td>
</tr>
<tr>
<td>Defrauding purchasers of a product?</td>
<td>10</td>
<td>30</td>
<td>54</td>
</tr>
</tbody>
</table>

20. Many of those who advocated more lenient treatment explained that white-collar crime generally warrants a response different from violent crime; they simply did not view regulatory violators as “common” or “hardened” criminals. Many also suggested that antitrust offenders in particular deserve special treatment; these respondents believed that antitrust violators are less culpable than others because the laws themselves are so ambiguous. A few felt that the motivation for antitrust violations differs from that for many other crimes: “It is difficult for me to equate violent crimes, such as murder, or personal crimes, such as embezzlement, with violations of antitrust, which for the most part I believe occur from ignorance, and not for personal gain.”

21. Many respondents quite correctly stressed that the decision to incarcerate an antitrust violator should depend upon the totality of the circumstances. Seventy percent of those advocating incarceration believed that prison sentences are appropriate only for deliberate and serious violations. Three indicated that prison is appropriate for repeat offenders. Thirty-five percent of those in category one and 24% of those in category two flatly stated that antitrust violations do not merit prison sentences.

Nearly all respondents thought that antitrust violators should be required to pay a fine. The responses to the question, “Do you think that businessmen who violate the antitrust laws deserve to be required to pay a fine?” were as follows:
indicated that they agreed with the sentences. Interestingly, of the 12 respondents who disagreed with the sentences, 9 did so because they felt the sentences were too harsh. One individual even stated that “this particular sentence came close to ‘cruel and unusual punishment,’ because it subjected the speaker to personal humiliation.”

The views of the respondents who felt that the sentences imposed were too lenient are also worth citing. A self-employed commercial printer felt that the sentences were “much too lenient, in essence all they amounted to was a slap on the hand. . . . It seems to me that [the] punishment was a complete farce!” Another, an adjunct university professor, thought that the sentences were “extremely lenient”; that imprisonment was definitely warranted; that the speaker had not accepted the fact that he had broken the law but “had rationalized away any guilt feelings he might previously have had”; and that, although “the speaker was chagrined at having to make his ‘confession,’ I felt the lesson he learned was to be more astute in the future.” These views were echoed by an attorney, who also felt that the sentences were too lenient and who was particularly displeased that the speaker, in his opinion, “did not fully describe the anti-trust violation or indicate verbally that anything wrong had been done.” These comments notwithstanding, the consensus of those who attended the defendants’ speeches was that the sentences imposed were appropriate. Although over half stated that serious antitrust violators should be imprisoned, only three felt that imprisonment in the paper label case would have been fitting.

When read together, these sets of responses reveal two inconsistencies. First, although virtually all respondents considered antitrust violations to be serious or moderately serious, only about two-thirds felt antitrust violators deserved to be imprisoned. Second, although two-thirds of the respondents supported imprisonment of antitrust violators in

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<th>Category One</th>
<th>Category Two</th>
<th>Total</th>
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<tbody>
<tr>
<td>Yes</td>
<td>50</td>
<td>38</td>
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<td>No</td>
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About a quarter of those who responded affirmatively recommended fines only for serious violators.

Several respondents suggested that the amount of any fine imposed should reflect, among other things, the profit gained from the defendant’s unlawful activity. For example, one individual urged that the company be fined a sum equal to 25% of the total profits it earned during the period of violation. Another recommended that the fine should approximate “25% or 50% of the value of the business generated as a result of the antitrust action.”

In elaborating upon his answer, one respondent stated that he “felt the sentences to be corrective, rather than punitive.” Others described the sentences as “appropriate,” “fair,” “effective,” “constructive,” “practical,” and “creative.”
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general, virtually none of the respondents thought such a penalty was appropriate in the paper label case.

The first inconsistency may reflect some degree of dissatisfaction with the imprecision of the antitrust laws as codified. Respondents frequently indicated that the antitrust laws are so imprecise that prosecution under them is somewhat unfair. Many characterized the law as a maze of complex, technical rules that poses myriad traps for the well-intentioned, unsuspecting businessman who becomes "the victim of a vague law which he did not understand." The respondents repeatedly emphasized lack of specific intent and ignorance of the law as troublesome elements in the antitrust context.

It is not surprising that these attitudes underlie the views of many who found antitrust violations less serious and less stigmatizing than did the respondents as a whole. A marketing manager, for example, wrote that he believed antitrust violations are less stigmatizing than violations of other criminal laws precisely "because of the ambiguity of the law." For others, the stigmatizing effect was lower because they felt the antitrust violator lacked specific intent to break the law: "The apparent lack of attention to the provisions of the law in this case would seem to make the violation less stigmatizing than a direct and willful violation such as [embezzlement, bribery, tax evasion, bank robbery, or consumer fraud]."

The respondents' knowledge about and attitude toward the antitrust laws may also have contributed to their seemingly inconsistent views concerning the type of sentence that generally ought to be imposed and the type of sentence appropriate in the paper label case. In addition, this second apparent inconsistency may stem in part from the respondents' personal encounter with a defendant in the paper label case. To decide to incarcerate a fellow human being is difficult. To maintain a harsh attitude toward sentencing when face-to-face with the person who would suffer the consequences of the sentence is especially difficult. The step from the theoretical belief that "antitrust violators should be imprisoned" to the specific judgment that "this particular businessman who stands before me ought to be incarcerated" is one not easily taken.

For many, the difficulty is compounded when the individual to be punished is, in most respects, an upstanding member of his community and a person with whom so many of the respondents apparently empathized strongly. As one stated, "They broke the law but they are not 'criminals' in the true sense of that word." More emphatic is the comment of another: "I think the laws and the judges should con-
centrate more on putting criminals in prison and keeping them there, than sending taxpayers to prison.” The remarks of one respondent, an insurance broker, are particularly illuminating:

At the dinner meeting where [the defendant] made his talk, I shared a table with about six other people. All said that at one time or another they had engaged in the practices that resulted in [the defendant’s] sentence. Two of them (both personally known to me as decent and ethical men) expressed their dismay that on that very day they had engaged in a conversation about a job that one had lost to the other in a bid situation which would have put them in violation of the law, as [the defendant] explained it to us. I have often heard that “ignorance of the law is no excuse,” but I feel that maxim must be tempered in times like ours. The body of law is growing at an alarming (and, in my opinion, an unnecessary) rate. When, despite the best efforts of trade associations, attorneys, accountants and insurance advisors, two honest businessmen can break the law without knowing it, we have a situation that needs correcting. Had my friends been “caught in the act” and received sentences anything [like the defendant’s], I would have considered it a gross miscarriage of justice.

The respondents’ differentiation of these defendants from other antitrust violators may also reflect the speakers’ inaccurate descriptions of the conduct in which they engaged. That these defendants may have characterized themselves, deliberately or inadvertently, as particularly sympathetic antitrust defendants is regrettable. Unfortunately, I cannot ascertain to what degree the defendants’ distorted characterization of their participation in the price-fixing activity colored the responses of their audiences.

Finally, the respondents’ inclination toward less stigmatizing sentences may have stemmed from their identification with the defendants they heard and their consequently profound appreciation of the costs of criminal liability. Personal exposure to an individual being punished for violating the antitrust laws clearly had a significant impact. Several respondents stressed, for example, that they were impressed by “the anguish that [the speaker] suffered with his family,” and the “personal feeling of the speaker’s loss of peace of mind and well-being during the entire episode.” One respondent wrote:

I consider the opportunity of hearing this man tell his story as a very positive one. It is a long way from headlines in a paper to the thoughts in the mind of the individual involved in the story. The headlines are soon forgotten, but the severe effect on the individual involved, as told by him, will remain for a long time.
Another summarized his views succinctly: "Having seen this man in person impressed me more than reading about 10 men having been convicted of violating the anti-trust laws." Several respondents stated that the very thought that they might ever have to make such speeches themselves was truly frightening. It was probably sentiments like these that underlay one of the more striking results of the inquiry: although three-quarters of all respondents stated that they believed the stigma associated with antitrust violations would be increased if the offenders were sentenced to prison, 65% of those in category one and 55% of those in category two stated that prison would be less effective than the paper label sentences in preventing similar offenses by others in the future.23

3. The Effect of the Sentences on the Respondents' Business Practices

The highly personal reactions to the speeches often had a practical impact upon respondents' business affairs. Respondents were asked: "What changes, if any, have occurred in your business practice as a result of the speech?" A significant number indicated that the presentation they heard heightened their awareness of the antitrust laws and prompted a review and intensification of their compliance procedures:24

- Reconfirmed company policy to all levels of management regarding antitrust laws.
- A greater effort has been made to teach the law and insist on compliance within our organization.
- We are much more aware of our responsibilities and have double checked our method of operations.

23. Only 19% of the respondents in category one and 17% of those in category two thought prison would be a more effective deterrent. One of these explained that "prison may not be much of a deterrent with crimes of passion or extreme need. But it probably is for people with comfortable incomes who just decide to be greedy." Another wrote that, although "this sentence did much more to get my attention, . . . the threat of prison is the primary deterrent in my mind." And a third, an attorney, stated concisely, "Prison still is the greatest fear of the white collar person."

- A number of persons were unwilling to characterize either incarceration or speech-making as the more effective deterrent. Four persons in category one stated that the relative effectiveness of these penalties would depend upon the circumstances of the individual case. Three individuals in category one felt that the deterrent impact of the two kinds of sentences would be roughly equal.

24. Others affected by the antitrust laws stated that they made no changes in their business practices. Of course, for most respondents in category two the question was inapplicable because the antitrust laws do not impinge directly upon their particular business or profession.
More warnings and wider policy dissemination.

Given far greater attention to all aspects of our business that could result in any infraction of the anti-trust law.

My competitors and I are a hell of a lot more careful about making sure [our prices] aren’t followed.

Pricing decisions are subjected to more intense scrutiny.

Significantly less discussion with competitors.

More careful than ever in any business meeting, even with regard to superficial remarks.

Others described more elaborate changes in business practices undertaken directly in response to the presentations:

All staff have received written reconfirmation of the general areas of antitrust law, and copies of the company policies which confirm that violations will not be tolerated. There has also been increased use of company counsel in terms of confirmation of all major company decisions.

Meetings at all divisions—brought in our attorney to talk at them. Letter to all management personnel about not supporting covert activity.

Mandatory standard procedures have been imposed for all individuals within the company to know and understand the corporate policy that absolutely forbids any price fixing or any other conditions which would restrain trade. Copies of the Anti-Trust laws are in the hands of all key personnel and all new employees are required to sign a statement that they understand them as a company policy.

Finally, the presentations appear to have generated an effort by members of the audiences to convey the defendants’ message to others. One respondent, for instance, stated that although he himself had not changed his business practices, he had “related the speech to other businessmen as a warning.” A university instructor said that he had tape-recorded the speech and now replays it in each of his classes in basic marketing. And a business executive wrote:

This talk and the need for increasing the general knowledge of antitrust prompted me to recommend this subject for the agenda of our corporate partners’ meeting last February. I had the occasion to present [the speaker’s] story and the problems of antitrust violation to our 200+ partners. It was very well received and many of the managers have taken direct measures to guard against such activities.
These comments are encouraging, for they suggest that the sentences imposed in the paper label case succeeded to some extent in achieving the principal objective of general deterrence. It is impossible to know, of course, whether the changes in business practices purportedly made in response to the defendants' speeches were fundamental and whether the speeches will continue to influence conduct in the business community. It is also impossible to ascertain whether the deterrent effect of these sentences was any greater than that of other types of sentences that might have been imposed. Nevertheless, the responses are consistent with the view that the presentations given by the defendants spurred efforts by certain members of the business community to ensure that their business operations comply with the antitrust laws. In my opinion, this finding is significant.

C. The Letter Responses

Because the replies to the letters I sent to attorneys, judges, and professors were not as structured as the responses to my questionnaire, they are less susceptible to organized analysis. Although certain attitudes were shared by members of all three occupational categories, it seems plausible that one's position in the legal world might bear upon one's attitude toward the sentences in the paper label case. Therefore, I discuss the responses of attorneys, judges, and professors in turn.

1. Attorneys

Perhaps understandably, the attorneys who represented the defendants in the paper label case expressed general enthusiasm for the type of alternative sentence imposed.\(^\text{25}\) They repeatedly emphasized the impact they felt the speeches had upon the business community: "The impact on the business community and on their legal advisers was more dramatic, persistent and penetrating than would have been the imposition of jail terms." Of particular interest were the comments of several of these attorneys who stressed that, from their perspective as private corporate counsel, the defendants' speeches were far more influential than presentations of counsel. One attorney wrote:

\(\text{25. Although each counsel in the paper label case was asked to disassociate himself from his role as advocate, "and instead [to] approach the issue from the perspective of a judge," such a change in perspective is not easily achieved; for some it was impossible. With admirable candor, two attorneys admitted this to be so. Judging from some of the comments that were submitted, I suspect that some of the other responding counsel, though perhaps not conscious of their professional bias, were similarly unable to transcend their role as advocates.}\)
Here were individuals who faced the threat of jail, talking to other business persons about their involvement, and the serious possibility, if not probability, of a jail sentence.

... These defendants were able to impress their audiences on a first hand basis, and I am certain that the presentations made carried far greater weight than innumerable presentations by counsel.

Another stated:

[In antitrust compliance talks I from time to time give to clients, ... I attempt to explain to businessmen the serious nature of the antitrust laws and the horrendous consequences that can flow from violations of those laws. [A colleague] has characterized that portion of an antitrust compliance talk as the “rattling the bones” portion. It had often occurred to me that that portion of the talk could better be delivered by one who had suffered the consequences of an antitrust violation rather than [by] a lawyer.

These attorneys frequently cited the extensive publicity given to the sentences as another of their desirable attributes. One said:

I was particularly impressed with the extraordinarily wide publicity which the sentences received, not only in the media but in conversations among businessmen. I very much doubt that a more routine sentence would have served to disseminate so widely the Court’s message that the antitrust laws must be respected and that, whatever may have been the situation in the past, the consequences of future violations will entail great personal tragedy and corporate loss.

Indeed, one of the Government attorneys indicated that he had changed his opinion concerning the propriety of the sentences as a result of the publicity they received. He stated that he had initially “fully agreed with the Government’s recommendation that certain of the defendants be sentenced to serve actual jail terms” and had found the Court’s sentences too lenient. But he explained, “After the wide publicity generated by the sentencing and the speeches I relented in my original opinion as to this specific case. I believe in this specific instance the sentences imposed by the Court had a very great educational effect on the business community.” He added, however, that he viewed the sentences imposed in the paper label case as sui generis and felt that, if repeated, their deterrent effect would be greatly diminished. Several attorneys noted that the publicity generated by the sentences was particularly well-timed in that it coincided
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with the recently enacted increase in penalties for violation of the antitrust laws.

Although these attorneys generally agreed that the publicity afforded the sentences was valuable, their evaluations of the sentences differed. Several were worried that the speechmaking requirement placed exorbitant demands on the individual defendants and their families. As one stated, "The obligation of giving a number of speeches... put a heavy burden on the individuals to think about what they had done and express their concerns. It must have been a difficult and humiliating thing for them to do..." One attorney thought the sentences were too harsh because they "repeatedly put the defendants in a very demeaning position." Another counsel disagreed in even stronger terms, arguing that the sentences "smack[ed] too much of the self-criticism demanded of 'sinners' by Red China and other doctrinaire Communist nations." 26

One Government attorney stated that he believes incarceration is the appropriate sentence in price-fixing cases "for no other reason than as a general deterrent to other businessmen who may be inclined to engage in similar activities." All other counsel of record, however, concurred that incarceration would not have been suitable for the defendants in the paper label case, individuals with "excellent records as citizens and businessmen, ... religious men with service backgrounds." The consensus among this group seemed to be that imprisonment in this case would have offended their sense of fundamental fairness. One attorney even questioned the very basis of general deterrence: "It would have been unjust to impose incarceration on the individuals involved in the label cases on the assumption that this would have acted to deter others from acting illegally." Of crucial significance for many was the enormous toll they felt incarceration would have exacted:

A prison term could have been debilitating and disastrous to the individuals involved and their families.

It seemed to me that even the briefest period of imprisonment would result in a lifetime of shame for him.

Interwoven with these comments is the familiar theme that antitrust violators are severely punished by the humiliation and loss of reputa-

26. Two attorneys stated technical but serious legal objections. One expressed concern that the speechmaking requirement "was in conflict with the nolo contendere pleas and the concern about admitting liability in civil actions." Another felt that the sentences might expose the defendants to liability in state courts because of admissions made in the speeches.
tion that follow a criminal conviction. As one attorney put it, "A mere conviction, therefore, is about as severe as any penalty which you can impose upon an individual of that type."

Despite their beliefs that incarceration would not have been an appropriate response to the paper label violations, several counsel in the case stated that they believed the threat of imprisonment remained the single strongest deterrent in the field of antitrust. As one wrote, "While I do not personally believe that individual violators of the antitrust laws should be subject to punishment by incarceration, I recognize the argument that incarceration, or the threat of incarceration, is the strongest means to prevent widespread violation of these laws." The real question for these attorneys was not whether imprisonment would have constituted a more effective general deterrent than the sentences imposed—clearly for them, it would have—but whether the increase in deterrence would have been worth the assumed private and social cost:

Doubtless, maximum jail sentences (like amputation) would have had a greater deterrent effect at least as to the number of other persons effectively influenced. I am sure such would have been at the cost, in some cases, of lost careers and perhaps destroyed family relationships. How one weighs these considerations is why we hire judges.27

These responses pose an interesting problem. The threat of incarceration may not continue to serve the purposes of general deterrence if it is never carried out. If fear of imprisonment is really the primary deterrent, a movement toward alternative sentencing may itself carry a weighty social cost.

Many other distinguished members of the bar graciously took the time to write at length concerning their reactions to the sentences and their views about the antitrust laws in general. Their letters reflect a broad spectrum of opinion. One attorney expressed "serious doubts whether incarceration serves any useful purpose in the antitrust field. . . . [I] would doubt that the fact that an antitrust defendant was sent to jail would have much deterrent effect." He believed that,

27. Although this attorney correctly identified the factors to be balanced, I remain unconvinced that from one week to one month of incarceration, which the Government recommended in the paper label case, would have left "lost careers" and "destroyed family relationships" in its wake. I do not wish to depreciate the hardship associated with even a short term of imprisonment. Nevertheless, I feel constrained to emphasize that in this case the specter of prolonged enforced separation of the defendant from his job or family was not a realistic possibility. Thus, in the paper label context, otherwise legitimate concerns about imprisonment were simply not relevant.
from the standpoint of deterrence and punishment, what hurts most is a heavy pecuniary fine. The common impression is that anybody who works for a large corporation is immensely wealthy. That just is not the fact, having regard for the tax structure and the inflation which plagues our society. A $100,000 fine represents a substantial part of the estate of most executives. It can only be replaced with after-tax money[,] which is not easy of accomplishment.28

In contrast, another attorney wrote that it has been his firm's experience "that an acceptance of nolo pleas and the imposition of fines do not act as effective deterrents to future violations of the antitrust laws." He welcomed the sentences imposed in the paper label case as "an effective device to discourage company officials, who often arrogantly regard themselves apart from the mundane antitrust violation activities," and suggested an additional penalty, "to cause the corporation to remove the offending officers from the official positions held and terminate employment."29

The reaction among this group of attorneys to the particular sentences I imposed was mixed and somewhat tentative. A few expressed general approval:

[The sentences] viscerally and doctrinally appealed to me as a much greater deterrent, if we ever do know how to measure it, than incarceration in jail.

[This is indeed punishment which to some might be even more humiliating than merely a suspended sentence or even a short time in jail.

[O]n the whole, I am pleased with this innovation. When I think of the horrendous felonies that are committed every day where the lives of the citizens of various communities, especially the large cities, are daily threatened and result so often in homicides, I cannot bring myself to believe that the illegal per se antitrust offenses are as venal intrinsically as many of the other crimes committed with willful intent and often with malice aforethought. I would not have taught antitrust for some decades had I not had a firm conviction of the validity of [its] fundamentals, but I also

28. The writer, however, did not exclude the possibility that there might be some instances in which the gravity of the violation would warrant both imprisonment and a substantial fine.

29. This sanction was also suggested by one of the questionnaire respondents. It has been mentioned with approval by several commentators in the field of antitrust, including Ralph Nader. See Nader, Introduction to M. Mintz & J. Cohen, America, Inc. at xviii (1971).
feel that when antitrust enforcement overreaches, the backlash is apt to be more damaging to the public interest than the offenses themselves.

Others were more equivocal:

I have no objection to or criticism of the [sentence] . . . . I admire the innovative thinking that went into the sentence, but a priori, I would doubt its [efficacy]. As a pragmatist, I reserve judgment and am prepared to temper my views by the results of actual experience.

And one attorney forcefully expressed his disagreement:

[The sentences] establish a “double standard” for “white collar” offenders which seriously undermines respect for the entire criminal justice procedure. Finally, the sentences do, intended or not, “depreciate” the seriousness of antitrust violations [by] suggesting that there exists a judicial tolerance for this non-violent form of theft.

. . . .

If the only real risk of a scheme which would produce vastly enhanced, artificial profits is the relatively mild rebuke and embarrassment of speechmaking (which at least one defendant came to enjoy), then I suspect the very human vice of greed will prevail in most instances. In short, “compromise” sentencing makes the game worth the candle.

2. Judges

A similarly wide range of opinion is reflected in the letters received from judges. Two judges declined to express an opinion about the sentences imposed, one believing he lacked sufficient information to assess the sentences, and the other remarking how uncertain we all are in this area: “All things considered, I come out enrolled as student rather than teacher.” Two judges viewed the sentences favorably. One stressed that, in his view, “compliance with your sentences was humiliating, perhaps more humiliating than a short prison sentence quietly served out of public view,” but also noted that it was his customary practice to impose short prison sentences—two weeks or five weekends, for example—upon income tax violators. Another judge was particularly impressed by the speechmaking requirement, indicating that he might impose similar sentences if an appropriate occasion arose.

Three other judges were in substantial disagreement with the sentences. One voiced a concern mentioned by several others, namely,
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that businessmen who violate the law must not be treated preferentially:

The courts must evaluate these white collar (antitrust) crimes and if the only effective deterrent is imprisonment, then such sentences will have to be imposed. The term of each sentence will have to depend upon the gravity of the offense in each case. The question will always be: How and in what manner was the public (or consumer) injured thereby and [to what degree does] the offense [tend] to create disrespect for the law.

As another judge put it:

In candor, I should tell you I have a deep conviction that the relatively few who are successful enough to enjoy the top material advantages of our society certainly should not be given special consideration when they are sentenced for major criminal offenses that adversely affect millions of their fellow citizens.

The strongest disagreement was expressed by an able and well-known district judge. He wrote:

Jail for "white collar" defendants is the only real deterrent. It carries a social obloquy and brands the offender for what he is. It is not appropriate in truly technical offenses, but fraud is another thing and certainly many per se violations of the Sherman Act fall in the same category. We judges tend to forget the suffering of those who are victimized by such offenses.

My experience at the bar was that one jail sentence was worth 100 consent decrees and that fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by the company down the line. There is no difference between a nolo plea and a guilty plea except for its impact on civil litigation.

... I would be unable to sleep nights if I continued to imprison blacks for nonviolent felony offenses, as is often necessary, and put white "white collar" offenders on the street. Defendants cannot be given different treatment because of their education, color or continued acceptability by clubs and civic groups. Your approach is not without much merit. It is ingenious. But are you not obliged to handle common people who forge a Treasury check, fail to file income tax, cheat Internal Revenue, or engage in some tawdry swindle the same way? Jail terms need not be long but they make the difference and I have found they often give the offender a new perspective on life.

3. Professors

The final group whose opinions I solicited consisted of professors in the fields of antitrust, criminal law, and business administration.
Eleven professors responded. Their letters display less general agreement with the sentences than the responses of any other group. This is not to say that all of them believed that all antitrust violators should be incarcerated. In fact, three of them were quite adamantly opposed to imprisoning antitrust violators. One professor wrote: "I view imprisonment as a sanction of last resort to be imposed only where all other methods of sanctioning fail. And I don't believe that the antitrust area is one where we do have to resort to prison sentences."

Another stated: "I don't think imprisonment is appropriate for first offenders except in egregious cases like the Westinghouse rigged-bids cases over a decade ago. The offenses, however severe from an economic viewpoint, lack that moral bite in the general public view which makes imprisonment appropriate."

A larger number expressed the view that the only deterrent for potential antitrust violators is a jail sentence. The following comments are illustrative:

I doubt . . . that any sentence which does not involve a term in jail will really succeed in convincing businessmen that price-fixing is a truly criminal activity rather than a minor breach of regulations.

Because the offenders may be able to inflict their power on so many others, and because the aggregate effects may be so large[,] I believe that strong penalties should be levied on the major offenders. I continue to be amazed at the shock and horror which the business press displays when a stiff sentence, including jail, has been handed down in an anti-trust case. From that information I conclude that jail does indeed—in this one area of law, at least—act as a deterrent.

[Although I am generally very much in favor of avoiding imprisonment or jail, and therefore sympathize with your approach to the sentencing problem, I wonder if a brief symbolic period—say a week or two—of actual time in confinement might not be warranted.

Speaking again only of explicit price fixing cases, I would like to see actual prison sentences imposed and served far more often than has been the historic pattern. I am not speaking of long sentences, thirty days would generally be sufficient. The businessmen I have represented over the years are truly terrified of the prospects of going to jail. My guess is that the prospect of the thirty day jail sentence carries more deterrent wallop than all but the most savage of fines.
Given these views, it is not surprising that most of the professors felt that the deterrent impact of the sentences imposed in the paper label case was inadequate. The following comments are typical:

I am skeptical that any amount of public speech making could have the impact on the business community that a few well-publicized jail sentences would have.

My guess, subject to more information, is that sophisticated corporate officers will regard this kind of sentence as further evidence that trial judges share their view that antitrust offenses are a particularly innocuous kind of white-collar "crime," and that if such sentencing becomes at all common, responsible counsel will have an increasingly difficult time discouraging corporate antitrust violations.

More adamant was the professor who wrote that he regards "a sentence that requires a defendant to give a speech or series of speeches to be no punishment at all. And because it is not punishment . . . , it will not deter others from engaging in like acts."

Many of the letters from members of the academic community suggest that their authors share my concern about antitrust violations and my doubt that traditional forms of punishment are satisfactory but do not agree with the particular alternative sentences fashioned here. Several professors wrote that "new and imaginative sanctions are needed in antitrust cases," and that it is "commendable for a judge to explore alternatives to incarceration which will achieve a similar deterrent effect upon others." But the consensus was neatly summarized in the following comment: "Although I applaud your effort to find a more suitable penalty and deterrent, I confess considerable doubt that a repeated mea culpa is sufficient."

30. One writer took strong exception to this view, stating that he was not persuaded "that it is a proper part of a judge's function to invent novel punishments," that the "prescription of punishment is a legislative function," and that he found it difficult "to justify the kind of discretion that your sentences assume." He also expressed concern about what he perceived to be the nonreviewable nature of the sentences:

It is no answer, of course, that the defendants may cheerfully accept the less obnoxious form of punishment, as I gather they probably did in the paper-label cases. The very existence of the harsh alternative is what induces them to accept and is what should make us wary about allowing such free-wheeling discretion on the part of a judge. Perhaps the defendants' own constitutional rights have not been infringed. . . . But the very fact that they will not complain aggravates the seriousness of the situation for potential defendants as a class. It places the question of a judge's power beyond review.

31. As had other respondents, a few of the professors commented about what one of their number characterized as "the problem of equality":

Any businessman ought to know that price-fixing agreements are criminal, and yet it is a fact that even flagrant violators rarely go to jail. The situation is bound to create an appearance of class discrimination, considering that other types of offenders do go to jail, although jail probably does not do them any good either.
Finally, the remarks of one law professor, who arranged for one of the defendants to address his antitrust class and was thus uniquely situated to evaluate one of the presentations first-hand, are thought provoking. Having explained his own belief that short periods of incarceration are necessary and appropriate in price-fixing cases and that the sentences in the paper label case were ill-designed, he stated:

I find it even more difficult to form any judgments as to the effect of the presentation given by the individual defendants pursuant to your sentences. The gentleman who talked to my class was chastened and shaken by his experience. In one sense he did not deny at any time that he had discussed prices with his competitors and had violated the law; and yet at the same time the tenor of his presentation was that he had not really been fully aware that anything so customary amounted to a legal violation. And he was at pains to explain to the class again and again that such conduct really was illegal. Reactions among the class varied: some were skeptical of his implied naivete, and were slightly hostile in their questioning. Others quite plainly felt sorry for him. But in legal terms, this was an atypically sophisticated audience. It is very difficult for me to guess what the impact of his presentation would have been at a Rotary luncheon or a meeting of the local Chamber of Commerce. My uncertain guess is that the listeners would not have come away with increased insight into the wisdom of the rule prohibiting price fixing or even with deepened resolve that they themselves would never let themselves drift into such circumstances.

Conclusion

That this study is markedly inconclusive when judged by scientific standards is hardly surprising. By its very nature, general deterrence is susceptible of measurement by only the most sophisticated techniques. Unfortunately, the techniques employed in this study were crude. Despite these shortcomings, some tentative conclusions are possible, both as to what has been learned in this study and as to what might be learned from future studies.

The sentences evoked general approval from those members of the business community who attended the presentations and from those attorneys who regularly counsel businessmen. Other reactions, however, were mixed. Many of the judges and law professors—individuals whose views I especially value—were critical of the sentences imposed. These variations in response may reflect differences in underlying values and attitudes concerning the antitrust laws and violators of
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those laws. Certainly, no one sentence for antitrust violators would generate approval from all of the individuals who responded.

A frequent criticism of the sentences stemmed from a perceived disparity between the treatment of "common criminals," such as those who steal welfare checks or engage in minor embezzlements, who are routinely sent to prison, and white-collar criminals, who are not. I share this concern, but I do not feel it applies to my sentencing. Although I judge each case individually, I rarely impose prison sentences upon first offenders convicted of nonviolent crimes—regardless of the color of their collars. I cannot and will not adapt my sentencing practices to conform to those of other judges, particularly to those that I consider overly harsh.

Were the sentences successful in terms of general deterrence? I cannot be certain. To be sure, the speeches succeeded in stimulating some stronger compliance measures by certain businessmen; but the key question—and the one impossible to answer—is whether those compliance efforts would have been more or less vigorous if the sentences had included incarceration.

To the extent the sentences were successful, their success almost certainly depended upon the personal impact of a face-to-face meeting with an individual convicted of violating the antitrust laws. Although strongly suggesting the existence of such an impact, this study has not established how, if at all, the total deterrent effect of the sentences differed from that of a sentence of incarceration. Nor can the study indicate the extent to which the deterrent effect of such sentences might be undercut by their repetition. I tend to believe that the impact of the speechmaking requirement stemmed largely from its novelty; if such speeches become an ordinary and expected occurrence, they would likely lose much of their force.

This study provides some guidance for judges who may impose such sentences in the future. Closer judicial supervision may be necessary to ensure that the speeches accurately describe the conduct for which the defendant was criminally penalized. Furthermore, judges may wish to require the defendant to address audiences concerned with the laws that were violated.

32. I frequently do impose prison sentences upon first offenders convicted of certain serious crimes, such as widespread trafficking in a controlled substance like heroin. I do not, however, view narcotics distribution as a nonviolent crime. A large-scale drug dealer and his organization routinely engage in violence to safeguard and carry out their operation, and their product inevitably invades the physical and psychological integrity of its consumers.
To evaluate the impact of sentencing decisions is difficult, but it is imperative that judges attempt to do so. To improve the quality of such evaluation, I urge greater cooperation between the courts and those social scientists trained and experienced in the necessary empirical techniques. The demands of research must, of course, never be allowed to dictate the sentencing decision itself. No defendant should ever be made a guinea pig, sentenced solely to facilitate empirical study. Every sentence must be justifiable on its own terms. Certainly, however, scientifically sound evaluation of the sentences that are imposed would increase the knowledge that judges bring to sentencing decisions. We all can benefit from more rigorous examination and discussion of both the sound and the faulty decisions of sentencing judges.