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SHERMAN ACT SENTENCING: AN EMPIRICAL STUDY, 1971-1979

One of the more controversial features of antitrust law concerns criminal sanctions under the Sherman Act.¹ The controversy began in 1890 when no less a proponent of antitrust than Senator James B. Sherman expressed doubts about including criminal sanctions in the Act which was later to take his name.² Since 1890, the desirability of antitrust criminal sanctions has been argued in the courts³ and in the literature⁴ and has been the

subject of numerous studies.⁵ Although it still occasionally is debated today,⁶ the controversy over Sherman Act criminal sanctions is no longer whether they are appropriate, but how severe such sanctions should be.⁷ This comment examines the latter issue by looking at antitrust sentencing. The paper utilizes an empirical approach, examining in detail Sherman Act sentencing for 1971 through 1979 and exploring possible explanations for why antitrust sentencing became stricter during the 1970s.

LENIENT SENTENCING IN SHERMAN ACT CASES: A CRITIQUE

Before the 1970s, Sherman Act violators rarely received severe sentences.⁸ Although fine sentences against offenders have been lenient historically,⁹ more indicative of lenience in Sherman Act sentencing prior to the 1970s is the infrequency with which antitrust offenders have been sentenced to jail.¹⁰ Between 1890 when the Sherman Act was passed and 1969, there were only 536 criminal cases in which individual offenders were subject to

¹ 15 U.S.C. §§ 1, 2, 3 (Supp. II 1978).

Section 1. 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

² See 21 CONG. REC. 2604 (1890) (remarks of Senator Sherman).

³ Nash v. United States, 229 U.S. 373 (1913). See note 19 *infra*.

⁴ See generally Baker & Reeves, *Paper Label Sentences*:

Critiques, 86 YALE L.J. 619 (1977); Mercurio, *Antitrust Crimes: Time for Legislative Definition*, 51 NOTRE DAME LAW. 437 (1976); Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590 (1977). See also Cahill, *Must We Brand American Business by Indictment as Criminals?*, 1 ABA ANTITRUST SECTION 26 (1952); Kennedy, *The Antitrust Aims of the Justice Department*, 9 N.Y.L.F. 1, 3 (1963).

⁵ See Flynn, *Criminal Sanctions under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301, 1301 n.3 (1967).

⁶ See generally Mercurio, *supra* note 4.

⁷ In 1973, for example, when the Senate Subcommittee on Antitrust and Monopoly was considering whether to increase maximum penalties for Sherman Act violations, most witnesses testifying on the proposed penalty changes did not question the desirability of antitrust criminal penalties but directed their attention to whether the proposed increases were sufficient to deter would-be antitrust violators. See generally *The Antitrust Procedures and Penalties Act, Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *Senate Sherman Act Felony Hearings*]. See also *Hearings on H.R. 2903 and H.R. 9947 Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

⁸ Flynn, *supra* note 5, at 1307.

⁹ Flynn, *supra* note 5, at 1305; Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 389 (1970). See also *Senate Sherman Act Felony Hearings*, *supra* note 7, at 173 (testimony of Mark Green).

¹⁰ Posner, *supra* note 9, at 391.

incarceration.¹¹ In only twenty-six of these cases were jail sentences actually served by offenders.¹² Significantly, of the twenty-six cases in which antitrust offenders served time, twenty-two cases involved trade restraints which were vitiated with racketeering activity or violence or were labor oriented.¹³ In other words, in the first seventy-nine years of Sherman Act enforcement, judges imposed jail sentences against individuals engaging in "pure" restraints of trade¹⁴ in only four cases.¹⁵

Although sentences in Sherman Act cases historically have been lenient, it is difficult to pinpoint reasons for the leniency. One reason may be the Sherman Act itself. The Sherman Act, particularly section one,¹⁶ broadly describes the conduct it condemns. The Act forbids all monopolies and attempts to monopolize as well as all contracts, combinations, and conspiracies in restraint of trade, but nowhere attempts to define or delimit these concepts.¹⁷ Not surprisingly, the Act has been condemned, both by commentators¹⁸ and by courts,¹⁹ as being too vague to support criminal convictions. One commentator has described the Sherman Act as:

vague in the scope of conduct proscribed, vague in the legal standard used to evaluate a course of action, and vague in the quantum and quality of

¹¹ *Id.*

¹² *Id.* See also Flynn, *supra* note 5, at 1305-06.

¹³ Posner, *supra* note 9, at 391.

¹⁴ The language is Posner's and is meant to indicate antitrust criminal cases in which the Justice Department brought only Sherman Act charges. See *id.* at 389.

¹⁵ One of the four "pure" trade restraint cases in which offenders served time in jail involved the famous Electrical Equipment Conspiracy. *U.S. v. Washinghouse Electric Corp.*, TRADE REG. REP. (CCH) ¶ 45060 (E.D. Pa. 1961). For information on the Electrical Equipment Conspiracy, see generally *Hearings on the Electrical Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961).

¹⁶ Most criminal antitrust cases are brought under § 1 of the Sherman Act. For example, between 1971 and 1979, the Justice Department filed 166 criminal antitrust cases (contempt and perjury cases not included). Of the 166 cases, 154 were brought under § 1, seven cases were brought under both § 1 and § 2, and only two cases under § 2. See CCH TRADE REG. REP., U.S. ANTITRUST CASE SUMMARIES—COMPLAINTS, INDICTMENTS, DEVELOPMENTS (10th ed. 1971-79).

¹⁷ 1 P. AREEDA & D. TURNER, ANTITRUST LAW 14 (1978).

¹⁸ Mercurio, *supra* note 4, at 438. See also Whiting, *Antitrust and the Corporate Executive*, 47 VA. L. REV. 929, 939 (1961).

¹⁹ See, e.g., *Nash v. United States*, 229 U.S. 373. For cases in which state antitrust laws have been attacked as being unconstitutionally vague, see Flynn, *supra* note 5, at 1312 n.65.

proof necessary to prove a violation. Moreover like some statutes, and more than most statutes, the antitrust laws are in constant flux and evolution. As the national economy, marketing techniques, business policy, and a host of other factors that give impetus and direction of individual business judgments evolve, interpretation and application of the antitrust laws shift and change to keep pace.²⁰

It is probable that the vagueness of the Sherman Act has contributed to leniency in antitrust sentencing. In some cases, the sentencing judge himself probably believed that the Sherman Act was vague, and adjusted the sentence accordingly. In other cases, judges were probably persuaded to reduce sentence by claims of an offending businessman that the Act did not indicate to the businessman what was and was not illegal competitive conduct. Indeed, some evidence does exist which suggests that businessmen do not know the content and scope of the Sherman Act.²¹ The evidence results from the controversial sentences imposed by Judge Charles B. Renfrew in *United States v. Blankenheim*.²² In *Blankenheim*, five corporate executives in the paper label industry were convicted of price fixing. Each executive was sentenced by Judge Renfrew to make twelve oral presentations to different business and civic groups about his participation in the price fixing conspiracy. At each presentation, audience members were given a questionnaire on antitrust sentencing. One of the questions inquired about the respondent's knowledge of the antitrust laws. Although all but one of the ninety-nine respondents knew that price fixing is illegal, many respondents had, in the words of Judge Renfrew, "great difficulty relating the general requirements of the antitrust laws to specific factual contexts."²³

The vagueness of the Sherman Act, however, has been exaggerated. Key Sherman Act concepts, which were left undefined at the time of the Act's passage, are no longer meaningless. The task of

²⁰ Flynn, *supra* note 5, at 1312 (footnotes omitted). Flynn, however, points out that the vagueness of the Sherman Act is "myth" because of the policy of the Justice Department to bring criminal charges in well-defined per se cases. *Id.* at 1312-13. See note 29 and accompanying text *infra*.

²¹ Renfrew, *supra* note 4, at 597-600.

²² No. CR-74-182 CBR (N.D. Cal., filed Nov. 1, 1974).

²³ Renfrew, *supra* note 4, at 597. Because of the failure to employ rigorous statistical techniques, the Renfrew study is of limited empirical value. However, it does provide, in Judge Renfrew's words, "an impressionistic canvass of the views of people in various walks of life about the sentencing of white collar criminals." *Id.* at 596.

infusing meaning into the sweeping, imprecise text of the Sherman Act was left by Congress to the courts, and the courts diligently have gone about accomplishing the task. "Restraint of trade," for example, was defined in 1911 in the landmark *Standard Oil* case;²⁴ "conspiracy" was interpreted in *United States v. American Tobacco*;²⁵ and "monopolize or attempt to monopolize" was explained by Judge Learned Hand in the famous *Alcoa* case.²⁶

Moreover, the Sherman Act withstood constitutional attack on vagueness grounds in *Nash v. United States*.²⁷ In *Nash*, two corporations and six individuals were charged with monopolization of and conspiracy to restrain trade in the sale of turpentine in interstate and foreign commerce. The defendants, among other anticompetitive conduct, manipulated the market for turpentine and engaged in coercion of brokers and consumers of turpentine. At trial, five individuals were found guilty, one individual was found not guilty, and no judgment was entered concerning the two corporate defendants. The convicted parties appealed, claiming that the Sherman Act, as interpreted in *Standard Oil*²⁸ was unconstitutionally vague. In a brief seven-page opinion written by Justice Holmes, the Supreme Court sustained the constitutionality of the Act.

A third reason why the vagueness criticism of the Sherman Act is exaggerated is the policy of the Justice Department to bring criminal charges against only well-defined types of trade restraints.²⁹ The policy of the Justice Department with respect to criminal prosecution under the Sherman Act has been described as follows:

In general, the following types of offenses are prosecuted criminally: (1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or monopolize; (3) a less easily defined category of cases which might generally be described as involving proof of use of predatory practices (boycotts, for example) to accomplish the objective of the combination or con-

spiracy; (4) the fact that a defendant has previously been convicted of or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense. There are other factors taken into account in determining whether to seek an indictment in cases that may not fall precisely in any of these categories. The Division feels free to seek an indictment in any case where a prospective defendant has knowledge that practices similar to those in which he is engaging have been held to be in violation of the Sherman Act in a prior civil suit against other persons.³⁰

Some observers have criticized the enormous discretion which the language of the Sherman Act affords the Justice Department in bringing criminal prosecutions.³¹ The Justice Department, however, has faithfully adhered to its express policy.³² For example, between 1971 and 1979, every section one case brought by the Justice Department charged at least one per se violation³³ of the Sherman Act.³⁴

Ultimately, the vagueness attack against the Sherman Act is unwarranted, and lenient antitrust sentencing because of it is unjustified. If anything, the sweeping text of the Act should be applauded, rather than disparaged. Although the courts have infused key Sherman Act concepts with widely-accepted and well-understood meaning,³⁵ the broad language of the Act has imbued it with a capacity to grow and meet new economic conditions and situations.³⁶ In the words of Chief Justice Hughes, the Act is written with a "generality and adaptability comparable to that found to be desirable in constitutional provisions."³⁷ The favorable product of judicial interpretation of the Sherman

³⁰ *Report of the Attorney General's National Committee to Study the Antitrust Laws* 349, 350 (1955) (statement of Stanley N. Barnes, Ass't. Att'y. Gen. in Charge of Antitrust Division).

³¹ Mercurio, *supra* note 4, at 438.

³² Whiting, *supra* note 18, at 940 n.44.

³³ Per se violations include price fixing, *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); market and customer allocation, *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951); *U.S. v. Topco Associates, Inc.*, 405 U.S. 596 (1972); and group boycotts, *Klors, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959).

³⁴ Virtually every § 1 case brought between 1971 and 1979 charged either price fixing or a combination of price fixing and some other per se violation. *See* CCH TRADE REG. REP., *supra* note 16.

³⁵ *See* notes 17-19 *supra*.

³⁶ Flynn, *supra* note 5, at 1312.

³⁷ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933).

²⁴ *Standard Oil v. United States*, 221 U.S. 1 (1911). *See* text accompanying note 41 *infra*.

²⁵ 221 U.S. 106 (1911).

²⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

²⁷ 229 U.S. at 376-78. The act was upheld by an eight-to-one majority.

²⁸ *See* note 24 and accompanying text *supra*.

²⁹ PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, CRIME AND ITS IMPACT: AN ASSESSMENT 110 (1967). *See generally* Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 CORNELL L. REV. 405 (1978).

Act, then, is an Act which has proven to be stable in meaning, but which has also proved to be workable in practice.

Another possible explanation for lenient sentencing in Sherman Act cases is the closeness of the Sherman Act to the common law. Although the Sherman Act was a product of populist fervor which spread across the United States in the late 19th century,³⁸ the Act is basically a child of the common law. Besides its substantive similarity to the common law trade tort of unfair competition,³⁹ the Sherman Act, according to Senator Sherman, was not designed to "announce a new principle of law, but applies old and well-recognized principles of the common law."⁴⁰

In early cases, judges stressed the common law features of the Sherman Act. The paramount case interpreting the Sherman Act in terms of the common law is *Standard Oil*, in which the Supreme Court read the Act to condemn only "unreasonable" or "undue" restraints of trade.⁴¹ Speaking for the majority in *Standard Oil*, Chief Justice White stated that the concepts contained in the Sherman Act, "at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption" of the Act.⁴²

Another important early opinion on the common law character of the Sherman Act was delivered by William Howard Taft, then sitting as judge on the Court of Appeals for the Sixth Circuit, in *United States v. Addyston Pipe and Steel*.⁴³ The *Addyston* case contains probably the most exhaustive judicial treatment of the relationship of the Sherman Act to the common law. In *Addyston*, Taft extensively discussed the common law of trade restraints before finally concluding that Congress intended the Act to be interpreted in light of common law principles.⁴⁴

Because of the common law character of the Sherman Act, judges, particularly in early cases,

probably saw the Act as a codification of common law trade tort principles⁴⁵ and thus more a civil than criminal piece of legislation. Judges consequently may have been reluctant to impose strong sentences in Sherman Act criminal cases. They left enforcement of the Act to injured private parties willing to sue for treble damages in civil actions, thereby establishing a precedent of leniency which would be followed by later judges, even after the tort and common law flavor of the Act dwindled and the Act took on the public and regulatory character which marks it today.

Lenient sentencing based on the position that the Sherman Act is basically a codified tort action ignores fundamental Sherman Act policy objectives. Perhaps the most important of these objectives is economic efficiency; by promoting competition, the Sherman Act improves resource allocation and adds to the economic well-being of the consuming public.⁴⁶ The Act also serves populist goals. "It disperses wealth; limits business size; broadens entrepreneurial opportunities; and substitutes the impersonal forces of the market place for the economic power of private individuals or groups to exploit or coerce those with whom they deal."⁴⁷ More recently, the Sherman Act has been touted as an important tool for fighting inflation.⁴⁸

Achievement of these Sherman Act policy objectives comes through effective deterrence of would-be offenders of the Sherman Act.⁴⁹ The possibility of civil actions for treble damages may in part serve as a deterrent. However, private litigants usually face a number of hurdles which severely limit the deterrence power of treble damage suits. These hurdles include the time and labor-consuming process of discovery, high attorney's fees, the prospect of drawn-out litigation, difficulty in proving damages, and often the enormous size, resources, and power of the defendant.⁵⁰ Achievement of Sherman Act policy objectives thus depends on effectively severe sentencing in Sherman Act criminal cases. Judges who view the Sherman Act as civil legislation and consequently impose lenient sentences

³⁸ For history and background information on the Sherman Act, see A. WALKER, HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA (1910).

³⁹ For information on the tort of unfair competition and other competition related torts, see 3 P. AREEDA & D. TURNER, *supra* note 17, at 276-87.

⁴⁰ 21 CONG. REC. 2456 (1890). See Bock, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

⁴¹ 221 U.S. at 66.

⁴² *Id.* at 51.

⁴³ 85 F. 271 (1898), *aff'd*, 175 U.S. 211 (1899).

⁴⁴ *Id.* at 279-91.

⁴⁵ See, e.g., *Standard Oil v. United States*, 221 U.S. at 50.

⁴⁶ 1 P. AREEDA & D. TURNER, *supra* note 17, at 7.

⁴⁷ *Id.*

⁴⁸ See text accompanying notes 84 & 85 *infra*.

⁴⁹ See note 58 and accompanying text *infra*.

⁵⁰ For a discussion of the use of treble damage actions as an enforcement tool, see Comment, *Effectiveness of the Private Treble Damages Action as an Antitrust Enforcement Mechanism: A Symposium*, 8 SW. U.L. REV. 505 (1976).

against offenders, therefore, fail to carry out the fundamental policies which underlie the Act.

Judges also may have imposed lenient sentences in Sherman Act cases because they saw sentencing under the Act in terms of the philosophy of competition law in general. The Sherman Act is part of a large body of competition law, including the Clayton Act⁵¹ and the Federal Trade Commission Act,⁵² as well as a pantheon of state and federal regulation of utilities and business.⁵³ The basic philosophy of this body of law, best exemplified by utility regulation, is to guide or shape the behavior of business. Within this prospective regulation-oriented milieu, judges probably lost sight of the purpose of Sherman Act sentencing, which is to punish past misconduct and hopefully to deter misconduct in the future.⁵⁴ Judges consequently imposed lenient fines in Sherman Act cases to remind the offending businessman that his past misconduct was frowned upon and depended upon carefully drawn consent decrees⁵⁵ to ensure proper conduct in the future.

Judges have probably also imposed lenient sentences against Sherman Act offenders on the basis that antitrust offenses are not sufficiently morally serious to warrant harsher sentences.⁵⁶ Antitrust

crime has rarely been seen as being as morally serious as other crime. In the Renfrew study, for example, respondents when asked whether antitrust violations were more or less stigmatizing or socially disgraceful than embezzlement, bribery of a public official, tax evasion, bank robbery, and consumer fraud, generally replied that antitrust violations were less stigmatizing.⁵⁷

The attitude that antitrust violations are not morally serious derives from the nature of the conduct the Sherman Act regulates. The Sherman Act, broadly speaking, regulates pursuit of self-interest in business. Short of monopoly or attempt to monopolize, the Act approves pursuit of interest by individual businessmen and disapproves of it when engaged in with competitors. The line the Sherman Act draws between individual pursuit of interest and collective pursuit is more a legal line than a moral one, since there is nothing intrinsically immoral about pursuit of interest in business. As such, competitive conduct which falls on the wrong side of the line may earn a degree of moral opprobrium because it is in fact a violation of the law, but the conduct, in the eyes of many sentencing judges, probably lacks sufficient moral seriousness to warrant strict sentencing.

It should be noted, however, that the moral aspect of Sherman Act offenses is not the basis upon which judges should impose sentence in Sherman Act cases. With crimes such as rape or murder, which bear a heavy stamp of moral opprobrium, the judge may appropriately consider the moral aspect of the crime in setting sentence. With antitrust violations, however, the goal of sentencing is general deterrence; that is, to impose sentences sufficient to deter future violators.⁵⁸ Judges may consciously or unconsciously equate severity of sentence with the moral seriousness of the offense, reserving harsh sentences for offenders engaging in morally serious crimes. To the extent that judges have done so in Sherman Act cases, they have probably been unfaithful to the goal of general deterrence.

Lenient sentencing based on the minimal moral seriousness of Sherman Act violations also ignores the enormous social implications of antitrust crime. Simply in terms of dollars and cents, the implications of ineffective sentencing in Sherman Act cases are enormous. The impact of antitrust crime is not limited to one locality and a few persons, but is felt

⁵¹ 38 Stat. 730 (1914), as amended, 15 U.S.C.A. §§ 12-27 (1977).

⁵² 38 Stat. 717 (1914), as amended, 15 U.S.C.A. §§ 41-48 (1977). Other statutes related to the Sherman Act are the Wilson Tariff Act, 28 Stat. 570 (1894), as amended, 15 U.S.C.A. §§ 8-11 (1977), and the Webb-Pomerene Act, 40 Stat. 516 (1918), as amended, 15 U.S.C.A. §§ 61-65 (1977).

⁵³ See, e.g., Justice Department merger guidelines issued under § 7 of the Clayton Act, [1977] 1 TRADE REG. REP. (CCH) ¶ 4510.

⁵⁴ See note 58 *infra*.

⁵⁵ A useful starting point for information on consent decrees in antitrust cases is 2 P. AREEDA & D. TURNER, *supra* note 17, at 140-45. See also Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 I.A. L. REV. 983 (1968); Turner, *Antitrust Consent Decrees: Some Basic Policy Questions*, 23 REC. A.B.N.Y. 118 (1968); Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967). For more recent material on antitrust consent decrees, see Kalodner, *Consent Decree as an Antitrust Enforcement Device*, 23 ANTITRUST BULL. 277 (1978); Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163 (1976); Comment, *Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 COLUM. L. REV. 296 (1977).

⁵⁶ For a thorough discussion on the moral aspect of antitrust crime, see Flynn, *supra* note 5, at 1315-23.

⁵⁷ Renfrew, *supra* note 4, at 601 n.19.

⁵⁸ See Baker & Reeves, *supra* note 4, at 619.

in scores of markets and in the pocket books of thousands of consumers.⁵⁹ Economic efficiency is also reduced by lenient sentencing because competitors are under no incentive not to monopolize or to engage in restraints of trade. Besides monetary and economic costs, there are also sociopolitical costs to ineffective sentencing. One of the more important of these sociopolitical costs is loss of economic freedom of choice. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."⁶⁰

Another factor contributing to lenient sentencing in Sherman Act cases is the white collar background of the offender.⁶¹ Sherman Act offenders are typically persons of high standing, both socially and morally, in the community. Usually, they have no previous criminal record. The exemplary background of many Sherman Act offenders has probably led some judges sitting on Sherman Act cases to reduce sentence. Character and criminal record of an offender are normally relevant and, indeed, important factors for consideration in sentencing. However, too much can be made of an offender's character and record in the context of antitrust sentencing. Because the goal of antitrust sentencing is general deterrence,⁶² the primary focus for the judge when imposing sentence should not be the offender's character and record, but on the probable effect sentencing will have on future violators.

Ultimately, chief responsibility for lenient Sherman Act sentencing rests in the failure of the Justice Department to actively seek, and of Congress to actively support, stricter Sherman Act sentencing. Historically, the Justice Department has not avoided bringing Sherman Act criminal actions. Between 1890 and 1969, for example, the Justice Department filed criminal charges in 44.7% of Sherman Act cases.⁶³ However, the Justice De-

partment has not actively sought in the past to incarcerate Sherman Act offenders.⁶⁴ Indeed, the Justice Department did not begin to seek incarceration of Sherman Act offenders until 1977.⁶⁵

Congress also exhibited little interest before the 1970s in having strict sentences imposed against Sherman Act offenders.⁶⁶ Prior to 1974, Congress increased the penalty provisions of the Sherman Act only once. The increase occurred in 1955, when the ceiling on fines for individuals and corporations violating the Sherman Act was changed from \$5,000 to \$50,000.⁶⁷ As a result of the insouciance of Congress and the Justice Department regarding Sherman Act sentencing, the courts have faced little institutional pressure to impose severe sentences against Sherman Act violators. Left to their individual discretion, judges consequently imposed lenient sentences in Sherman Act cases.

To sum up, judges historically have been reluctant to incarcerate Sherman Act offenders and have been equally unwilling to impose stiff fines in Sherman Act cases. Several factors, including the broad language and common-law origins of the Act, the philosophy of regulation implicit in competition law in general, the relative morality of Sherman Act violations, the character and record of Sherman Act offenders, and the lack of congressional and administrative pressure for strict sentencing, may have contributed to judicial lenience in sentencing Sherman Act violators. However, most of these explanations for leniency in Sherman Act sentencing either lack merit, have been exaggerated in importance, or obscure more important

criminal suits have not been counted. See CCH TRADE REG. REP., *supra* note 16.

Year	Total # of cases	Criminal	Civil
1971	42	9	33
1972	68	18	50
1973	43	17	26
1974	39	21	18
1975	36	22	14
1976	43	23	20
1977	40	25	15
1978	44	31	13
1979	35	16	19
Totals, 1971-79	390	182	208

⁵⁹ See Flynn, *supra* note 5, at 1319-20.

⁶⁰ United States v. Topco Associates, 405 U.S. at 610.

⁶¹ See generally E. SUTHERLAND, WHITE COLLAR CRIME (1949).

⁶² See note 58 and accompanying text *supra*.

⁶³ Posner, *supra* note 9, at 385. The percentage of criminal to total cases is similar for the 1970s. Between 1971 and 1979, the Justice Department brought 182 criminal cases and 390 cases in total, for a percentage of 46.7%. Material on the number of Sherman Act criminal and civil cases from 1971 to 1979 is broken down by years below. Civil actions arising from or jointly filed with

⁶⁴ Flynn, *supra* note 5, at 1306.

⁶⁵ See text accompanying notes 79-83 *infra*.

⁶⁶ See note 71 and accompanying text *infra*.

⁶⁷ 69 Stat. 282. The Sherman Act, as originally passed, provided for maximum fines of \$5,000 and jail terms of one year. 26 Stat. 209.

TABLE 1

Period	Individuals subject to sentence (nolo plea, guilty plea, or conviction)	Individuals serving sentence (incarceration, fine, or community service)	Individuals serving no sentence	Percentage of offenders serving sentence	Percentage of offenders serving no sentence
Misdemeanor, 1971-75	204	179	25	87.7	12.3
Misdemeanor, 1976-79	168	167	1	99.4	0.6
Felony, 1976-79	59	59	0	100.0	0.0
Misdemeanor & Felony, 1976-79	227	226	1	99.6	0.4
Totals, 1971-79	431	405	26	94.0	6.0

sentencing considerations. The historical record of the courts in sentencing Sherman Act offenders has therefore not been an impressive one.

SHERMAN ACT SENTENCING, 1971-1979:
AN EMPIRICAL STUDY

As the following study of Sherman Act sentencing during the 1970s should indicate, the pattern of leniency which historically has existed in antitrust sentencing ended in the 1970s. Data for the study, which covers the years from 1971 through 1979, was gathered from the Blue Book⁶⁸ and includes only cases involving "pure" restraints of trade.⁶⁹ To allow for better understanding of trends in antitrust sentencing during the 1970s, the data has been broken down into three general categories: 1) misdemeanor antitrust cases, 1971-75, 2) misdemeanor cases, 1976-79, and 3) felony cases.

Table 1 provides information on the frequency with which Sherman Act offenders were sentenced during the 1970s. Between 1971 and 1979, 431 individuals were subject to sentence for Sherman Act violations; 405 of these persons (or 94.0%) ultimately served some sentence. A close look at the material reveals that sentencing became stricter in the latter years of the 1970s. Although the percentage of individuals serving sentence in misdemeanor cases from 1971 through 1975 is a respectable 87.7%, the sentencing performance of courts in the last four years of the decade was outstanding. Of 227 persons subject to sentence in misdemeanor and felony cases from 1976 through 1979, 226 (or 99.6%) served some sentence. Nota-

TABLE 2

Period	Individuals Subject to Sentence	Individuals Incarcerated	Percentage of Individuals Incarcerated
Misdemeanor, 1971-75	204	26	12.7
Misdemeanor, 1976-79	168	35	20.8
Felony, 1976-79	59	22	37.3
Misdemeanor & Felony, 1976-79	227	57	25.1
Totals, 1971-79	431	83	19.3

bly, all fifty-nine felony defendants subject to sentence incurred some penalty.

In addition to imposing more sentences against Sherman Act offenders in the 1970s, courts showed an increasing willingness to incarcerate violators. In table 2, the number of individuals incarcerated for violating the Sherman Act is compared with the number of individuals subject to sentence. From 1971 through 1975, 12.7% of Sherman Act offenders were incarcerated, a remarkable statistic when compared to the frequency with which judges imposed jail sentences against Sherman Act defendants prior to 1971.⁷⁰ Yet, in antitrust cases from 1976 through 1979, the rate at which offenders were incarcerated doubled, increasing from 12.7% to 25.1%. In misdemeanor cases for 1976 through 1979, the percentage of offenders spending time in jail reached 20.8%. In addition, 37.3% of felony defendants served jail time, a rate of incarceration three times that for offenders in misdemeanor cases from 1971 through 1975.

The percentage of judges imposing jail sentences against Sherman Act offenders also increased dur-

⁶⁸ CCH TRADE REG. REP., *supra* note 16.

⁶⁹ In other words, the study does not consider cases in which antitrust charges are coupled with charges of racketeering, perjury or mail fraud. See note 14 and accompanying text *supra*.

⁷⁰ See notes 8 & 9 and accompanying text *supra*.

TABLE 3

Period	Cases in which at least one individual was subject to sentence	Cases in which Judge imposed at least one jail sentence	Cases in which Judge imposed no jail sentence	% of cases in which Judge imposed at least one jail sentence	% of cases in which Judge imposed no jail sentence
Misdemeanor, 1971-75	44	9	35	20.5	79.5
Misdemeanor, 1976-79	27	7	20	25.9	74.1
Felony, 1976-79	16	7	9	43.7	56.3
Misdemeanor & Felony, 1976-79	43	14	29	32.6	67.4
Totals, 1971-79	87	23	64	26.4	73.6

ing the 1970s. Table 3 measures the percentage of judges incarcerating offenders by tabulating the number of Sherman Act cases in which at least one offender served time in jail. From 1971 through 1975, judges imposed at least one jail sentence in only one of every five Sherman Act criminal cases (20.5%). In misdemeanor and felony cases from 1976 through 1979, however, at least one offender was sentenced to jail in one of every three Sherman Act criminal cases (32.6%). Thus, not only did the percentage of Sherman Act offenders receiving jail terms increase as the 1970s progressed, the number of judges imposing jail sentences increased as well.

Although judges sitting on Sherman Act cases demonstrated an increasing willingness to use the jail sentence against offenders, they did not behave predictably in setting the term to be served. Table 4 presents data on the length of sentence imposed in Sherman Act cases during 1971 through 1979. As table 4 indicates, the length of sentence imposed against Sherman Act offenders fluctuated during the 1970s. In misdemeanor cases from 1971 through 1975, twenty-six individuals served a total of 1495 days in jail for an average sentence of fifty-eight days. The average sentence for the twenty-two felony defendants serving time was a comparable fifty-nine days. However, the thirty-five defendants serving time in misdemeanor cases from 1976 through 1979 spent only 759 days in jail, an average sentence of twenty-two days. Thus, despite the fact that judges were increasingly willing to incarcerate Sherman Act defendants, the material in table 4 indicates that there still was considerable disagreement among judges as to the appropriate jail term individuals should serve for Sherman Act violations.

Table 5 examines for 1971 through 1979 how often courts imposed fine sentences against Sherman Act violators. As table 5 shows, judges sitting

TABLE 4

Period	Individuals Serving Time	Total Days Served	Average Sentence
Misdemeanor, 1971-75	26	1495	58 days
Misdemeanor, 1976-79	35	759	22 days
Felony, 1976-79	22	1295	59 days

TABLE 5

Period	Individuals subject to sentence	Individuals fined	% of individuals fined
Misdemeanor, 1971-75	204	176	86.3
Misdemeanor, 1976-79	168	153	91.1
Felony, 1976-79	59	48	81.4
Misdemeanor & Felony, 1976-79	227	201	88.5
Totals, 1971-79	431	377	87.5

on antitrust cases were fairly consistent during the decade in imposing fine sentences. In misdemeanor cases from 1971 through 1975, 86.3% of individuals subject to sentence received fines. The percentage of offenders fined reached 91.1% in misdemeanor cases from 1976 through 1979, and felony defendants were fined 81.4% of the time.

Although courts imposed the fine sentence in a fairly consistent fashion during the 1970s, they did not avoid imposing harsher fines. As table 6 indicates, the average fine imposed against Sherman Act offenders increased substantially during the 1970s. In misdemeanor cases from 1971 through 1976, 176 individuals were assessed fines cumulating \$1,479,500, for an average sentence of \$8,400.

TABLE 6

Period	Individuals Fined	Total \$ Levied Against Individuals Fined	Average Fine
Misdemeanor, 1971-75	176	\$1,479,500	\$8,400
Misdemeanor, 1976-79	153	\$1,816,200	\$11,900
Felony, 1976-79	48	\$841,000	\$17,500

TABLE 7

Period	Individuals Fined, Jailed, or both Fined and Jailed	Individuals Jailed Only	Individuals Fined Only	Individuals Both Jailed and Fined	Percentage of Individuals Jailed Only	Percentage of Individuals Fined Only	Percentage of Individuals Both Jailed and Fined
Misdemeanor, 1971-75	179	3	153	34	1.7	85.5	12.8
Misdemeanor, 1976-79	167	14	132	21	8.4	79.0	12.6
Felony, 1976-79	53	5	31	17	9.4	58.5	32.1
Misdemeanor & Felony, 1976-79	220	19	163	38	8.6	74.1	17.3
Totals, 1971-79	399	22	316	61	5.5	79.2	15.3

TABLE 8

Period	Corporate Offenders Assessed Fines	Total \$ Levied Against Corporate Offenders	Average Sentence
Misdemeanor, 1971-75	343	\$8,007,100	\$23,300
Misdemeanor, 1976-79	175	\$5,323,180	\$30,400
Misdemeanor, 1971-79	518	\$13,330,280	\$25,700
Felony, 1976-79	134	\$23,351,375	\$174,300

Fines against misdemeanor defendants in the period from 1976 through 1979 increased 42% to \$11,900. Felony defendants paid, on the average, a fine of \$17,500, or more than twice the average fine incurred by offenders in misdemeanor cases from 1971 through 1975.

Besides imposing steadily stiffer fines against antitrust offenders during the 1970s, judges toughened sentencing by increasingly imposing fine sentences in conjunction with jail terms. Table 7 examines judicial use of fine only, jail only, and fine and jail sentences from 1971 through 1979. The percentage of fine only sentences declined as the 1970s progressed. In misdemeanor cases from 1971 through 1975, 153 of 179 offenders (85.5%) received fine only sentences. From 1976 through 1979, however, judges levied fine only sentences against only 74.1% of felony and misdemeanor offenders. The percentage of defendants receiving a jail and fine sentence, on the other hand, in-

creased during the 1970s, from 12.8% in misdemeanor cases from 1971 through 1975 to 17.3% in misdemeanor and felony cases for the years of 1976 through 1979. The increase in use of the jail and fine sentence in the latter years of the 1970s is attributable, however, to felony cases where 32.1% of defendants served both a jail and fine sentence.

As table 8 indicates, judges in the 1970s also toughened fine sentences for corporations violating the Sherman Act. In misdemeanor cases from 1971 through 1979, for example, 518 corporate offenders suffered an average penalty of \$25,700. In felony cases, in contrast, the average sentence for corporate offenders was \$174,300.

Although it is difficult to establish with certainty why Sherman Act sentencing toughened during the 1970s, it is still possible to point to factors which reasonably can be said to have had some influence on judges' sentencing in Sherman Act cases. Passage of the Antitrust Procedures and

Penalties Act, for example, was probably the most important factor contributing to stricter antitrust sentencing during the 1970s. Congress passed the Procedures and Penalties Act in 1974.⁷¹ The Procedures and Penalties Act, besides making important changes in procedures for using consent decrees in antitrust cases,⁷² increased the ceiling on fines for corporate offenders from \$50,000 to \$1,000,000 and for individuals from \$50,000 to \$100,000, and raised the maximum jail term for individuals from one to three years. In addition to these penalty increases, the Procedures and Penalties Act elevated the status of Sherman Act violations from misdemeanor to felony.

Several commentators have criticized elevating Sherman Act violations to felony status, principally on the ground that the Sherman Act is too imprecise to brand as felons businessmen violating the Act.⁷³ The criticism, however, is unwarranted, since the Justice Department in felony cases has carefully followed its longstanding policy of only seeking criminal charges against individuals engaging in well-defined types of trade restraints, such as price fixing.⁷⁴

Elevating Sherman Act offenses to felony status also has been criticized on deterrence grounds. At least one commentator has argued that felony status would not spur judges sitting on Sherman Act cases to impose stricter sentences, rather it would, if anything, provoke judges to sentence less harshly than in the past.⁷⁵ The contention appears to be

based on how sentencing judges would react to the collateral consequences an individual suffers when he is convicted of committing a felony.⁷⁶ Judges, it apparently was feared, would ease sentences against Sherman Act offenders convicted of felony violations because such offenders were already saddled with the collateral consequences of a felony conviction. Although the argument has a degree of theoretical appeal, it ignores the fact that most felony defendants in antitrust cases escape the collateral effects of a felony conviction by pleading *nolo contendere*.⁷⁷ In addition, in cases where felony defendants have been convicted of violating the antitrust laws and have thus incurred collateral consequences, judges have generally treated convicted defendants as severely as, and sometimes more severely than, felony defendants pleading *nolo contendere* in the same case.⁷⁸ Thus, elevating Sherman Act violations to the status of felony has not been the barrier to tougher sentencing some observers thought it would be.

A second factor which has contributed to stricter Sherman Act sentencing in the 1970s is the policy of the Justice Department to seek stricter sentences. The Justice Department has stated its policy concerning incarceration as follows:

The maximum prison term for a Sherman Act felony is three years and the corresponding parole eligibility would occur after one year. The Antitrust Division will, in appropriate circumstances, recommend this maximum penalty. In arriving at individual recommendations, the step-by-step approach will be followed considering and applying several aggravating and mitigating factors to a base sentence of 18 months. The 18 months will be the base period from which recommendations in all criminal antitrust cases, except those which involve very small, purely local conspiracies, will be calculated.⁷⁹

The Justice Department has also stated that the recommended fine will track the recommended prison sentence.

⁷⁶ Collateral consequences of a felony conviction include disenfranchisement and disqualification for public office. For an extensive treatment of collateral consequences, see Comment, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

⁷⁷ Posner, *supra* note 9, at 388-90. In felony Sherman Act cases beginning in 1976 through 1979, 53 defendants pleaded *nolo contendere* to charges of violating the Sherman Act, while five defendants were convicted of, and one defendant pleaded guilty to, violating the Act. See CCH, TRADE REG. REP., *supra* note 16.

⁷⁸ See TRADE REG. REP. (CCH) ¶¶ 2548, 2576, 2662, for felony cases in which individuals were convicted or pleaded guilty to violating the Sherman Act.

⁷⁹ 45 U.S.L.W. 2419 (Mar. 8, 1977).

⁷¹ Act of December 21, 1974, Pub. L. No. 93-528, 88 Stat. 1708.

Sections 1, 2 and 3 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (15 U.S.C. § 1, 2, and 3), are each amended—

(1) by striking out "misdemeanor" whenever it appears and inserting in lieu thereof in each case "felony";

(2) by striking out "fifty thousand dollars" whenever such phrase appears and inserting in lieu thereof in each case the following: "one million dollars if a corporation, or, if any other person, one hundred thousand dollars"; and

(3) by striking out "one year" whenever such phrase appears and inserting in lieu thereof in each case "three years."

⁷² See Comment, *supra* note 55.

⁷³ Halverson, *An Evaluation of Substantive Changes and Penalties*, 43 ANTITRUST L.J. 419, 423 (1974); Mercurio, *supra* note 4, at 438-39. See generally *Official Report From Washington, Antitrust and the Proposed Revision of Federal Criminal Laws*, 43 ANTITRUST L.J. 395 (1974).

⁷⁴ From 1976 through 1979, the Justice Department brought 45 felony cases. In each case, the Department charged at least price fixing or bid rigging. See CCH, TRADE REG. REP., *supra* note 16.

⁷⁵ Halverson, *supra* note 73, at 423.

The midpoint in the permissible sentencing range, \$50,000, would be the base point, just as 18 months is the base prison sentence. \$50,000 may be unduly severe for defendants with a net worth below a certain figure. Accordingly, where \$50,000 exceeds 25 percent of an individual's net worth the latter figure would be used as the base point.⁸⁰

With respect to corporate offenders, the Department has announced that it will take as base point "ten percent of the corporation's total sales in the affected line of commerce by a corporation during a conspiracy. Where there is evidence that this figure is, in fact, low, we shall use the actual percentage increase and apply this figure."⁸¹ In reaching its sentencing recommendations and departing from the above base points, the Justice Department considers five factors: 1) the amount of commerce involved in the restraint, 2) the position of the individual involved in the restraint, 3) the existence and degree of predatory or coercive conduct, 4) the length of participation in the restraint, and 5) any previous convictions.⁸² The Justice Department has also stated that it will consider whether and to what degree an offender has cooperated with the Department as well as any personal, family, or business hardships an offender may have.⁸³

The penalty increases adopted by Congress in 1974 and the policy statement expressed by the Justice Department in 1977 have put institutional pressure on courts to impose stricter sentences against Sherman Act offenders and reasonably explain why courts imposed progressively tougher sentences in the latter years of the 1970s. However, the courts began imposing tougher sentences in Sherman Act cases in 1972, suggesting that institutional pressure is not the only factor responsible for tougher sentencing in Sherman Act cases during the 1970s. Less tangible factors probably have contributed to stricter sentencing as well.

One such factor is the role strong antitrust sentencing was seen as having in the early 1970s in promoting prosperity in the economy. It was thought that effective sentencing would help fight inflation by deterring antitrust violations.⁸⁴ President Ford in 1974, for example, requested increased penalties for Sherman Act offenses as part of a comprehensive plan for fighting inflation.⁸⁵ Although the effectiveness of antitrust prosecution in decreasing price levels has been criticized,⁸⁶ it is likely that judges sitting on Sherman Act cases in the early 1970s imposed stricter sentencing on the ground that strong sentencing would aid economic recovery.

CONCLUSION

Sherman Act sentencing became stronger during the 1970s. In contrast with the pattern of lenient sentencing which historically has been the hallmark of Sherman Act sentencing, courts began in 1972 to impose stricter sentences against antitrust violators. During the 1970s, for example, more individuals served time in jail for Sherman Act violations than in the years from 1890 to 1969 combined. Besides incarcerating more offenders, the courts imposed stricter fine sentences against both corporate and individual offenders. In addition, as the decade passed, judges sitting on Sherman Act criminal cases increased the severity of sentences, imposing the strongest sentences against felony offenders. Although the deterrent impact of tougher sentencing is still not clear, the trend of stricter sentencing in Sherman Act criminal cases promises to continue and thus provides for an encouraging beginning for antitrust enforcement in the 1980s.

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⁸⁴ See generally *Antitrust in Times of Economic, Technological and Ecological Crisis: A Symposium*, 36 U. PITT. L. REV. 591 (1975).

⁸⁵ Address by President Gerald R. Ford, Joint Session of the 93d Cong. (Oct. 8, 1974), reprinted in 10 WEEKLY COMP. PRES. DOC. 1239 (1974).

⁸⁶ See generally Handler, *Antitrust—Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211 (1975).

⁸⁰ *Id.*

⁸¹ *Id.* at 2420.

⁸² *Id.* at 2419.

⁸³ *Id.*