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INTRODUCTION

The economic philosophy of the United States is founded on principles of free enterprise and competition. The antitrust statutes constitute legislative recognition of the need to maintain those principles. These statutes prohibit certain types of individual commercial activity that threaten the stability of our economic system. Consequently, the exercise of private choice in the marketplace is restricted to preserve the economic order of the community. The Sherman Act forms the foundation of the federal scheme of antitrust enforcement. It provides criminal sanctions as well as civil penalties for conduct constituting monopolization; attempts to monopolize; and contracts, combinations, and conspiracies in restraint of trade. Violations of the Act are felonies. Individuals convicted under the Sherman Act face two possible punishments: a fine not exceeding $100,000, and/or a jail sentence not exceeding three years. Corporate offenders can be fined up to $1,000,000.

The responsibility of imposing criminal sanctions under the

5. Although § 14 of the Clayton Act provides criminal sanctions for antitrust violations, government prosecution of such cases traditionally has been under §§ 1, 2 or 3 of the Sherman Act. K. Elzinga & W. Brett, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 31 n.2 (1976) [hereinafter cited as Elzinga & Brett].
6. Id. Prior to 1974, violations of the Sherman Act were misdemeanors; the maximum corporate fine was $50,000, the maximum individual fine was $50,000, and the maximum jail sentence was one year. These penalties were increased to the present maxima in 1974. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706 (1974) (amending 15 U.S.C. §§ 1-3).
7. See infra notes 13-20 and accompanying text.
8. Id.
Sherman Act is reserved for sentencing judges. No rigid rules or formulas exist to guide them in the accomplishment of this delicate task. The factors influencing sentencing decisions are diverse and often evoke conflicting results. No solitary circumstance dictates the appropriate sentence in individual cases. Therefore, judges must determine what factors are relevant to the sentencing decision and assess the importance of each. Consequently, these determinations shape the sentence ultimately imposed.

The difficulty of this undertaking is enhanced by the controversy surrounding antitrust sentencing. The literature abounds with conflicting approaches, and the superiority of these approaches is hotly debated. Moreover, written court opinions on sentencing in antitrust cases are rare. Therefore, judges burdened with the sentencing responsibility are even deprived of the direction offered by precedent.

This note examines the situations faced by sentencing judges in antitrust cases. It outlines some of the factors that figure prominently in their decisions, and describes the various methods of analyzing those factors. The specific topics discussed include the purposes of antitrust sentencing, the types of sentences available, the severity of sentences, and the nature of the offense.


Addressing the sentencing task in United States v. Bengimina, 1971 Trade Cas. (CCH) 73,474, at 89,925 (W.D. Mo. 1971), Judge Oliver stated:

The imposition of a sentence in any criminal case unquestionably is one of the most important, difficult duties a trial judge must perform. It is clear historically that the sources and data for acquiring, training and knowledge as to how a trial judge is to properly discharge that duty has, generally speaking, been lacking.

Very little data, for example, had been published in regard to what criteria should be utilized and what factors should be considered in imposing a sentence in any criminal case, to say nothing of a federal criminal antitrust case.


12. This has been noted by publishers of a loose-leaf reporting service. 2 Trade Reg. Rep. (CCH) ¶ 8801 (1981).
BACKGROUND

Since its enactment in 1890, the Sherman Act has provided criminal sanctions for antitrust violations. Originally, the maximum fine for individuals and corporations was $5,000; and the maximum jail term for individuals was one year. Fines and jail sentences were adopted as the principal penal tools for antitrust enforcement.

The Sherman Act's criminal sanctions remained unchanged for sixty-five years. Yet, Congress eventually recognized that those penalties had proven to be inadequate to guarantee the effective enforcement of the Act. The ineffectiveness of these sanctions was attributed to their leniency and to the infrequency with which they were imposed. (13, 14)


An extreme example of lenient sentencing is found in the famous electrical equipment conspiracy cases, Dep't of Justice Cas. Nos. 1496a, 1498, 1500, 1502, 1504, 1506, 1507, 1517, 1519, 1521, 1523, 1525, 1527, 1529, 1539, 1541, 1548, 1550, 1558, and 1566, New U.S. Antitrust Cases [1957-61 Transfer Binder] TRADE REG. REP. (CCH) (1961). In these cases, 29 corporations and 44 executives were indicted on charges of bid-rigging and price-fixing. The value of the goods involved exceeded one billion dollars. All defendants ultimately pleaded guilty or nolo contendere and were fined a total of approximately $2,000,000. Yet the average corporate fine imposed was $16,500 and the highest individual fine imposed was $12,500. The maximum fine of $50,000 was levied only once in 159 sentences. Note, Sentencing Antitrust Felons, supra note 4, at 1100 n.14; see Flynn, supra note 14, at 1308 n.45.
which they were imposed.\textsuperscript{19} In an apparent response to this tolerant approach to antitrust sentencing, Congress amended the Sherman Act in 1955.\textsuperscript{19} The amendment heightened the severity of the sanctions by raising the maximum fine for individuals and corporations to $50,000.\textsuperscript{20}

Although the Sherman Act is essentially a criminal statute, the actual use of penal sanctions did not reflect its criminal nature.\textsuperscript{21} Even after the 1955 amendment,\textsuperscript{22} an indulgent sentencing posture continued.\textsuperscript{23} Congress again attempted to reform this sentencing

Jail sentences have also traditionally been lenient. For example, from 1890 to 1970, only nineteen individuals actually went to jail for pure antitrust violations for a total of 28 months. Thus, during the first 80 years of the Sherman Act, the average jail sentence was approximately 1.5 months. Sims, supra note 11, at 697. “Pure” antitrust violations refer to suits in which only Sherman Act violations were charged. Posner, A Statistical Study of Antitrust Enforcement, 13 J. L. & Econ. 365, 389 (1970). Such suits, therefore, do not include those which involve acts of violence, threats, or other forms of coercion, racketeering, or labor disputes. Until recently, jail sentences were not imposed unless one of these other charges accompanied the antitrust charge. Id. at 391; Elzinga & Breit, supra note 4, at 31. Not only do antitrust violators receive more lenient sentences than do blue collar criminals, antitrust violators also receive significantly more lenient sentences than other types of white collar offenders. Note, Sentencing Antitrust Felons, supra note 4, at 1099 n.9. See Statement by Donald I. Baker Before the Tenth New England Antitrust Conference Concerning the Sentencing of Antitrust Felons, Nov. 20, 1976, reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 790, D-1 (1976) [hereinafter cited as Statement by Donald I. Baker]. “White collar” crime includes embezzlement, lending fraud, postal fraud, violations of income tax laws, securities laws, labor laws, antitrust laws, customs laws and other regulatory statutes. Posner, supra note 11, at 409. See United States v. Bengimina, 1971 Trade Cas. (CCH) ¶ 73,474, at 89,926 (W.D. Mo. 1971).

18. From 1890 to 1959, the Antitrust Division of the Department of Justice instituted 1,499 antitrust cases. Of those, only 729 were brought as criminal actions. Flynn, supra note 14, at 1304. Out of the 729 criminal suits brought during that period, 486 were pursued to the sentencing stage. Id. at 1305. Of those 486, only 48 resulted in the imposition of jail sentences, and in most cases, the sentence was suspended or the individuals were placed on probation. Id. Many of these cases involved acts of violence, threats, coercion, or labor disputes. Elzinga & Breit, supra note 4, at 31. It was not until 1959 that a prison sentence was imposed for a pure antitrust violation (involving no acts of violence or union misconduct). Id. See supra discussion in note 17. In the first 79 years of the Sherman Act, judges imposed jail sentences against individuals engaging in pure restraints of trade in only four cases. Comment, Sherman Act Sentencing: An Empirical Study, 1971 — 1979, 71 J. CRIM. L. & CRIMINOLOGY 244, 245 (1980) [hereinafter cited as Comment, Empirical Study]. See Note, Sentencing Antitrust Felons, supra note 4, at 1099; Note, Community Control, supra note 17, at 291.

20. Id.
23. Sims, supra note 11, at 696; Flynn, supra note 14, at 1307; Comment, Empirical Study, supra note 18, at 244; Note, Sentencing Antitrust Felons, supra note 4, at 1099; Elzinga & Breit, supra note 4, at 30, 33.
approach\textsuperscript{24} by amending the Sherman Act in 1974.\textsuperscript{25} The 1974 amendment increased the ceiling on fines for individuals to $100,000 and for corporate offenders to $1,000,000, and the maximum jail term for individuals to three years.\textsuperscript{26} The amendment also elevated the status of Sherman Act violations from misdemeanor to felony.\textsuperscript{27}

These augmented penalty provisions clearly manifest a congressional desire to increase the harshness of punishments for Sherman Act violations.\textsuperscript{28} As a result, antitrust violators have received more severe criminal sentences more frequently.\textsuperscript{29} Nonetheless, the Sherman Act merely articulates maximum penalties.\textsuperscript{30}

\begin{quote}
24. See 120 CONG. REC. H36340 (1974) (remarks of Rep. Hutchinson). In making a Sherman Act violation a felony, "Congress sent a strong message. Deliberate and intended violations of our fundamental public policies are appropriately punished by severe sanctions, other factors aside." Sims, supra note 11, at 702. Thus, Congress created a \textit{prima facie} presumption that the crime is a grievous one for which imprisonment ought to be given. United States v. Alton Box Board Co., 1976-2 Trade Cas. (CCH) ¶ 61,190, at 70,400 (N.D. Ill. 1976).

The legislative intent behind the penalty increases was expressed during the floor debates prior to the enactment of the law. 120 CONG. REC. H36339 (1974). Many legislators stressed that the statutory maximum penalties should be increased so that violators would no longer receive small fines or short prison sentences. 120 CONG. REC. H36340 (1974) (remarks of Rep. Hutchinson).


26. \textit{Id.}


29. Comment, \textit{Empirical Study}, supra note 18. The Justice Department has adopted an aggressive policy toward antitrust enforcement. Since 1976, the Department has actively sought tougher and more frequent criminal penalties. Sims, supra note 11, at 696. The Justice Department is filing more felony indictments and naming more individuals as defendants now than it did prior to December, 1974. Those indictments are resulting in \textit{nolo contendere} pleas, in guilty verdicts, and in sentences. The sentences are significantly greater than those imposed prior to 1974. See Statement by Richard J. Favretto, Deputy Director of Operations, Antitrust Division, Before the Twelfth Annual Antitrust Institute, Ohio State Bar Association, October 27, 1978.

fore, offers sentencing judges no guidance as to the factors to be considered in formulating criminal sentences for antitrust violators.

INFLUENTIAL FACTORS IN SENTENCING DECISIONS

Purposes of Sentencing

Six principal reasons for sentencing are commonly cited: (1) deterrence of others (general deterrence); (2) deterrence of the

Trade Cas. (CCH) ¶ 71,649 (E.D. Ill. 1966). There is no difference between a nolo contendere plea and a plea of guilty as far as punishment is concerned; jail sentences may be imposed as well as fines. Id. See also United States v. McDonough Co., 1959 Trade Cas. (CCH) ¶ 69,482 (S.D. Ohio 1959).

From the defendant's point of view, a nolo contendere plea offers two advantages. First, it avoids the expense of litigating the case. Second, the judgment entered by the court on such a plea cannot be used against the defendant in subsequent litigation, especially private treble damage actions. United States v. American Bakeries Co., 284 F. Supp. 864 (W.D. Mich. 1968).

Under § 5(a) of the Clayton Act, 15 U.S.C. §§ 12-27 (1976), a judgment in a government antitrust action can be used as prima facie evidence against the defendant in a private antitrust action. Id. Yet, this does not apply to consent judgments entered before any testimony has been taken. United States v. American Bakeries Co., 284 F. Supp. 864 (W.D. Mich. 1968). The judgment entered on plea of nolo contendere falls within this exception. Id. Thus, while a guilty plea also would avoid the expense of a trial, the judgment entered on such a plea would be admissible in a private antitrust action.

In determining whether to accept or reject a nolo contendere plea, a court may consider many factors. The plea should not be refused for the purpose of aiding private litigants under the Clayton Act. United States v. Safeway Stores, 1957 Trade Cas. (CCH) ¶ 68,770 (N.D. Tex. 1957). Yet, it has been held that it would not be in the public interest to deprive litigants of the benefits of the Clayton Act. United States v. Standard Ultramarine and Color Co., 1955 Trade Cas. (CCH) ¶ 68,237 (S.D.N.Y. 1955). It has also been held that the fact that a defendant will be subjected to possible private actions is not a compelling reason to justify acceptance of the plea. United States v. B.F. Goodrich Co., 1957 Trade Cas., (CCH) ¶ 68,713 (Col. 1957).

It has been asserted that the entry of a plea of nolo contendere in an antitrust case is a mitigating circumstance. United States v. Bengimina, 1971 Trade Cas. (CCH) ¶ 73,474 (W.D. Mo. 1971). The plea guarantees a certain result on the government's part and saves time, money, and energy. It is claimed that these circumstances should act in mitigation in the determination of the final sentence. Id. at 89,931. This view has, however, been clearly rejected. United States v. Cosentino, 191 F.2d 574 (7th Cir. 1951); United States v. Jones, 119 F. Supp. 288 (S.D. Cal. 1954); United States v. McDonough Co., 1959 Trade Cas. (CCH) ¶ 69,482 (S.D. Ohio 1959). Therefore, although nolo contendere pleas are a prominent aspect of criminal antitrust actions because of their frequency, they do not have a significant impact on the ultimate sentences of antitrust defendants.


32. General deterrence refers to the theory that by the imposition of a criminal sentence
person sentenced (specific deterrence);\textsuperscript{33} (3) incapacitation;\textsuperscript{34} (4) punishment;\textsuperscript{35} (5) rehabilitation;\textsuperscript{36} and (6) retribution.\textsuperscript{37} Sentences will vary depending on which purpose is deemed paramount. Sentencing judges, therefore, must initially determine the goal being pursued for each sentence imposed.\textsuperscript{38}

Many regard general deterrence as a fundamental goal of sentencing.\textsuperscript{39} The object of general deterrence is prevention of harmful conduct in the future.\textsuperscript{40} Hence, general deterrence justifies imposing a cost on one individual to bring about a greater benefit for society as a whole.\textsuperscript{41} Sentencing guidelines issued by the Antitrust Division of the Justice Department reflect this sentiment.\textsuperscript{42} The

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on an individual already convicted of a violation, other potential offenders will refrain from committing that offense. Baker & Reeves, Paper Label Sentences: Critiques, 86 YALE L.J. 619, 619 (1977) [hereinafter cited as Baker & Reeves].

33. Specific deterrence means that if an individual defendant is subject to criminal sanctions, that particular individual will not commit subsequent violations after being released from prison. Id. at 619 n.1.

34. Incapacitation refers to the idea that if an individual defendant is imprisoned, that defendant will not be able to commit another offense outside of jail, at least during the term of imprisonment. Committee on Corporate and Antitrust Law, New Dimensions in Criminal Antitrust Enforcement, 35 Bus. LAW. 1749, 1759 (1980) [hereinafter cited as New Dimensions].

35. Punishment encompasses the theory of retaliatory sanctions imposed by society for impermissible conduct. See supra note 31.

36. Rehabilitation means that the imposition of criminal penalties will modify the attitude and behavior of the individual sentenced, and that individual will be restored to a useful and constructive condition. Ideally, rehabilitated defendants will not commit future violations. Parsons, Sentencing in Antitrust Cases, 47 Antitrust L.J. 717, 721 (1978) [hereinafter cited as Parsons].

37. Retribution refers to the idea that the serving of a criminal sentence by a defendant will repay society for the violation Kennedy, Criminal Sentencing: A Game of Chance, 60 Judicature 209, 212 (Dec. 1976) [hereinafter cited as Kennedy].

38. Baker & Reeves, supra note 32, at 619.


40. Baker & Reeves, supra note 32, at 620 (quoting Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1105 (1952)).

41. Baker & Reeves, supra note 32, at 619.

42. U. S. Department of Justice Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act, reprinted in Antitrust & Trade Reg. Rep. 803 (BNA), at F-1 (March 1, 1977) [hereinafter cited as Sentencing Guidelines]. These guidelines are designed to structure and to systematize the government's sentencing recommendations in felony cases. They provide a policy for departmental sentencing recommendations designed to ensure consistency in sentencing and to generally increase the level of penalties sought in each case. Id. at F-1 to F-2. The guidelines are established for use by the Justice Department in making sentencing recommendations to the sentencing judge. These recommendations serve as a framework for the exercise of judicial discretion. Id. The guidelines require the attorney in the Antitrust Division to follow a step-by-step approach, considering and
guidelines assert that the job of the Antitrust Division is not merely to prosecute antitrust violators, but also to deter anticompetitive conduct by individuals and their business entities, and to promote competition where appropriate.43

Supporters of this view maintain that the functioning of the economy depends largely upon voluntary compliance; the Antitrust Division cannot actually monitor the competitive behavior of every individual and industry.44 Given the impossibility of monitoring all of the businesses in the country, coupled with the difficulty of detecting and proving criminal violations of the antitrust laws, sentencing in each antitrust case must be used to the maximum advantage to deter other violations.45 This emphasis on general deterrence echoes the purposes of the increased penalties accomplished by the Antitrust Procedures and Penalties Act.46

applying several aggravating and mitigating factors to a recommended base sentence. Sims, supra note 11, at 698. See infra notes 144-45 and accompanying text.
43. Sims, supra note 11, at 693.
44. Sentencing Guidelines, supra note 42, at F-3.
45. Id.
46. Note, Sentencing Antitrust Felons, supra note 4, at 1107. The floor debates prior to the enactment of the increased penalties are described at note 24 supra. The following comment illustrates the view held by many representatives that deterrence is an important function of the increased criminal sanctions:

Corporate executives may now reasonably expect that they will not receive any meaningful punishment for criminal violations of the Sherman Act even when they commit the most serious of price-fixing offenses. In this time of double-digit inflation, the public cannot afford to let giant corporations commit repeated violations of the antitrust laws. Today we should amend those laws to make the penalties for antitrust violations strong enough to act as a real deterrent


This view was also acknowledged by President Ford's administration. The President noted that the increase in penalties was long overdue and that the bill would provide a significant deterrent "and will give the courts sufficient flexibility to impose meaningful sanctions." Statement of the President on Signing the Bill into Law, 10 WEEKLY COMP. OF PERS. DOC. 1600 (Dec. 23, 1974).

However, one legislator argued that the increased penalties would not be an effective deterrent. Representative Danielson suggested that monetary penalties against corporations would have a more substantial deterrent effect. 120 CONG. Rec. H36345 (1974) (remarks of Rep. Danielson). The monetary penalties would deprive violators of all profits accruing as a result of the violation, and the civil sanctions would bar them from employment as executives for a period of five years.

Support for sanctions of this type is not new. Senator Hubert Humphrey of Minnesota advocated such penalties as early as 1950. ELZINGA & BURRT, supra note 4, at 40 n.22. On April 19, 1950, Humphrey introduced S. 3388 in the 81st Congress. This bill would have barred for two to five years the compensation of any person convicted of an antitrust violation by a corporation found guilty in the same proceeding. Id. Senator William Proxmire echoed support for this view in 1961. He acknowledged the ineffectiveness of incarceration as a penalty for antitrust offenses. Senator Proxmire suggested replacing the penalty provi-
Proponents of general deterrence also assert that criminal sanctions are the most effective means of curbing future illegal activity.\textsuperscript{47} Their conclusion is based on an analysis of the nature of antitrust crimes and the types of person likely to commit such violations.\textsuperscript{48} Antitrust offenses, for example, may be carried out over a period of several months or years, requiring at least a minimum degree of coordination and planning.\textsuperscript{49} Therefore, endorsers of general deterrence recognize the fundamental importance of certainty in detection, conviction, and punishment of antitrust crimes.\textsuperscript{50} Because antitrust violators have a clear option to engage or not to engage in criminal activity, the knowledge that severe criminal sanctions will be imposed can have a major effect in deterring such conduct.\textsuperscript{51}

Despite these arguments, some judges and lawyers reject general deterrence as a valid sentencing goal in antitrust cases.\textsuperscript{52} This repudiation is based on the belief that sentencing an offender to discourage others from engaging in similar conduct punishes the offender not for the violation alone, but for other people's criminal propensities.\textsuperscript{53} Although general deterrence is regarded by its crit-
ics as an acceptable by-product of sentencing, it is not viewed as an appropriate reason for sentencing. This view challenges claims of the effectiveness of general deterrence. The failure of the criminal sanctions to deter antitrust violations is attributed to difficulties in enforcement. Opponents of general deterrence also point out that no empirical data support the claims of its effectiveness.

Antitrust crimes generally are not committed for personal gain. In addition, most defendants have no prior criminal record and are typically perceived as respected members of the community. Consequently, incapacitation, rehabilitation, and specific deterrence are seldom advanced as primary reasons for sentencing antitrust violators. Furthermore, punishment and retribution are rarely proposed to justify criminal sanctions in antitrust cases. Thus, while general deterrence is the most controversial justification for sentencing, it is also the one most often relied upon.

Traditional Versus Alternative Approaches to Sentencing

Traditional Sentences

The controversy surrounding criminal antitrust sentencing does not end with the determination of the sentencing goal, but extends to the type of sentence imposed. Thus, even where there is agreement on the appropriate purpose, there may be disagreement on the appropriate sentence to accomplish that purpose.

The traditional penalties for antitrust violations are those stated in the Sherman Act: fines and imprisonment. Advocates of these sanctions maintain that they are the most effective means of achieving the sentencing goal. This position was adopted by

55. Parsons, supra note 36, at 720; Alton Defendants' Response, supra note 52, at 71,179.
56. Kadish, supra note 2, at 435.
57. Id. at 434; Parsons, supra note 36, at 720; New Dimensions, supra note 34, at 1754.
58. Curran, supra note 11, at 710.
59. Renfrew, supra note 39, at 592; Comment, Empirical Study, supra note 18, at 249.
60. Baker & Reeves, supra note 32, at 619; Curran, supra note 11, at 710; Renfrew, supra note 39, at 592.
61. Sentencing Guidelines, supra note 42, at F-2; Kennedy, supra note 37, at 212; Parsons, supra note 36, at 720; United States v. Alton Box Board Co., 1977-1 Trade Cas. (CCH) ¶ 61,336, at 71,164 (N.D. Ill. 1971).
64. See supra notes 47-51 and accompanying text.
Judge Allen in *United States v. Clark Mechanical Contractors, Inc.*, in which suppliers of mechanical services were prosecuted for combining and conspiring to fix prices, rig bids, and allocate customers. Pursuant to pleas of *nolo contendere* entered by each of the individuals and the corporate defendants, the court sentenced four individual defendants to thirty days in jail, and one individual to nine months imprisonment. The individual defendants also received fines ranging from $6,000 to $25,000. The corporate defendants were fined between $10,000 and $25,000.

According to Judge Allen, prison sentences in antitrust cases were warranted on the ground that they served as deterrents to others who might be tempted to commit the same criminal acts. He reasoned that Sherman Act violators cheat the public, especially when such violations involve the selling of services and supplies to public bodies. Further, he compared these illegal practices to the conduct of income tax violators, who by their illegal actions attempt to and often do cheat the public of revenues which rightfully belong to the government.

While recognizing the desirability of uniformity in sentences within the federal system, Judge Allen noted that such uniformity had not been reached and probably would never be completely achieved. He attributed this to the differing factors which enter into the imposition of sentences in each case and to the individual discretion vested in each sentencing judge.

The *Clark* opinion cited the ABA *Standards Relating to Sentencing Alternatives and Procedures* to support the decision that

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65. 1973 Trade Cas. (CCH) ¶ 74,482 (W.D. Ky. 1973).
66. The indictment alleged that this combination and conspiracy was effectuated by means of discussions among the defendants and co-conspirators of prospective bids to be submitted; of designating among themselves whom the successful bidder was to be; of submitting intentionally high or "complementary" bids on specific jobs in order to protect those jobs for others, yet give the appearance of competition; and of allocating specific mechanical contracting jobs among themselves based on historical customer patterns, chance, need or division of work. It was brought to the court's attention during the proceedings that the price fixing alleged in the indictment and the conspiracy pertaining to the sale of mechanical contracting supplies and mechanical contracting services in the Louisville area was of a very substantial volume and affected not only private purchasers, but schools and other public agencies.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Standards Relating to Sentencing Alternatives and Procedures* § 2.5(c)(iii)(Approved Draft 1968) [hereinafter cited as *Standards*].
the prison sentences were appropriate for the individual defendants.\textsuperscript{72} According to Judge Allen, the offenses committed were of such a serious nature that it would unduly depreciate their seriousness if a sentence of probation were imposed.\textsuperscript{78} Again comparing the antitrust violations to income tax violations, the court concluded that the justifications for imposing short prison terms on income tax violators to achieve general deterrence also apply when sentencing antitrust violators.\textsuperscript{74} Judge Allen, therefore, viewed general deterrence as the fundamental goal of antitrust sentencing in the \textit{Clark} case. Finally, he determined that the traditional penalties of fines and imprisonment were the most appropriate means of realizing that objective.\textsuperscript{78}

\textsuperscript{72} United States v. Clark Mechanical Contractors, Inc., 1973 Trade Cas. (CCH) \textsuperscript{74}482, at 99,141 (W.D. Ky. 1973).

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} A similar approach was adopted by Judge Rosenberg in United States v. American Radiator \& Standard Sanitary Corp., 1971 Trade Cas. (CCH) \textsuperscript{73}579 (W.D. Pa. 1971). The defendants in \textit{American Radiator} were found guilty of antitrust violations after a 72 day trial. They had conspired to fix prices of vitreous china and enameled cast iron plumbing fixtures, from September 1962 to 1966. The sentences consisted of a 60 day prison term, a $40,000 fine, and a $30,000 fine.

The defendants moved to have the sentences reduced. In denying the motions, Judge Rosenberg stated the purpose of the sentences was general deterrence. \textit{Id.} at 90,410. Although he did consider the harmful effect the sentences would have on the families of the defendants, his primary goal was deterrence. He did not seek retribution against the defendants, but viewed them as he did all other defendants. Judge Rosenberg's ultimate concern was to achieve deterrence of other corporations and individuals who may become involved in antitrust violations. He was mindful of the fact that antitrust violations are serious crimes for which Congress provided a maximum fine of $50,000. \textit{Id.} Since this case was decided in 1971, the maximum fine was $50,000 and the maximum jail term was one year. \textit{See supra} notes 19-20 and accompanying text.

Judge Rosenberg felt that the defendants offered no compelling reason for the reduction of the sentences. The defendants exhibited neither a sense of contrition or regret that they had violated the law, nor an acceptance of the law and the due process that had been accorded them. The sentences had been carefully formulated to provide meaningful deterrence for both the defendants and all others. Since Judge Rosenberg sought to avoid the implication that others could violate a law of Congress and go unpunished, the sentences were not reduced. Therefore, the sentencing goal in \textit{American Radiator} paralleled that in the \textit{Paper Labels} case. Yet, Judge Rosenberg perceived jail terms as the most effective means to achieve that goal. Hence, as in \textit{Clark Mechanical Contractors}, traditional sentences were ordered.

This sentencing approach was also followed by Judge Oliver in United States v. Bengimina, 1971 Trade Cas. (CCH) \textsuperscript{73}474 (W.D. Mo. 1971). \textit{Bengimina} involved the criminal prosecution of vending machine operators for antitrust violations. The indictment alleged threats and coercion by the defendants and co-conspirators against their competitors. The threats were intended to prevent the defendants' competitors from expanding their business and from switching to other vending machine operators. The defendants were members of the Music Operators Association, a trade association of the music vending in-
Alternative Sentences

Even when judges agree on the appropriate sentencing purpose, they may impose contrary sanctions to accomplish that purpose. This situation is most evident whenever alternative sentences, rather than traditional penalties, are imposed to achieve similar sentencing goals. This approach was adopted by Judge Renfrew in United States v. Blankenheim, the Paper Labels case. The Blankenheim defendants manufactured paper labels for the containers of various canned and bottled goods. The paper label industry was functioning in a competitive economic situation because the trade association effectuated price fixing through an accepted price schedule circulated throughout the nation. The defendants pleaded nolo contendere to the charges in the indictment.

One individual defendant received a jail term of one year. He was confined for three months; the remainder of the sentence was suspended, and he was placed on probation for three years. He was also fined $10,000. The other individual defendant received a jail term of one year. He was confined for one month; the remainder of his sentence was suspended and he was also placed on probation for three years. Additionaly, he was fined $7,500. The four corporate defendants were fined between $2,500 and $10,000.

In formulating the sentences, Judge Oliver echoed the views expressed by Judge Allen in Clark Mechanical Contractors and by Judge Rosenberg in American Radiators. He stated that judges are required to "impose sentences in accordance with the intention of the Congress . . . as expressed . . . in a particular statute enacted by that body." Id. at 89,924. If Congress determines that a certain offense is punishable by a fine, by imprisonment, or by both, then Congress must intend that judges will sometimes impose fines, or jail terms, or both, according to the facts of each case. Id. at 89,924-25.

Judge Oliver also relied on the American Bar Association Standards Relating to Sentencing Alternatives and Procedures. Standards, supra note 71. He endorsed the view that deterrence can best be effected at the sentencing stage by considering the extent to which a particular sentence will unduly minimize the seriousness of the offense and, in effect, amount to a license or an invitation to commit it. Judge Oliver stated that something more than a fine must be included in a sentence if that sentence is to have any realistic deterrent effect on future violations of antitrust laws. Therefore, the purpose of the sentences was general deterrence. Like Judge Allen and Judge Rosenberg, Judge Oliver resorted to the customary sanctions provided by Congress to achieve that purpose.

76. The term "alternative sentences" refers to sentences that are not restricted solely to fines, jail terms, or some combination of the two. They often consist of some type of community service or restitutive activity. Parsons, supra note 36, at 722 (quoting Federal Judicial Center, 1976 Annual Report).

77. No. CR-74-182 CBR (N.D. Cal., filed Nov. 1, 1974). The defendants in this case were members of the industry that manufactures paper labels affixed to the containers of a variety of canned and bottled products. Therefore, the case is customarily referred to in the literature as the "Paper Labels" case. To avoid confusion, it will be referred to as the Paper Labels case throughout this comment.

78. This type of situation closely resembles the perfectly competitive model. Perfect competition requires efficiency by producers, and prices for goods are determined by the supply and demand for those goods. In a perfectly competitive market, sellers must take the market price as given. They can sell as much or as little as they like at that price. If they sell above the market price, they will not be able to dispose of their goods. For a full discus-
cause many of the manufacturers were small in comparison to their customers. The possibility that purchasers would shift to another more competitive supplier forced companies in the industry to keep their costs and prices as low as possible. These businesses, then, were under constant pressure to retain their market positions. Manufacturers of paper labels began to exchange increasingly explicit information concerning pricing decisions and policies, eventually dividing the market through pricing agreements.\textsuperscript{79} The indictment which followed charged nine corporate and eight individual defendants with Sherman Act violations.\textsuperscript{80} All eight of the individual defendants ultimately pleaded \textit{nolo contendere} as did eight of the nine corporate defendants.\textsuperscript{81} In the \textit{Paper Labels} decision, Judge Renfrew fined the corporate defendants from $10,000 to $50,000 each. Three individual defendants were fined from $4,000 to $7,500 and received suspended jail sentences ranging from three to six months.\textsuperscript{82}

Five individual defendants, however, received alternative sentences. They were given fines and suspended jail sentences as were the three other individual defendants.\textsuperscript{83} But as a special con-

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\textsuperscript{79} See Renfrew, supra note 39, at 591. 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 information concerning pricing decisions and policies. The market allocation scheme collapsed when a disappointed former employee revealed the illegal practices. Several private treble damage actions and a criminal indictment followed.

\textsuperscript{80} Id. (quoting Indictment at 4), United States v. H.S. Crocker Co., No. CR-74-182 CBR (N.D. Cal., filed Mar. 12, 1974). The indictment charged that the nine corporate and eight individual defendants had agreed, \textit{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."

\textsuperscript{81} The ninth corporate defendant was found guilty at trial. The individual defendants originally pleaded not guilty, but later changed their pleas to \textit{nolo contendere}. Since the private civil actions preceded the criminal action and the government did not object to the change of plea, the new pleas were accepted. Renfrew, supra note 39, at 592.

\textsuperscript{82} These defendants were excluded from the speech-making requirements. This decision was not based on an assessment of their relative culpability for the price fixing activity. The obligation to give presentations was designed not to punish those convicted, but rather to promote general deterrence. Judge Renfrew felt that these three defendants could not effectively communicate the message that he wanted conveyed. Therefore, he did not impose the same duty upon the others. Renfrew, supra note 39, at 592 n.5.

\textsuperscript{83} Id. at 590. The fines ranged from $5,000 to $15,000 each, and the jail terms ranged from three to six months.
dition of probation the court required each of the five to make speeches to business or civic groups about the acts for which they were convicted.  

Addressing his task of sentencing these five individual defendants, Judge Renfrew determined that the primary purpose of imposing criminal sanctions in this case was general deterrence. He recognized a widespread feeling in the business community that antitrust violators often escape undetected and unpunished, and, therefore, perceived an acute need for general deterrence in the field of antitrust. Given the difficulty of detection and proof of criminal antitrust violations, a judge must use every sentencing opportunity to maximize the deterrence of potential violators. Judge Renfrew noted that a sentence should be sufficiently harsh to discourage similar criminal activity because too lenient a sentence might depreciate the seriousness of the offense and encourage other violations. In Judge Renfrew's opinion, the imposition of fines alone would have no deterrent impact on the community. Although he acknowledged the traditional goal of general deterrence, Judge Renfrew rejected reliance on the traditional sanctions of fines and jail terms to achieve that goal.

He believed instead that the most effective means of promoting general deterrence was to require the defendants in the Paper La-

84. Judge Renfrew required each defendant to “make an oral presentation before twelve (12) business, civic or other groups about the circumstances of this case and his participation therein” and to “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.” Renfrew, supra note 39, at 590, (quoting Judgment and Order of Probation and Fine, United States v. Blankenheim, No. CR-74-182 (N.D. Cal., filed Nov. 1, 1974)). The pertinent language in the Judgment and Order of Probation and Fine against each defendant is identical. Id. at 590 n.3.

85. Specific deterrence and incapacitation were rejected because all of the defendants were community leaders of previously unsullied reputation who held top executive positions in their corporations. Therefore, they did not present a threat of continued violations. Rehabilitation was similarly rejected because the defendants needed neither psychological nor vocational training. Retribution was accomplished through the hardship resulting from the prosecution itself and the fines imposed. Judge Renfrew determined that 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 imposed were large in relation to the defendants' ability to pay. Judge Renfrew concluded that monetary exaction alone constituted firm and proportionate punishment. Renfrew, supra note 39, at 592-93.

86. Id. at 594.

87. Judge Renfrew believed that not only would the fines provide no deterrence, but they might even encourage potential violators who may perceive them as a mild sanction for a highly profitable activity. He also believed that incarceration was inappropriate due to the circumstances detailed in note 85 supra. Renfrew, supra note 39, at 593-94.
bels case to give speeches. General deterrence requires both that an unpleasant punishment be imposed upon the wrongdoers and that the public have a relatively high degree of knowledge about the activity prescribed by law and the sentences imposed for its violation. Judge Renfrew reasoned that the emotional and financial burden of the prosecution, the fines imposed, and the defendants' embarrassment in appearing before groups of their peers as convicted criminals would supply sufficient deterrent sting to the individual defendants. At the same time, however, the court intended to achieve greater public awareness of the demands of the law and the consequences of its violation by ordering the defendants to deliver speeches about their personal experiences. Media coverage of the sentences was expected to convey the same message to an even wider audience.

Judge Renfrew viewed the publicity of the Paper Labels sentences as performing a vital function in achieving the sentencing goal. He believed that violations might be deterred by increasing community awareness that a particular kind of unlawful conduct would be detected and that prosecution and conviction would follow. In cases where general deterrence was the principal purpose of a sentence, Judge Renfrew felt it was only logical to attempt to ensure that as many people as possible learn of the prosecution and punishment of the defendants.

The imposition of alternative sentences has been repeatedly criticized. Such disapproval is predicated on the view that an alternative sentence neither promotes general deterrence, nor instills confidence in our legal system. Critics assert that a prison term,

88. Id. at 594.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id. For a discussion of the deterrent impact of certainty in detection, conviction, and punishment of crime, see supra note 50 and accompanying text.
96. Baker & Reeves, supra note 32, at 620. "Crimes by prominent corporations and individuals establish an example which tends to erode the moral base of the law and provide an opportunity for other kinds of offenders to rationalize their misconduct." Id. (quoting President's Comm'n on Law Enforcement and Admin. of Justice, Task Force Report: Crime and Its Impact — An Assessment 104 (1967)). This erosion of confidence in the law is
rather than some alternative penalty, is more likely to achieve these objectives. A sentence of total confinement is preferred in those cases in which the imposition of a different sentence would unduly depreciate the seriousness of the offense. Proponents of prison sentences allege that failure to imprison antitrust violators would unduly depreciate the gravity of the crime. These advocates allege further that experience indicates that businesspeople view prison as particularly unpleasant, making incarceration a uniquely effective deterrent.

The alternative sentences imposed in the Paper Labels case have also been disparaged because they negate certainty in sentencing, ultimately diminishing their deterrent impact. Sentencing for the sole purpose of deterrence makes the character of the offense, rather than that of the offender, the controlling factor in the sentencing decision. Personal characteristics of the defendant are irrelevant to the calculation of a sentence justified by general deterrence because the offender is not being imprisoned for the purpose of self-improvement. Under such circumstances, tailoring sentences for each individual significantly undermines deterrence by making sentences more uncertain and difficult to predict in advance. Thus, to the extent that Judge Renfrew was influ-

increased when it is perceived that blue collar criminals go to jail but antitrust violators do not. Id.

97. Baker & Reeves, supra note 32, at 621. Critics of alternative sentencing also claim that because “price fixing is a crime involving rational choice, it takes a substantial enforcement effort and a substantial punishment to make and keep the deterrent threat a potent one.” Id. at 620. Potential antitrust violators will engage in price fixing only if they perceive that the benefits (potential profits) will substantially outweigh the costs (probable punishment). Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968). Thus, penalties imposed for antitrust violations must be greater than, and not merely equal to, potential profits if the deterrent effect is to be achieved. Further, the probability of punishment must be high. If the likelihood of detection and conviction is low, potential antitrust violators may view the benefits as greater than the costs. See discussion of the certainty of punishment at note 50 supra. “[I]f the probability of getting caught and convicted is low, the punishment will have to be much greater than criminal revenues to achieve deterrence.” Statement by Donald I. Baker, supra note 17, at D-3.

98. STANDARDS, supra note 71. “For certain offenses, . . . the failure to impose a prison sentence might be unduly encouraging to similar attempts in the future and might destroy the confidence of the public in the system.” Id. § 2.5(n), at 107.

99. Baker & Reeves, supra note 32, at 621.
100. Id. See also Liman, supra note 95, at 630.
101. See supra notes 50, 94, & 97 and accompanying text.
103. Baker & Reeves, supra note 32, at 622.
104. Id. at 622-23.
105. Id. at 623.
enced by characteristics of the individual offenders, some critics assert that he considered factors irrelevant to his sentencing goal.106

Opponents of alternative sentencing claim further that heavy jail sentences will publicize the underlying violation and serve to inform the businessperson of the kind of conduct that is illegal.107 According to this view, the community awareness, acknowledged by Judge Renfrew as important to the achievement of deterrence, is better accomplished by imposition of jail sentences.

Finally, alternative sentences are criticized because they reinforce the perception that antitrust violators are accorded special treatment by sentencing judges.108 Alternative sentencing approaches compel the result that certain price fixers are sentenced to prison, while other price fixers are sentenced to give speeches.

The need for uniformity in sentencing has become apparent to most observers of the criminal justice system.109 Recent legislative proposals, almost without exception, curtail judicial discretion and enhance legislative responsibility for the standardization of sentencing.110 Price fixers are receiving extremely disparate sentences merely because they are sentenced by different judges.111 Such disparity contributes to the belief that courts are not administering evenhanded justice.112 There is, therefore, an urgent need for greater uniformity in antitrust sentencing.113

The controversy surrounding the appropriate type of criminal antitrust sentencing continues. Supporters of alternative sentences directly oppose advocates of the traditional penalties even where the purposes to be served by each sentencing approach are identical. In addition, the proponents of alternative sentences have exhibited disagreement among themselves regarding the appropriate goal to be achieved.

A comparison of the Paper Labels case and United States v. Al-

106. Id.
107. Id. at 625.
108. Id.
109. Dershowitz, supra note 95, at 628.
111. Dershowitz, supra note 95, at 628.
112. Id.
113. Id. See also Liman, supra note 95, at 633.
Criminal Antitrust Sentencing

Alton Box Board Co.\textsuperscript{114} is illustrative. In Alton Box, most of the large corporations in the paper folding carton industry were charged with conspiring to fix prices.\textsuperscript{115} Price accommodation was accomplished by suppliers offering exceptionally high bids for short-term contracts so a competitor would receive the contract.\textsuperscript{116} This conduct was reciprocated by the other members of the paper folding carton industry. Through these cover bids, the container suppliers could maintain their contracts and prices. This practice virtually eliminated competition within the industry.

In formulating sentences for the Alton Box defendants, Judge Parsons relied on the ABA Standards for Criminal Justice Relating to Sentencing Alternatives and Procedures.\textsuperscript{117} He acknowledged three general justifications for imprisonment: (1) public protection; (2) a defendant's need for rehabilitation; and (3) the gravity of the offense.\textsuperscript{118} Judge Parsons stated that unless one of these factors was present, imprisonment for an antitrust violation was unnecessary.

The defendants in Alton Box received alternative sentences in addition to short prison terms. The alternative sentences consisted of a project designed to orient the defendants to the problems of employment for the ex-offender.\textsuperscript{119} The defendants developed an agency for cataloguing and surveying all social agencies and philanthropic groups in the community which offered services to the ex-offender with regard to employment. They then recruited the assistance of industrial management and made available to the blue collar ex-offenders training programs leading to employment. In-

\textsuperscript{114} 1977-1 Trade Cas. (CCH) ¶ 61,336 (N.D. Ill. 1977).

\textsuperscript{115} The paper folding carton industry is a large but not commonly visible industry, participating in the processing of consumer products. The manufacturers of products cannot produce the containers in which their products are sold as cheaply as they can purchase them from the carton manufacturers. \textit{Id.} at 71,163.

\textsuperscript{116} The indictment alleged that they acted among themselves to accommodate each other's company by using cover bids. Product manufacturers dealt at arm's length with the suppliers of paper cartons. Short-term contracts were entered into on an almost daily basis. The demands of product manufacturers were put out for bids among the container suppliers. \textit{Id.}

\textsuperscript{117} STANDARDS, supra note 71.

\textsuperscript{118} United States v. Alton Box Board Co., 1977-1 Trade Cas. (CCH) ¶ 61,336, at 71,166 (N.D. Ill. 1977).

\textsuperscript{119} Initially, all of the individual defendants were incarcerated between 24 hours and 15 days. Fines imposed were between $500 and $35,000. The sentences in this case were imposed in 1976, pursuant to \textit{nolo contendere} pleas, but the suit was instituted prior to 1974. Thus, the maximum jail term allowable was one year and the maximum fine allowable was $50,000. See supra notes 19-20 and accompanying text.
dusties shared with corrections officers the responsibilities of the program's supervision.

This project resulted in an ongoing agency that uses ex-offenders as operators to study ex-offenders, and to furnish ex-offenders with jobs and job training. The agency marshals the assets and good will of the industrial community and serves as a clearinghouse for other community outreach programs.

Judge Parsons' sentencing decision in Alton Box was guided by his belief that sentencing should have some rational relationship to the prevention of more unlawful conduct, and that individual freedom should be limited only to the extent that a well-ordered society finds it necessary. He also maintained that the certainty of punishment had a greater effect on the prevention of unlawful conduct than had the severity of punishment, that the individual should be held responsible only for what he or she did or caused others to do, and that a publicly proclaimed "tough judge" was usually overly simplistic or in search of public approval rather than striving for the correct sentence.120

Judge Parsons acknowledged the controversy surrounding anti-trust sentences and their purposes.121 After consideration of the divergent approaches,122 he concluded ultimately that alternative sentences were appropriate for the Alton Box defendants. This decision was predicated on his view that deterrence was not the sentencing judge's only consideration in an antitrust case. For example, under the Alton Box circumstances, imprisonment was not the most appropriate sentence for all of the defendants. Yet, Judge Parsons could not endorse the position that under no circumstances may imprisonment be considered in price fixing cases merely because of the otherwise excellent backgrounds of the defendants or because their indictment and conviction might be exceedingly traumatic.123

Judge Parsons asserted that a defendant should be punished only for what he or she had done and not for the potentially crimi-

121. Id.
nal conduct of others. He concluded that general deterrence might be a valid by-product of sentencing, but should not be the primary purpose for sentencing antitrust offenders. Judge Parsons' views on the alternative sentences imposed in *Alton Box* are, therefore, in accordance with those expressed by Judge Renfrew in the *Paper Labels* case. Both judges preferred alternative sentences over traditional penalties. Yet, their determinations of the appropriate goal to be achieved through alternative sentences are in direct conflict. Judge Renfrew's purpose was general deterrence, while Judge Parsons specifically rejected general deterrence as a fundamental sentencing goal.

**Severity of Sentences**

Where a judge chooses the traditional sanctions of fines and jail terms, sentences for antitrust violations are necessarily limited by maximum penalties allowed under the Sherman Act. However, these statutory limits offer sentencing judges little guidance. No minimum penalty is articulated. Judges must determine, therefore, not only the type, but also the severity of the sentence imposed.

Initially, this decision requires a choice between a fine, a jail sentence, or both. Thereafter, judges must set the amount of the fine or the length of the prison term at any level between zero and the prescribed statutory limits.

The choice between a fine and imprisonment is not an easy one. Legislators, lawyers, and judges disagree on the value of each sanction in the sentencing process. Those favoring the exaction of a fine allege that it achieves the same result as imprisonment, but is less costly to society. They claim the goal of deterrence can be equally served by increasing the amount of the fine until it imposes the same burden imposed by incarceration. A fine is less costly
to society because it is a transfer payment. A jail sentence is more expensive, however, because society must absorb the cost of maintaining prisoners and receives no financial benefit in return.

Conversely, imprisonment is regarded by some as the more appropriate sanction. Those advocating incarceration assert that fines do not achieve a comparable result. They view fines as ineffective sentences, especially if the offender is unable to pay them. Furthermore, according to proponents of jail sentences, fines are inherently less effective than imprisonment. Because a fine can never equal the pain of incarceration, fines and jail sentences do not produce the same deterrent effect.

This belief in the superiority of imprisonment is zealously advocated by the Antitrust Division of the Justice Department. The Division instituted a policy to actively seek stricter sentences in antitrust cases. As part of this effort, sentencing guidelines were adopted. The dual purposes of the guidelines are to encourage uniformity in sentencing and to encourage stricter sentencing in the quest for general deterrence.

The policy underlying the guidelines is that a prison sentence is the preferable sentence in a criminal antitrust case. Fines should be recommended only when a prison sentence is not appropriate. The guidelines favor a base sentence recommendation of eighteen months in all appropriate cases, which is half of the maximum statutory sentence. After the base sentence is established, the guidelines indicate a series of factors that will be considered to either increase or decrease the recommendation in a specific case.

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132. Posner, supra note 11, at 410. The fine collected from the offender is paid to society, but society must pay only the cost of collecting the fine.
133. Id.
134. Coffee, supra note 11.
135. In this circumstance, the cost-benefit analysis fails because the fine can never be paid. See supra note 130 and accompanying text.
137. United States v. Alton Box Board Co. marks the beginning of a significant effort by the Division to encourage stronger sentencing. Sims, supra note 11, at 696.
138. Sentencing Guidelines, supra note 42.
139. Id. at F-2.
140. Id. at F-5.
141. Id. at F-2 — F-5. The maximum jail sentence is three years (36 months). Thus, the base sentence recommendation is 18 months. The guidelines also indicate a base sentence recommendation for fines of $50,000 for an individual (one-half of $100,000 maximum) where fines are deemed appropriate.
Five aggravating, or sentence increasing, factors are listed: (1) the amount of commerce involved; (2) the position of the individual in the corporation and in the conspiracy; (3) the existence and degree of predatory coercive conduct involved in the conspiracy; (4) the duration of the defendant's participation; and (5) whether the defendant has been convicted of or filed a plea of *nolo contendere* in a prior antitrust prosecution. In addition, three mitigating, or sentence reducing, factors are listed: (1) cooperation with the government; (2) business, family or personal hardship, including poor health; and (3) facts indicating that the conspiracy was small or local.

If nothing else, these guidelines indicate that jail sentence recommendations will be urged more frequently by the government and that the amounts of fines and length of jail terms will be much greater than in the past. Sentencing judges are not required to adhere to the recommendations submitted. Nevertheless, their choices of the type and severity of sentences will likely be influenced by the recommendations. Indeed, empirical evidence suggests that this has already occurred.

The imposition of severe criminal sanctions in antitrust cases recently has prompted criticism because of the possibility of overdeterrence. This disapproval is premised on the belief that the deterrent impact of criminal penalties will cause businesspeople to avoid salutory and procompetitive conduct that lies close to the borderline of impermissibility. Businesspeople may choose instead to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good faith error in judgment. At least one court has, however, rejected the legitimacy of the concern for overdeterrence.

143. *Id.*
144. *Id.*
145. *Id.* at 510.
147. This concern was acknowledged by the United States Supreme Court in United States v. United States Gypsum Co., 438 U.S. 422 (1978). In considering whether the government must prove an element of intent in a criminal antitrust case, the Court discussed the conduct regulated by the Sherman Act. *Id.* at 440. The opinion stated that the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. *Id.* at 441.
148. *Id.*
150. In United States v. McKinnon Bridge Co., Inc., 1981-1 Trade Cas. (CCH) ¶ 64,104 (M.D. Tenn. 1981), the court decided that overdeterrence is not a valid concern. The court's
Nature of Offense

It has long been a policy of the Antitrust Division to bring criminal charges only where there has been a willful violation of the law. Willfulness may be shown in one of two ways. First, willfulness will be presumed if the rule of law violated is clear and established. Price fixing, market allocation, and clearly predatory conduct meet this standard. Second, willfulness will also be presumed if it appears that the defendants knew they were violating the law or were acting with flagrant disregard of the legality of their conduct. Therefore, the Antitrust Division's policy assures sentencing judges that the violations for which they must impose sanctions, at the very least, meet these threshold intent requirements.

Some judges, however, regard the gravity of the offense, rather than the defendant's intent, to be of paramount importance in deciding the appropriate sentence. For example, in United States v. Alton Box Board Co., Judge Parsons stated that when crimes are malum in se, imprisonment may be indicated even though it is unnecessary for the rehabilitation of the defendant or for the protection of society or the community. A crime is malum in se if it offends some deep-seated and historical morality of a civilized society. According to Judge Parsons, incarceration for such a crime is justified as a social demonstration of the right of people not to have such conduct exist in their society. Although antitrust violations are not by definition malum in se, they may be sufficiently
grievous to meet this standard and thus justify incarceration.\textsuperscript{158} Using Judge Parsons' approach, the sentencing decision turns on the gravity of the offense, and if the crime is malum in se, imprisonment is justified.\textsuperscript{158}

Sentencing judges may, however, be hesitant to impose severe criminal sanctions because of the difficulty in determining the guilt of corporate personnel above the level of those who overtly carry out the antitrust violation.\textsuperscript{160} In large corporations, upper level management is able to insulate itself from criminal liability by claiming ignorance of subordinates' conduct.\textsuperscript{161} Moreover, the true formulators of anticompetitive policies and activities can further protect themselves by covertly disguising instructions to subordinates.\textsuperscript{162} These actions make it virtually impossible to identify accurately the real instigators of anticompetitive conduct. As a result, incarceration may be viewed as inappropriate if imposed only on a lower echelon employee.\textsuperscript{163}

\textbf{CONCLUSION}

All of the views discussed above will affect sentencing decisions to some extent. Sentencing judges, however, ultimately are guided by the more fundamental policy of equity. Regardless of the factors considered and their relative importance, the resulting sentence must be fair.

Different sentencing approaches often result in different conclusions. Nevertheless, different sentences are not necessarily unfair sentences. The circumstances of individual cases dictate which sanctions are just. Consequently, sentencing approaches should vary with the facts of each case. Imprisonment, for example, may be justified by a need for rehabilitation in one case, and by a need for punishment in another case. On the other hand, imprisonment may not be necessary or appropriate where the prosecution itself has been severely traumatic to the defendant.\textsuperscript{164}

Sentence disparity is a valid concern,\textsuperscript{165} and demands for uni-

\textsuperscript{158} Id. at 71,167.
\textsuperscript{159} Id.
\textsuperscript{160} Elzinga & Brett, supra note 4, at 38.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 39; Kadish, supra note 2, at 431.
\textsuperscript{163} Id. at 431.
\textsuperscript{164} Renfrew, supra note 39, at 593.
\textsuperscript{165} White, supra note 9, at 513.
formity\textsuperscript{166} are understandable. The exercise of judicial discretion, however, is vital to a fair sentencing process. Sentencing guidelines may accommodate factors in individual cases that alter the normal sentencing course. Yet guidelines cannot compare with the unique ability of the sentencing judge to absorb all relevant facts and circumstances. Guidelines are necessarily dogmatic. In contrast, judicial discretion is not bound by structure. The "virtually unfettered discretion" deplored by many\textsuperscript{167} is precisely what insures equity and rationality in sentencing decisions.

That same discretion, however, is also what makes the task of antitrust sentencing so difficult. Sentencing judges are required to determine the appropriate sentencing goal and to decide both the type and severity of the penalty imposed. The judiciary strives to find the best sentencing technique among the divergent approaches and views that are thrust upon them every day. The myriad approaches and theories of sentencing aggravate the sentencing judge's already difficult task. Legislative direction would substantially simplify the sentencing decision. Without the luxury of clear rules and formulas, however, judges must confront each defendant individually and impose the sentences they deem appropriate.

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\textsuperscript{166} Sentencing Guidelines, \textit{supra} note 42.
\textsuperscript{167} Sims, \textit{supra} note 11, at 699.