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POLICING THE FIRM

*D. Daniel Sokol**

ABSTRACT

Criminal price fixing cartels are a serious problem for consumers. Cartels are hard both to find and punish. Research into other kinds of corporate wrongdoing suggests that enforcers should pay increased attention to incentives within the firm to deter wrongdoing. Thus far, antitrust scholarship and policy have ignored this insight in the cartel context. This Article suggests how to improve antitrust enforcement by focusing enforcement efforts on changing the incentives of internal firm compliance.

INTRODUCTION

In 2006, details began to emerge about a massive, decade-long, worldwide price fixing conspiracy involving air cargo. Seasoned international travelers will recognize members of the conspiracy, which included some of the best-known airlines in the world—Air France-KLM, Alitalia, American Airlines, British Airways, Cathay Pacific Airways, Delta (via its acquisition of Northwest Airlines), Lufthansa, LAN, El Al, Emirates Airlines, Singapore Airlines, Air India, All Nippon Air-

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ways, South African Airways, and Thai Airlines.[1] The extraordinary dollar amount of this worldwide price fixing cartel (over $4 billion recovered so far)[2] has made the air cargo cartel the largest cartel in terms of damages collected.

The number and sophistication of the companies and individuals involved in this collusive criminal activity[3] and lack of detection by internal gatekeepers such as in-house counsel and compliance officers illustrate inadequate corporate governance on a massive scale. Employees of a given airline would send emails and phone their counterparts across airlines to ensure that price changes, based on an agreed upon fuel surcharge index, would be followed by all of the cartel members. These employees would report up to their superiors that all the cartel members would increase the surcharge. Put differently, there were price conversations between competitors and some bonding and monitoring mechanisms thereafter to enforce the cartel.[4]

With all of the compliance enforcement methods used by antitrust agencies (imprisonment, individual and corporate fines, and leniency), the number of antitrust agencies around the world spending resources to uncover cartels, and layers of compliance programs within a given company, it may be surprising that so many large and sophisticated companies avoided detection for ten years. The cartel's duration and composition is even more shocking given significant corporate governance focus on improving compliance.

Corporate scandals of the past decade have inspired burgeoning academic literature on corporate governance and wrongdoing. However, the explosion of scholarship on corporate governance and com-

1 *See Air-Cargo Price Fixing Probed*, CHI. TRIB. (Feb. 16, 2006), http://articles.chicagotribune.com/2006-02-16/business/0602160172_1_cargo-airlines-japan-airlines-corp-surcharges.

2 John M. Connor, *Multiple Prosecutions Point to Huge Damages from Auto-Parts Cartels* 2 n.1 (Am. Antitrust Inst., Working Paper No. 12-06, 2012), *available at* http://ssrn.com/abstract=2190200.

3 Parties to the various cases include over thirty airlines worldwide. *See In re* Air Cargo Shipping Servs. Antitrust Litig., No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at *1 n.1 (E.D.N.Y. Sept. 26, 2008) (listing the defendants in the First Consolidated Amended Complaint). There were multiple conspiracies across different countries and a particular country's market may have had a slightly different set of conspirators than another country, such as between the conspiracy in the United States and the conspiracy in the United Kingdom. *Id.* at *1.

4 *Id.* at *7 ("[A]ll thirty defendants, which range from airlines with enormous fleets and broad reach to the national airlines of tiny countries, gathered or otherwise communicated simultaneously, and thereby agreed to implement identical measures in unrelated markets all over the world.").

pliance,[5] as well as a similar increase in scholarship on white collar crime and corporate criminality,[6] has for the most part neglected antitrust.

Cartels are a sophisticated form of corporate crime because they, like other conspiracies, inherently require coordination across multi-

5 *See, e.g.*, Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779 (2011) (discussing Dodd-Frank's corporate governance provisions); Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247 (2010) (advocating for regulation of banks' executive pay); Sanjai Bhagat et al., *The Promise and Peril of Corporate Governance Indices*, 108 COLUM. L. REV. 1803 (2008) (analyzing corporate governance indices' effectiveness); John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229 (2007); Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685 (2009) (examining various enforcement efforts); Jill E. Fisch, *The Overstated Promise of Corporate Governance*, 77 U. CHI. L. REV. 923 (2010) (taking a critical approach to corporate governance methods); Jesse E. Fried, *Share Repurchases, Equity Issuances, and the Optimal Design of Executive Pay*, 89 TEX. L. REV. 1113 (2011) (criticizing calls to associate executives' pay with stock value); Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637 (2011) (discussing conflicts in corporate governance); Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987 (2010) (arguing that CEOs are losing power to shareholders and their boards of directors); Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899 (2007) (comparing whistleblowing to insider trading); Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629 (2011) (recognizing the role of authorities critical of regulation); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005) (arguing that the Sarbanes-Oxley Act was made in haste and requires change).

6 *See, e.g.*, Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144 (Alon Harel & Keith N. Hylton eds., 2012); Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1482 (2009) (making a comparative examination of other countries' criminalization and advocating for criminalization); Pamela H. Bucy, *Why Punish? Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287 (2007) (predicting that there will be more corporate criminal investigations but fewer indictments of businesses); Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 512 (2011) (examining the meaning of "fraud" in the securities context); Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126 (2008) (taking a comparative law approach to criminal liability for corporations); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1777 (2011) (using case studies to show a change in prosecutions); Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1 (2008) (addressing the conflict over the U.S. Department of Justice's request for corporations to waive attorney-client privilege); Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 802–20 (2011) (arguing for the need to increase debarment to deter foreign corruption).

ple firms, as the air cargo cartel example illustrates.[7] That the air cargo cartel was not detected[8] across its participant firms either internally or through third parties (customers and outside gatekeepers such as law and accounting firms) suggests current antitrust criminal and civil penalties are not sufficient to deter wrongdoing, nor is the probability of detection sufficiently high.

Two major trends suggest that antitrust cartel enforcement is different relative to other areas of corporate crime. First, in white collar crime overall, there has been a shift toward more significant structural penalties. Brandon Garrett named this phenomenon "structural reform prosecution," a process in which prosecutors secure the cooperation of a business to adopt internal reforms.[9] Similarly, Vik Khanna and Timothy Dickinson have focused on the use of corporate monitors (embedded outside oversight personnel) to increase firm compliance.[10] However, the systematic use of structural reform prosecution and monitors has been underutilized in the antitrust criminal context, even when a corporate monitor has been imposed on a firm that has committed other crimes, for example in the Foreign Corrupt Practices Act (FCPA) context, as well as antitrust violations.

The lack of systematic structural reform through monitors for antitrust criminal price fixing seems surprising. One might suspect that the type of penalties imposed upon a firm would be more severe for criminal antitrust than civil antitrust. Indeed, in 2004 the Supreme Court called cartels "the supreme evil of antitrust."[11] Yet, it is generally civil rather than criminal antitrust that imposes corporate monitors and compliance officers.

Second, the corporate and white collar crime literature offers important governance lessons on the interaction of various internal firm stakeholders—corporate boards, shareholders, senior and mid-

7 On the economics of coordination in cartels, see William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393 (2011). The economics of cartels is not dissimilar to that of other sorts of criminal conspiracies. *See, e.g.*, Nuno Garoupa, *Optimal Law Enforcement and Criminal Organization*, 63 J. ECON. BEHAVIOR & ORG. 461 (2007) (examining how to achieve optimal deterrence).

8 Detection means finding the cartel. One could argue that it also includes that people within the firm care enough to do something about it and have the power to do something about it.

9 Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 854 (2007).

10 Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007).

11 Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

level management.[12] Yet, antitrust scholarship on cartels generally has not recognized these insights.[13] Instead, antitrust scholarship generally continues to see the firm as a "black box."[14]

The present Article uses insights from economics, finance, accounting, and management literatures to bridge gaps in antitrust legal scholarship and offers a novel two-part proposal designed to reduce cartel formation and increase detection of existing cartels. The proposal provides incentives for firms to increase their compliance.

The first proposal is to provide increased carrots for applicants under the "leniency program" (no penalties from the Department of Justice Antitrust Division (DOJ Antitrust))[15] as a "super leniency" for the cartel member that exposes the cartel and cooperates with DOJ Antitrust (no penalties from DOJ Antitrust and no damages in private litigation). The second proposal involves increased sticks—the automatic imposition of corporate monitors for all cartel members other than the leniency applicant. To make the case for the combination of corporate monitors and antitrust's use of leniency for cartels, this Article explains: (a) what is currently done to punish cartels and why this is not as effective as it needs to be, (b) how monitors work in other contexts, and (c) how monitors and leniency would function to deter and detect cartel activity in a criminal antitrust setting.

Properly designed, such a proposal would shift detection of wrongdoing from government enforcers to firms and encourage firms to spend more of their internal resources through more responsive regulation.[16] This would increase incentives for firms to self-report

12 In recent years, antitrust scholarship has started to explore how cartels work internally. *See* Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813, 825–41 (2011) (describing cartel management); D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201 (2012) (providing survey evidence of antitrust lawyers on the behavior of cartel clients).

13 *See generally* Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343 (2011) (providing a literature review on cartel scholarship).

14 Rosa M. Abrantes-Metz & D. Daniel Sokol, *Antitrust Corporate Governance and Compliance*, *in* OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS (Roger D. Blair & D. Daniel Sokol eds., forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246564 (providing a literature review of compliance and antitrust).

15 *See infra* Section II.A. Though the Federal Trade Commission can bring civil section 1 cases, this article focuses on DOJ Antitrust, which is the exclusive federal antitrust enforcer of criminal antitrust. Nearly all cases involve corporate leniency rather than individual leniency, so this Article focuses on corporate-level leniency.

16 *See generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992) (describing internal responsive regulation options which firms could take).

illegal behavior.[17] In those cases where cartels do form, the proposal would help to reduce the corrupt culture both within each firm and within the entire industry that might otherwise give rise to future cartel violations.

The remainder of the Article proceeds as follows. Part I provides an overview of cartel policy and the limits of its current enforcement system. Part II discusses super leniency as an alternative to traditional leniency. It also explores the lack of corporate monitors in antitrust and asks why antitrust remedies do not resemble remedies in other areas of corporate crime, with the routine imposition of monitors, such as the FCPA.

Part III discusses the current use of monitors in civil antitrust enforcement and how monitors might be used in criminal antitrust enforcement. This Part argues that super leniency and monitors would improve deterrence and increase the incentive to defect from existing cartels.

Given the use of monitors to change behavior in other antitrust settings to protect consumers and promote compliance, this Article argues that the most likely reason that criminal antitrust has not embraced the use of monitors is the fear by DOJ Antitrust that somehow tinkering with the leniency program will weaken the program. The path dependency of the current DOJ Antitrust approach leads to the use of ossified enforcement tools and techniques out of touch with mechanisms elsewhere in white collar practice that make enforcement more effective. The Article concludes that super leniency and monitors would move antitrust closer to optimal cartel enforcement as compliance will become a strategic variable for firms.

I. THE COST OF CARTELS

Cartel activity is a significant and unambiguous loss to society, which is why it receives *per se* illegal treatment (or something similar) in most of the world. From 2000 to 2010, the fines imposed against cartels by government actions totaled $31 billion in the European Union and $12 billion in the United States.[18] Private actions against

17 Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 323 (2012) ("Corporate criminal liability thus cannot serve its central purpose unless it is structured to provide firms with strong incentives to detect and self-report violations, as well as to cooperate with governmental authorities' efforts to sanction individual wrongdoers. Indeed, corporate sanctions undermine the central purpose of corporate liability when firms face higher expected sanctions when they engage in optimal corporate policing than when they do not.").

18 John M. Connor, *Cartels Portrayed: U.S. vs. EC: Who's Winning the Prosecution Race?: A 21-Year Perspective, 1990 to 2010*, at 29 (Am. Antitrust Inst., Working Paper

cartels during this period (mostly in the United States) amounted to an additional $41 billion.[19]

These figures do not offer context of how high the overcharge (the amount charged above the competitive price) was for cartel victims. For U.S. cartels, overcharges averaged between 18% and 37%.[20] For European cartels, the range was between 28% and 54%.[21] This overcharge rate is under-inclusive globally as cartel members have the ability to continue to reap supra-competitive profits in third-world country markets that lack effective cartel enforcement. In these other countries, many of which are in the developing world, cartel members often offset their fines from jurisdictions that impose them via higher overcharges to their victims.[22]

Even with large fines for illegal activity, there is a significant problem of cartel detection, which suggests under-deterrence. Scholars have estimated the U.S. cartel detection rate between 13 and 17 percent.[23] This percentage has not changed even after the introduction of the cartel leniency program, which provided for no penalties in return for the leniency applicant to defect from the cartel and cooperate with the authorities.[24] Two recent papers on European cartels sug-

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No. 11-03, 2011), *available at* http://www.antitrustinstitute.org/sites/default/files/AAI%20Working%20Paper%20No.%2011-03.pdf; *see also* John M. Connor & Robert H. Lande, Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges (August 31, 2011) (unpublished manuscript), http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=robert_lande (analyzing the total, combined impact of every existing anti-cartel sanction).

19 Connor, *supra* note 18, at 30.

20 John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for U.S. and EU Fining Policies*, 51 ANTITRUST BULL. 983, 983 (2006).

21 *Id.*

22 *See* Julian L. Clarke & Simon J. Evenett, *The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel*, 48 ANTITRUST BULL. 689 (2003) (detailing how the vitamins cartel was able to avoid the negative effects of enforcement); Alvin K. Klevorick & Alan O. Sykes, *United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on* Empagran, 3 J. COMPETITION L. & ECON. 309 (2007) (discussing the vitamins cartel case).

23 Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 REV. ECON. & STAT. 531, 535 (1991) (analyzing the period between 1961 and 1988).

24 Alla Golub et al., The Probability of Price Fixing: Have Stronger Antitrust Sanctions Deterred? 5 (Apr. 8, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1188515 (providing a modern analysis).

gest a detection rate range between 12.9% and 13.2%[25] or alternatively between 10% and 20%.[26]

Increasing the damage caused to consumers by cartels is cartel durability. The average duration of a cartel is five years.[27] Yet, cartels break up and reform with some frequency so that in some industries, there is recurring cartel activity for decades.[28]

DOJ Antitrust claims that there is no cartel recidivism.[29] In contrast, academic studies claim that recidivism may be significant.[30] Har-

25 Emmanuel Combe et al., *Cartels: The Probability of Getting Caught in the European Union* 17 (Bruges Eur. Econ. Research, Paper No. 12, 2008), *available at* http://www.coleurop.be/content/studyprogrammes/eco/publications/BEER/BEER12.pdf.

26 Peter L. Ormosi, *How Big Is a Tip of the Iceberg? A Parsimonious Way to Estimate Cartel Detection Rate* 21 (Ctr. for Competition Pol'y, Working Paper No. 11-6, 2011), *available at* http://competitionpolicy.ac.uk/en_GB/c/document_library/get_file?uuid=186cc0ec-a536-406d-9792-603f4f6ed95c&groupId=107435. Estimates of activity based on unobserved detection of behavior are something that many fields, such as ecology and epidemiology address. *See, e.g.*, HANDBOOK OF CAPTURE-RECAPTURE ANALYSIS (Steven C. Amstrup et al. eds., 2005) (discussing this work in the context of animal tagging).

27 Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 44, 74 (2006) (providing a survey of the literature); *see* Andrew R. Dick, *When Are Cartels Stable Contracts?*, 39 J.L. & ECON. 241 (1996) (investigating factors that determine cartel life expectancy); Jaime Marquez, *Life Expectancy of International Cartels: An Empirical Analysis*, 9 REV. INDUS. ORG. 331 (1994) (calculating life expectancy for cartels); Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365 (1970) (analyzing data from a number of agencies). As a qualification to the five year average, this average only may represent cartels that are detected and prosecuted. Moreover, the cartel may last longer than the time charged in the indictment and unstable cartels may escape prosecution because they collapse earlier. To my knowledge, the current world champion for endurance is the *Indo-Ceylon-Pakistan Shipping Conference*, which was established in 1875 and dissolved by the Competition Commission of India in October 2008—a life of 134 years. *See* Nikhil Gupta, *Competition Concerns in Shipping Conferences* (research paper for Competition Commission of India), *available at* http://cci.gov.in/images/media/ResearchReports/F2_LatestRevisedFinalReportNikhil32_20080411102353.pdf.

28 *See* Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard To Do: Determinants of Cartel Duration*, 54 J.L. & ECON. 455 (2011) (discussing the relative stability of cartels).

29 Gregory J. Werden et al., *Recidivism Eliminated: Cartel Enforcement in the United States Since 1999*, 1 COMPETITION POL'Y INT'L ANTITRUST CHRON., Oct. 2011, at 6 (suggesting that among those firms that have pled guilty to cartel crimes, these firms have not subsequently pled guilty to another cartel crime thereafter).

30 Martin Carree et al., *European Antitrust Policy 1957–2004: An Analysis of Commission Decisions*, 36 REV. INDUST. ORG. 97, 117 (2010); John M. Connor, *Recidivism Revealed: Private International Cartels 1990–2009*, 6 COMPETITION POL'Y INT'L. 101, 101 (2010); John M. Connor & C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990–2005*, at 23 (Am. Antitrust Inst., Working Paper No. 07-01, 2007); *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944039. Recidivism may

ding and Gibbs argue that there is an "awesome level of recidivism on the part of major companies who appear as usual suspects in the world of business cartels. In short, this suggests a confirmed culture of business delinquency."[31] Wils identifies a quarter of leniency applicants in Europe as recidivists.[32] Connor, using cross-country data, also suggests cartel recidivism.[33] Explaining high recidivism is the fact that a firm may be better off financially for participation in a cartel even after paying fines when caught.[34]

A. Limits to Optimal Deterrence

Optimal deterrence constitutes the basis for cartel enforcement. The importance of an optimal regime is to "yield the 'right' amount of compliance with legal rules—bearing in mind that enforcing these duties is itself costly."[35] Deterrence is another way of asking whether firms comply with the law and, if not, how to create an optimal compliance-based system. Becker, in his seminal article, suggested that optimal deterrence is a function of the damages varying inversely with probability of detection.[36] Optimal deterrence makes the firm that participates in illegal activity internalize the cost of crime. Landes extended Becker's idea to antitrust.[37] Given the pernicious effects of cartels, low rates of detection, and insufficient penalties, it does not seem that cartel enforcement globally has led to optimal deterrence.[38]

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be higher than the numbers suggest. Cartel members caught more than once may just be the cartelists who are bad at colluding, or at hiding it. There may be many more recidivists about whom we do not know simply because these cartelists get smart the second time around.

31 Christopher Harding & Alun Gibbs, *Why Go to Court in Europe? An Analysis of Cartel Appeals 1995–2004*, 30 EUR. L. REV. 349, 369 (2005).

32 Wouter P.J. Wils, *Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis*, 35 WORLD COMPETITION 5, 20 (2012).

33 Connor, *supra* note 30, at 101, 116.

34 Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 801 (2004).

35 Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 857–58 (1984).

36 Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). *But see* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953–56 (2003) (explaining the problems with deterrence theory).

37 *See generally* William M. Landes, *Optimal Sanctions for Antitrust*, 50 U. CHI. L. REV. 652 (1983) (describing how the lack of optimal deterrence causes firms to internalize the cost of crimes in antitrust cases).

38 To optimally deter firms against participating in cartels requires sufficient ceilings for penalties. *See* Paolo Buccirossi & Giancarlo Spagnolo, *Optimal Fines in the Era*

The optimal level of penalties is not the only factor to affect optimal deterrence. Optimal deterrence also requires consideration of enforcement costs. Such enforcement costs would include direct costs of enforcement activities (the cost of the compliance program to a firm, the cost of monitoring by government, private rights, etc.), plus the cost of error (which deters socially valuable behavior). Moreover, uncertainty in administrability may increase compliance costs.[39]

B. The Current Enforcement System

To deter cartel formation and participation, U.S. antitrust law contains a mix of criminal and civil penalties for both firms and individuals under section 1 of the Sherman Act.[40] Theory suggests that by holding both individuals and corporations accountable, this mix of punishment improves the probability of detection and leads to deterrence that is closer to optimal deterrence.[41]

The importance of criminal sanctions for firms is that it creates some incentive for firms to monitor their agents. Yet, because the firm and its agents' interests may differ due to agency costs, there are also criminal penalties for individuals.

The mere threat of criminal sanctions is enough for nearly all firms and individuals to settle with DOJ Antitrust through a plea agreement.[42] The extensive use of plea agreements is unlike other

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of Whistleblowers: Should Price Fixers Still Go to Prison?, *in* THE POLITICAL ECONOMY OF ANTITRUST 81 (Vivek Ghosal & John Stennek eds., 2007) (discussing optimal fines). Yet, penalties can be set too high. Penalties that are too harsh may undermine optimal deterrence. OFFICE OF FAIR TRADING, AN ASSESSMENT OF DISCRETIONARY PENALTIES REGIMES 6 (2009) ("Higher fines can increase the cost of errors, may (in some situations) lead to insolvency and may not deter individual managers."); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 276 (2008). If compliance costs are too high, then these extra costs of firms exiting the market will be borne by consumers because of a higher marginal cost of production. Bruce H. Kobayashi, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 736 (2001).

39 Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 495 (2010) (suggesting this concern as a Type III error).

40 15 U.S.C. § 1 (2006 & Supp. V 2012).

41 Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, *in* PROSECUTORS IN THE BOARDROOM 11, 33 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

42 DEP'T OF JUST., ANTITRUST DIV. WORKLOAD STATISTICS FY 1999–2008 at 7, *available at* http://lawprofessors.typepad.com/files/doj-antitrust-division-workload-statistics—fy-1999-to-fy-2008.pdf.

areas of white collar crime, which rely more heavily on Deferred Prosecution Agreements and Non-Prosecution Agreements.[43]

C. *More Effective Punishment for Cartels in Antitrust*

Most antitrust scholars suggest that increasing fines and jail time will lead to optimal deterrence for cartels.[44] This Article argues that those traditional enforcement tools alone will not lead to significantly improved enforcement.

The use of plea agreements[45] is a low risk choice for DOJ Antitrust, which gets a "win" without the significant personnel expenditure required for a fully litigated trial and without the risk of losing the case. DOJ Antitrust also counts every penalty, including the lightest penalties, as a win, even when others might see such low penalties as a loss.

The fact that nearly all antitrust cases end in a plea bargain exacerbates the tendency to have low levels of punishment.[46] Plea agreements mean less jail time than litigated cases. Judges are wary of imposing too much jail time or fines for economic crimes generally.[47] Indeed, the lack of parity for sentencing of white collar crimes[48] is one of the reasons that Congress created the Sentencing Guidelines.[49]

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43 Garrett, *supra* note 6, at 1822 (explaining DPAs, NPAs, and their uses).

44 *See, e.g.*, Emmanuel Combe & Constance Monnier, *Fines Against Hard Core Cartels in Europe: The Myth of Over Enforcement*, 56 ANTITRUST BULL. 235 (2011); Massimo Motta, *On Cartel Deterrence and Fines in the European Union*, 29 EUR. COMPETITION L. REV. 209 (2008). *But see* Kobayashi, *supra* note 38, at 716 (arguing that there may already be too much deterrence).

45 On plea agreements generally, see Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341–45 (2012) (examining the prevailing scholarly views on plea bargaining).

46 Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 85–86 (2010) (describing the impact of plea agreements on corporate crime generally).

47 *See, e.g.*, Sackett v. E.P.A., 622 F.3d 1139, 1142 (9th Cir. 2010) (listing the factors to be considered by courts in assessing the amount of a penalty for a violation of the Clean Water Act), *rev'd*, 132 S. Ct. 1367 (2012); STANTON WHEELER ET AL., SITTING IN JUDGMENT (1988).

48 *See* Kristy Holtfreter et al., *Public Perceptions of White-Collar Crime and Punishment*, 36 J. CRIM. JUSTICE 50, 51 (2008) ("[The public] still expects common offenders to be sentenced more harshly.").

49 U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 15 (2004) ("The Commission also sought to correct past under-punishment of crimes, such as 'white collar' crimes."); *see also* Daniel Richman, Federal White Collar Sentencing in the United States – A Work in Progress 2–4 (May 20, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999102 (discussing legislative history).

Prison sentences seem to be effective in changing the deterrence calculations for individuals within firms regarding cartel crimes.[50] However, while jail time may affect an individual's participation in a cartel, it does not seem to significantly alter firm-level decision-making. This difference leads to a more fundamental point regarding deterrence and the distinction between firm and individual: recent reviews of the empirical scholarship suggest that jail is not as much a deterrent for firms as seems to be popularly believed.[51]

Financial penalties for firms may be costly and affect firm decision-making. One review of cartel scholarship finds that "at a fundamental level, the most important result [of the academic literature] is that high fines are a crucially important element of deterrence."[52] Limiting the impact of high fines is that most cartel cases settle for closer to single damages than treble damages.[53] Thus, cartel fines seem to be insufficient as a deterrent for cartels.[54]

High fines have limits as to effectiveness. The literature on marginal deterrence suggests that increasing criminal sanctions in cartels in particular will have far less effect than increasing the odds of enforcement.[55] Moreover, the private bar does not seem able to

50 Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917, 935–36 (1987).

51 ORG. FOR ECON. CO-OPERATION AND DEV., HARD CORE CARTELS: THIRD REPORT ON THE IMPLEMENTATION OF THE 1998 COUNCIL RECOMMENDATION 27 (2005); Christine Parker, *Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality*, *in* CRIMINALISING CARTELS 239, 239 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

52 OFFICE OF FAIR TRADING, *supra* note 38, at 8.

53 Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 171 (1993); Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 883 (2008).

54 Joseph E. Harrington, Jr., *Antitrust Enforcement*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 181 (Steven N. Durlauf & Lawrence E. Blume eds., 2008) (concluding that, "financial penalties fall significantly short of making collusion unprofitable"). On the other end of the penalty spectrum, fines that are too high may lead to bankruptcy of the firms in the market, which would result in a more highly concentrated market and potential monopoly by the remaining firm. Of course, impact is also limited by the fact that the managers commit the crime, but the shareholders pay the fines—and not even the holders at the time of the violation, but those at the time the fine is imposed.

55 Christine Parker & Vibeke Lehmann Nielsen, *Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation*, 56 ANTITRUST BULL. 377, 412–13 (2011) (describing the Australian compliance system and its limits); Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 L. & SOC'Y REV. 591 (2006) (discussing situations where higher penalties are rejected as being disproportionate for cartel crimes). In the United States, one might note that as the Federal Sentencing Guidelines are now merely

detect cartels,[56] so substituting private enforcement for public enforcement[57] probably will not work in the antitrust context.

Unlike other jurisdictions, the U.S. antitrust system does not use additional forms of non-financial punishment to deter cartel activity. These might include director disqualification (e.g., United Kingdom),[58] whistleblowing rewards for individuals (e.g., South Korea),[59] or something analogous to criminal sanctions for CEOs under the Sarbanes-Oxley compliance certification[60] to encourage greater antitrust compliance.

While the optimal magnitude of types of sanctions has been discussed in great detail, these discussions have not been a significant part of the antitrust literature.[61] The broader non-antitrust literature suggests that many firms behave illegally and consider many factors in

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advisory, judges are more able to act on any reluctance they may have to send "nice" people to prison for "mere" white collar offenses. Moreover, both judges and (to the extent a case goes to trial) a jury might not be amenable to punish a mid-level executive for an offense that redounded to the benefit of the firm only and not the individual. Yet because Congress can change these limits (but chooses not to), the limits should not be understood as structural limits.

56 Gregory J. Werden et al., *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL. 207, 224 (2011) ("Over ninety percent of fines imposed for Sherman Act violations since 1996 can be traced to investigations assisted by leniency applicants . . . .").

57 Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984).

58 Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, 3 (2010) (advocating for director disqualification in the United States); Andreas Stephan, *Disqualification Orders for Directors Involved in Cartels*, 2 J. EUR. COMPETITION L. & PRACTICE 529 (2011) (describing the U.K. experience with director disqualification for cartels).

59 Cécile Aubert et al., *The Impact of Leniency and Whistle-Blowing Programs on Cartels*, 24 INT'L J. INDUST. ORG. 1241, 1254 (2006) (offering a theoretical model for whistleblowing and cartel detection); D. Daniel Sokol, *Detection and Compliance in Cartel Policy*, 2 COMPETITION POL'Y INT'L ANTITRUST CHRON., Sep. 2011, at 5 (describing the South Korean antitrust experience). The bounty approach also has been tried in the U.K. but with no success to date, largely because the bounty is quite small (£100,000). This literature on the appropriate use of the *qui tam* model is innovative and very appealing conceptually but does not include a discussion in the model of an appropriate filter by the antitrust authority to avoid frivolous or disgruntled employee suits. On the appropriate mix of incentives more generally, see Omri Ben-Shahar & Anu Bradford, *Reversible Rewards*, 15 AM. L. & ECON. REV. 156 (2012).

60 Sokol, *supra* note 12, at 222 (advocating a similar approach in the antitrust setting).

61 Kaplow, *supra* note 13, at 416–18.

their decision to comply or not to comply, based on the relative costs and benefits of compliance.[62]

Thus far, this Article has focused on firm level enforcement. However, firm employees may have different incentives to comply with antitrust law than does a firm itself. Sometimes even if at the board of directors' level the firm wants to comply with antitrust law, its agents may not.[63]

In other situations, both firm and individual have incentive not to comply.[64] Put differently, there is no agency cost for cartels because both the firm and individual cartelists benefit from cartel participation in terms of profits and stock price increases, assuming no detection of the cartel and mere basic (legal but not strong) oversight from the board. Cartels may be similar to other areas of white collar crime, such as bribery, in that, if wrongdoing goes undetected, both the individual and the company benefit through higher shareholder value (and individuals can justify their involvement as somehow saving jobs in the company), because the harms are externalized.[65] This is unlike embezzlement or the internal misreporting of financial information, where the individual's actions unambiguously damage the firm long term. Improved incentives for compliance would change these dynamics between firm and individual and increase agency costs as they would align corporate incentives with good governance and legality. Paradoxically, increasing agency costs is typically what corporate governance strives to avoid.

Previous antitrust scholarship on the effectiveness of cartel compliance in the United States suggests that antitrust compliance pro-

62 John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 L. & SOC'Y REV. 7 (1991); Eric Helland, *The Enforcement of Pollution Control Laws: Inspections, Violations, and Self-Reporting*, 80 REV. ECON. & STAT. 141 (1998).

63 Kaplow, *supra* note 13, at 417, 427. *See generally* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 834 (1994) ("Corporate crimes are not committed by corporations; they are committed by agents of the corporation."); Barry D. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 341, 355–60 (1991) (providing organizational theory understandings of corporate crime); Patrick Bolton & Mathias Dewatripont, *The Firm as a Communication Network*, 109 Q.J. ECON. 809, 813–37 (1994) (describing the internal network within the firm); Timothy F. Malloy, *Regulating by Incentives: Myths, Models, and Micromarkets*, 80 TEX. L. REV. 531 (2002) (discussing the black box in the environmental law context).

64 Sometimes there are differences between short-term and long-term incentives of firms and their agents.

65 Marjo E. Siltaoja & Meri J. Vehkaperä, *Constructing Illegitimacy? Cartels and Cartel Agreements in Finnish Business Media from Critical Discursive Perspective*, 92 J. BUS. ETHICS 493, 500–01 (2010).

grams are not effectively integrated within firm culture.[66] Instead, only a select group of managers understand the importance of antitrust compliance, whereas much of mid-level management and employees do not seem sensitive to the importance of such compliance generally, seem to forget their training, or seem insensitive to the particular nuances of what types of collaboration among competitors are illegal.[67] Subsequent generations of employees and managers get trained by their more senior colleagues in industry practices and thereby pass on company and industry norms of non-compliance.[68]

Changing norms regarding cartels have important policy applications. In other areas of corporate crime, a U.S. Attorney's Office might target a particular industry to change industry norms. Cartel enforcement, by its industry-level nature, allows for the possibility of more effective norm changing at the industry level if there are appropriate incentives for detection and effective penalties.

This Article suggests an alternative approach to the one used by DOJ Antitrust—one that creates different mechanisms to address the root behavior that motivates illegality and that can change industry norms (or is itself a product of bad norms). This alternative would create a set of incentives that better address the core problem of improving detection. The Article suggests better aligning of firm incentives and organizational structures that otherwise lead to illegality within a given firm and industry. This will change the traditional approach to leniency as some firms may jockey for a better position to defect from a cartel.[69]

66 Sokol, *supra* note 12, at 226–29.

67 *Id.*

68 Margaret C. Levenstein & Valerie Y. Suslow, *Cartel Bargaining and Monitoring: The Role of Information Sharing*, *in* THE PROS AND CONS OF INFORMATION SHARING 43, 61–65 (Swedish Competition Auth. ed., 2006) (suggesting that trade associations in the United States seem to have learned and changed the culture, while trade associations in Europe have not).

69 One could argue that perhaps cartel penalties should be increased to five-fold or ten-fold of damages to get to optimal deterrence. However, such proposals while easy in theory are difficult to implement in practice due to significant pushback to a substantial increase in penalties. This is largely due to the history of excesses in punishment in antitrust and how courts have limited the scope of liability to address the possibility of excessive liability. *See* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1119–23 (1986).

D. Lack of Incentives for Firms to Monitor

1. Compliance Incentives

It is costly to monitor firms for both obvious and non-obvious reasons. To understand this lack of effective monitoring, one must first understand why firms should monitor their agents and the nature of various organizational structures within the firm that may make monitoring costly. The frustration of cartel policy is that firms seem unwilling (or have rationally affirmatively decided not to) or do not believe it is possible to take more effective steps against cartel behavior.

One aspect of the sometimes anemic cartel compliance efforts by firms is that corporate law does not provide sufficient incentives to create the sort of internal compliance process that may create effective compliance for antitrust.[70] Empirical work on board liability shows that in practice, there are limited financial penalties for weak monitoring by the board.[71] The lack of strong corporate compliance mechanisms overall shapes the nature of firm-level compliance in antitrust and its limits.

The impact of corporate law on compliance also limits the effectiveness of compliance codes. Scholarship regarding the implementation of corporate codes of conduct post-Sarbanes-Oxley finds that implementation has been mostly rhetorical.[72]

The nature of punishment of corporate crime explains, in part, the paradox of why compliance (including antitrust compliance) is not more effective. Jennifer Arlen provides powerful insight into the problem:

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70 The present Article will not focus on the fiduciary duties owed to monitors and what the appropriate role should be. For such treatment, see Khanna & Dickinson, *supra* note 10, at 1735–40 (discussing the types of fiduciary duties that a monitor may have). The current Article does, however, note that even some minimal compliance may be better than no compliance. *See* James E. Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 304 (1998) (noting the role of compliance in the sexual harassment setting).

71 Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1064–74 (2006).

72 Lori Holder-Webb & Jeffrey Cohen, *The Cut and Paste Society: Isomorphism in Codes of Ethics*, 107 J. BUS. ETHICS 485, 486 (2012); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491–92 (2003); Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 106 ("[T]he objective indicators of a values-based program are also easy to mimic, making it difficult to separate out the sincere programs from the fakes."). Implementing codes of conduct and having an effective compliance and ethics program may be two different things. Just having a code, and even having people sign it, can be close to meaningless.

> A firm that adopted an effective compliance program to detect wrongdoing thereby increased the risk that the evidence it created would be used to convict it if a crime occurred. A firm that reported wrongdoing could not do so without increasing its own risk of being found criminally liable. By contrast, a company that turned a blind eye to the risk of crime, or even evidence of crime, might avoid sanction altogether. In addition, if the wrong was detected, the firm would not be subject to any formal increased sanction for not reporting or cooperating.[73]

Thus, firms have incentives not to undertake serious compliance. Instead, inaction allows firms to reap the rewards of illegality (assuming non-detection).[74] Current antitrust enforcement therefore misses a critical cause of the lack of effective anti-cartel compliance on the part of firms.[75]

2. Corporate Law and Incentives

Shaping the incentives of compliance is the legal regime. Under Delaware law, the board of directors (rather than shareholders) is the most significant unit of governance.[76] Under current practice, firms lack sufficient incentives to invest seriously in compliance programs. Corporate boards under Delaware law have very weak legal duties to monitor the firms' actions, as the scope for violating such duties is narrow.[77]

Caremark[78] provided directors with greater oversight duties for corporations, particularly a proactive obligation for oversight. However, the case provided a relatively difficult threshold for finding liabil-

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73 Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 41, at 62, 72.

74 Even when there is detection, firms may behave strategically to shift the blame of non-compliance to lower-level employees. Garrett, *supra* note 9, at 876.

75 One might argue that antitrust is different from many other types of corporate crime for another reason. The corporate leniency program allows a firm to be the leniency applicant for its cartel participation and leads to a total decrease in the corporate sanction. One might argue that this might solve the incentive problem. However, as noted earlier, there are not sufficiently high sanctions to deter a significant cartel behavior. *See supra* notes 23–34 and accompanying text. Moreover, a company might not qualify for leniency, e.g., because its employee "led" the conspiracy.

76 Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1746 (2006).

77 Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine*, 38 FLA. ST. U. L. REV. 209, 210 (2011).

78 *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–70 (Del. Ch. 1996) (discussing the oversight duty under Delaware law).

ity for poor compliance. Therefore, *Caremark* did not create sufficient incentives for more effective corporate oversight.[79] In *Stone v. Ritter*, the Delaware Supreme Court interpreted the *Caremark* duty (based on a duty of care) as a loyalty duty but nevertheless required a showing "that the directors knew that they were not discharging their fiduciary obligations."[80] Thus, it is very difficult to win a case based on an oversight claim.[81]

Given the high threshold for liability under *Caremark*, there seems to be little incentive under Delaware law for a serious pro-active compliance program beyond the minimum required under corporate law. The one exception to this set of incentives is that the scope of liability, should a court find the board of directors to be liable, would make the violation of corporate law for non-compliance non-exculpable.[82] To the extent that price fixing decisions occur at the top, what one has is really not a failure to monitor, but rather a knowing viola-

79 Jennifer Arlen, *The Story of* Allis-Chalmers, Caremark, *and* Stone*; Directors' Evolving Duty to Monitor, in* CORPORATE LAW STORIES 323, 326–27 (J. Mark Ramseyer ed., 2009).

80 Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (holding that liability exists when the board "consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention"). For academic commentary, see Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769 (2007).

81 Michael J. Borden, *Of Outside Monitors and Inside Monitors: The Role of Journalists in* Caremark *Litigation*, 15 U. PA. J. BUS. L. 921, 925 (2013) ("Of the 248 cases brought under Delaware law alleging *Caremark*-type violations, only fourteen times did the *Caremark* claim survive the motion to dismiss. Plaintiffs achieved an adjudication of liability only once.").

82 Corporate law can change the standard for the oversight duty but would do so at the risk of creating another set of problems in terms of firm governance. DEL. CODE ANN. tit. 8, § 102(b)(7) (2013). If anything, Delaware is moving to applying the *Caremark* standard in other contexts involving analysis of good faith. *See, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009) (applying essentially the *Caremark* standard in the transactional context). On good faith generally, see Christopher M. Bruner, *Good Faith, State of Mind, and the Outer Boundaries of Director Liability in Corporate Law*, 41 WAKE FOREST L. REV. 1131 (2006) (discussing Delaware law); Claire A. Hill & Brett H. McDonnell, Disney, *Good Faith, and Structural Bias*, 32 J. CORP. L. 833 (2007) (arguing for an clarifying two-part test for good faith analysis). For example, corporate law can return oversight as a function of a duty of care and good faith. For an article that pushes the relationship of good faith and duties of care and loyalty, see, Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967 (2009). Whether corporate law should create a different threshold for oversight and whether fiduciary liability is too crude a tool is beyond the scope of this Article. This Article only addresses a theory of second best: the antitrust impact of the current system of corporate rules of liability. Stephen M. Bainbridge, Unocal *at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 827 (2006) (explaining the theory of second best in corporate law). It may be easier to solve the problems in

tion of the law. That is quite different as a matter of corporate law—if one can show a knowing violation, it is a straightforward (and non-exculpable) violation of fiduciary duty.[83] Yet, qualitative interviews on cartel compliance suggest that in some cases, even senior officials do not know that cartel activity is illegal (particularly Asian and European executives) or think that fixing the actual price is illegal but do not realize that something like coordinating among firms to set up territorial or output restrictions is also illegal.[84]

Even if the antitrust violations occur at a lower level, so that one is indeed talking about failures to monitor, one must be careful to distinguish two separate agency questions. One is the agency problem motivating the primary violator, the individual, discussed *infra*.[85] The other is the agency problem facing the board in devising a monitoring system. The problem is, why should we distrust the board's decision as to how to monitor antitrust violations if we have correctly set up the penalty system for the organization as a whole? The belief that the board is well-positioned to decide how much monitoring is enough is at the core of the defense for the extreme weakness of the *Caremark* duty. This problem can be addressed by changing the baseline for best practices within a *Caremark* setting. The government can respond via a requirement to improve monitoring much the way that it did regarding requiring that a majority of the board be made up of outside directors where previously the board could be a majority of corporate insiders.[86]

E. Culture of Corruption

Culture plays a role in understanding cartels as well as finding methods to combat them. There are a number of different ways in which various incentives shape culture. The following Section provides an overview of a number of different areas. Some are based on organizational factors, others on institutional factors, and yet others based on larger societal factors. This Section illustrates the diversity of factors that shape a culture of corruption that allows for cartels to flourish.

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antitrust that result from the corporate governance problem rather than restructure corporate law to expand liability for oversight cases.

83 DEL. CODE ANN. tit. 8, § 102(b)(7).

84 Sokol, *supra* note 12, at 226–29.

85 *See infra* subsection I.E.2.c.

86 Tom C.W. Lin, *The Corporate Governance of Iconic Executives*, 87 NOTRE DAME L. REV. 351, 363 n.67 (2011).

1. Understanding Culture and Its Impact on Firms and Industries

Incentives within the firm are strong factors in shaping the behavior of the firm and its agents. Thus, firm culture may create direct incentives for criminality.[87] For a cartel to avoid detection by a participating firm's employees, there typically needs to be some level of management that actively participates in the cartel and other employees who either are unaware of or turn a blind eye to such behavior.

Firm culture has both economic and socio-legal explanations. Corporate crime is an agency cost.[88] The foundational work on agency costs by Jensen and Meckling modeled how agents might do what is in their best interests rather than that of the firm without effective monitoring by the principal.[89] Close monitoring can reduce this divergence but might deter agents from risk-taking that might benefit the firm.

Culture affects compliance both within an industry and within individual firms. In her book *Controlling Unlawful Organizational Behavior*,[90] sociologist Diane Vaughan proposed a causal model for misconduct that includes the competitive environment (competition, scarce resources, and norms), organization characteristics (structure, processes, and transactions), and regulatory environment. These factors taken together explain misconduct.

In her later work, *The Challenger Launch Decision*, Vaughan used this same model to explain the space shuttle Challenger explosion. *The Challenger Launch Decision* contained extensive data about organizational processes. The central concept that emerged was normalization of organizational deviance.[91] This normalization process explained how non-compliance became part of the organizational routine.

If we treat non-compliance as a form of misconduct, then this model applies in the case of cartel compliance. Gilbert Geis wrote a classic article on the heavy electrical equipment price fixing cartel. In it, he quoted industry leaders who said that they committed no wrongdoing because their activity was viewed as legitimate in the industry.

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87 *See generally* ROBERT JACKALL, MORAL MAZES (1988).

88 Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 2 (1999).

89 Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 327–28 (1976).

90 DIANE VAUGHAN, CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR chs. 4–6 (1985).

91 DIANE VAUGHAN, THE CHALLENGER LAUNCH DECISION 150–52 (1996).

That is, executives in their view were conforming to, not breaking, the rules.[92]

There are two sets of cultural factors that antitrust must consider in tweaking the current cartel leniency model—firm-level and industry-level factors. A more effective cartel policy requires shaping and responding to these organization characteristics.

2. Organizational Characteristics That Lead to Non-Compliance

Violations of antitrust law may occur because of organizational failure (poor compliance mechanisms and incentives) rather than just pure profit seeking on the part of senior management.[93] From the standpoint of organizational failure, to the extent that compliance is weak, this will negatively affect the legitimacy of the program within the firm.[94]

Organizational design issues that may contribute to illegality are "processes and tasks, positional relationships, and hierarchical levels and departmental boundaries."[95] As organizations increase in complexity, firms develop various organizational structures in response.[96] As this subsection will illustrate, there is no monolithic way to describe a corporation's culture. A company adapts based on a number of factors and any remedy to a corrupt cartel culture needs to account for this dynamic behavior due to culture. This subsection provides an overview of the dynamics that shape how compliance works based on a number of factors to provide context for the discussion specific to antitrust compliance and the various solutions this Article advocates.

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92 *See generally* Gilbert Geis, *The Heavy Electrical Equipment Antitrust Cases of 1961*, *in* WHITE-COLLAR CRIME 117 (Gilbert Geis & Robert F. Meier eds., 1977).

93 Alan R. Beckenstein & H. Landis Gabel, *The Economics of Antitrust Compliance*, 52 S. ECON. J. 673, 674 (1986).

94 *See* Tammy L. MacLean & Michael Behnam, *The Dangers of Decoupling: The Relationship Between Compliance Programs, Legitimacy Perceptions, and Institutionalized Misconduct*, 53 ACAD. MGMT. J. 1499, 1501, 1515 (2010); Martin Ruef & W. Richard Scott, *A Multidimensional Model of Organizational Legitimacy: Hospital Survival in Changing Institutional Environments*, 43 ADMIN. SCI. Q. 877 (1998) (discussing hospitals' internal operations and legitimacy); Gary R. Weaver et al., *Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures, and Corporate Ethics Practices*, 42 ACAD. MGMT. J. 539 (1999).

95 Jonathan Pinto et al., *Corrupt Organizations or Organizations of Corrupt Individuals? Two Types of Organization-Level Corruption*, 33 ACAD. MGMT. REV. 685, 695 (2008) (citations omitted).

96 *See generally* MICHAEL L. TUSHMAN & CHARLES A. O'REILLY III, WINNING THROUGH INNOVATION (2002).

a. Size

Since the mid-1990s, close to half of criminal antitrust violations targeted by DOJ Antitrust have involved international cartels.[97] This focus on large-firm international price fixing is important given that the size of the firm affects its propensity for criminality. Larger firms are more prone to criminal behavior.[98]

Size may be a factor because, as organizations get larger, agency costs increase and monitoring becomes more difficult. Likewise, the complexity of organizations may increase agency costs.[99] The larger and more complex an organizational structure, the more difficult it is to coordinate various organizational subunits. Because of organizational size and complexity, it is possible to hide significant wrongdoing from government officials and inside and outside gatekeepers.

b. Structure

Organizational structure may affect firm culture. A centralized organization will be more likely to have a strong organizational culture than a decentralized organization that has subcultures within departments or divisions.[100] Centralization may reduce agency costs because there may be better oversight. Decentralization may be the product of increased firm complexity, and complexity may increase monitoring costs.

In some cases, the more complex the organization, the higher the proclivity is for illegal activity.[101] A unit within the firm (such as a division) might have an incentive to improve a division's profitability even though much of the risk for the cost of wrongdoing might be placed at the firm level. Therefore, a decentralized structure

97 John M. Connor & Darren Bush, *How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism*, 112 PENN ST. L. REV. 813, 813 n.1 (2008).

98 Melissa S. Baucus & Janet P. Near, *Can Illegal Corporate Behavior Be Predicted? An Event History Analysis*, 34 ACAD. MGMT. J. 9, 14–15 (1991).

99 *See* OLIVER E. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR (1970); Ming-Jer Chen & Donald C. Hambrick, *Speed, Stealth, and Selective Attack: How Small Firms Differ from Large Firms in Competitive Behavior*, 38 ACAD. MGMT. J. 453 (1995); R. Preston McAfee & John McMillan, *Organizational Diseconomies of Scale*, 4 J. ECON. & MGMT. STRATEGY 399 (1995); J. Myles Shaver & John M. Mezias, *Diseconomies of Managing in Acquisitions: Evidence from Civil Lawsuits*, 20 ORG. SCI. 206 (2009).

100 *See* LINDA K. TREVIÑO & KATHERINE A. NELSON, MANAGING BUSINESS ETHICS 214 (5th ed. 2011).

101 Marie A. McKendall & John A. Wagner, III, *Motive, Opportunity, Choice, and Corporate Illegality*, 8 ORG. SCI. 624, 627 (1997).

increases the risk of development of unethical subcultures within an organization.[102]

Given the link between organizational structure and wrongdoing, it seems to be the case that the internal governance structure within a corporation affects the likelihood of successfully monitoring illegal behavior and enforcing compliance. For example, the structure of the board may impact outcomes. Independent outside directors seem to be more effective than inside directors (members of the firm's management team) at policing against corporate fraud[103] and opportunistic grants of stock options.[104] Specific to cartels, recent finance-based work suggests that cartel-member firms tend to file an abnormally large amount of financial restatements, have less effective monitoring due to foreign or busy (too many board positions) directors, and are less likely to replace directors who resign.[105]

Illegal activity may become embedded in an organization over time and become a part of organizational culture.[106] Unethical changes within an organization may be subtle and gradual, such that individuals do not realize that they are engaging in illegal behavior.[107] Over time, organizations reach a tipping point in their culture at which illegality becomes a defining element of the organization itself. This may lead to the "decoupling" of actual practice from various generalized compliance procedures because of the vagueness of the vari-

102 *See* Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 ACAD. MGMT. REV. 20, 28–29 (1989) (discussing organization and identification).

103 Mark S. Beasley, *An Empirical Analysis of the Relation Between the Board of Director Composition and Financial Statement Fraud*, 71 ACCT. REV. 443, 443 (1996); Mark S. Beasley et al., *Fraudulent Financial Reporting: Consideration of Industry Traits and Corporate Governance Mechanisms*, 14 ACCT. HORIZONS 441, 450 (2000); Hatice Uzun et al., *Board Composition and Corporate Fraud*, 60 FIN. ANALYSTS J. 33, 33 (2004).

104 Lucian A. Bebchuk et al., *Lucky CEOs and Lucky Directors*, 65 J. FIN. 2363, 2364 (2010).

105 Tanja Artiga González et al., *Smokescreen: How Managers Behave When They Have Something to Hide* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 18886, 2013), *available at* http://www.nber.org/papers/w18886.

106 *See* Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. MGMT. REV. 836, 842 (2007) ("[T]he moral actions of the firm interact with the moral concerns of employees in influencing their behaviors within the organizational context."); Kenneth Bettenhausen & J. Keith Murnighan, *The Emergence of Norms in Competitive Decision-Making Groups*, 30 ADMIN. SCI. Q. 350, 350 (1985) (describing how social norms are formed in organizations); John Van Maanen & Edgar H. Schein, *Toward a Theory of Organizational Socialization*, 1 RES. ORG. BEHAV. 209 (1979).

107 Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORG. BEHAV. 1, 5–6 (2003).

ous legal terms used for compliance or terms that omit important elements.[108]

As this discussion of incentives, culture, and legitimacy[109] suggests, social norms play an important role in corporations.[110] By changing the corporate norm to an ethical standard through the use of effective compliance management techniques and more effective use of compliance programs, a compliance program increases the probability of detection of illegal activity.[111] Some firms have a strong compliance culture because incentives have been put into place to reward strong compliance.[112] These incentives may take the form of pay incentives, monitoring of the firm's incentive structures, and rewarding positive behavior through promotions.[113] In addition to incentives, culture is molded through other compliance techniques such as organizational structures that allow for effective monitoring by legal and compliance staff, appropriate discipline, including the disciplining of managers who fail to take steps to monitor their subordinates, and practical communications, all of which lead to the overall creation of pro-compliance corporate cultures.[114] For other firms, the social norms may work towards non-compliance for many of the same reasons. When individuals are rewarded for unlawful behavior, when monitoring by compliance staff is not strong, or when country-level and industry norms push toward cartel behavior, these norms may reinforce the probability of cartel behavior.[115]

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108 Kenneth A. Bamberger & Deirdre K. Mulligan, *Privacy on the Books and on the Ground*, 63 STAN. L. REV. 247, 302–11 (2011); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 340–41 (1977) (providing the classical formulation).

109 *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (concluding that people obey the law if they believe it is legitimate, not because they fear punishment).

110 Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1809–10 (2001); Robert Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717 (2001); Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 677–78 (2006).

111 Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 960 (2009); Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961 (2006).

112 *See* JOESEPH E. MURPHY, USING INCENTIVES IN YOUR COMPLIANCE AND ETHICS PROGRAM (2012), *available at* http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/724.aspx.

113 *Id.* at 23–32.

114 *Id.* at 9, 21–22, 32–33.

115 Sokol, *supra* note 12, at 223–26.

Incentives and direction from senior management may make criminality the norm within a firm.[116] Rapid growth and unrealistic company performance forecasts are factors that indicate an increased likelihood of accounting fraud.[117] Additionally, there is some evidence that firms exhibiting an illegal culture will manifest that culture in a number of different areas—tax, accounting, securities, etc.[118] The discussion *infra* on Bridgestone provides one such example.[119]

c. Incentive Pay and Individual-Level Motivations

There is a principal-agent problem in firms in which the agents (employees) veer from what is in the shareholders' best interest in order to maximize the individual employee's best interest. One way in which firms reduce the agency cost problem is through incentive-based pay. If agents have equity stakes in the firm, they may have incentives to monitor the firm for illegal activity when the illegal behavior threatens firm returns.[120] In some cases, pay for performance better aligns managers' incentives with those of the firm.[121]

When incentive-based pay is too large, however, it may lead to illegal behavior. Theory would suggest that non-linearities in payoffs (such as large bonuses or stock option grants) encourage cartel behavior on the part of managers. It is more likely that firms that promote short-term gains for pay have individuals who may undertake criminal behavior to "meet the numbers."[122] A number of empirical works show that CEOs whose pay is incentive-based are more likely to misreport material information.[123]

If officers and directors have an equity stake in the firm, they have incentives to monitor the firm for illegal activity when the illegal

116 *Id.*

117 Scott L. Summers & John T. Sweeney, *Fraudulently Misstated Financial Statements and Insider Trading: An Empirical Analysis*, 73 ACCT. REV. 131, 132, 136 (1998).

118 Anthony J. Daboub et al., *Top Management Team Characteristics and Corporate Illegal Activity*, 20 ACAD. MGMT. REV. 138 (1995).

119 *See infra* notes 193–99 and accompanying text.

120 Alexander & Cohen, *supra* note 88, at 4, 32.

121 Angela G. Morgan & Annette B. Poulsen, *Linking Pay to Performance—Compensation Proposals in the S&P 500*, 62 J. FIN. ECON. 489, 521 (2001).

122 Michael L. Seigel, *supra* note 6, at 11. This is also true in the cartel context. *See* González et al., *supra* note 105, at 2–3, 32.

123 Daniel Bergstresser & Thomas Philippon, *CEO Incentives and Earnings Management*, 80 J. FIN. ECON. 511, 512–13 (2006) (finding discretionary accruals used to manipulate reported earnings); Natasha Burns & Simi Kedia, *The Impact of Performance-Based Compensation on Misreporting*, 79 J. FIN. ECON. 35, 63 (2006) (linking CEO stock options with financial misreporting).

behavior threatens firm returns.[124] However, if managers receive bonuses based on certain profitability metrics, this may encourage members to meet their performance-based metric by any means necessary—including becoming involved in a cartel (and in some cases the senior managers involved in the cartels may be the same ones who set the financial targets).[125]

In the cartel agency cost context, too much equity pay may create negative incentives that may encourage cartel behavior on the part of managers.[126] The short-term incentive of a significant payout will increase, especially if the risk of detection is low both inside the firm and by antitrust enforcers.[127] Firms may change the incentives for illegality for their employees via a focus in incentive pay on long-term rather than short-term gain.[128]

3. Morality: Firm and Society-Based Stigma for Participation in Cartels

Morality is linked both to firm culture as well as to greater societal norms. The perception by society that illegal acts are also immoral may create increased deterrence within the firm based on a pro-compliance culture.[129] There are social costs to individuals for wrongdoing, such as stigma.[130] These costs amount to shaming penalties.[131] When there are no financial incentives for whistleblowing on car-

124 Alexander & Cohen, *supra* note 88, at 12, 31–32 (analyzing criminality in seventy-eight firms from 1984–1990).

125 Paolo Buccirossi & Giancarlo Spagnolo, *Corporate Governance and Collusive Behavior*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1219, 1224 (Wayne Dale Collins ed., 2008).

126 For example, incentive compensation for managers is a significant factor in corporate tax shelter/tax avoidance activities. Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and Firm Value*, 91 REV. ECON. & STAT. 537, 541, 544 n.19 (2009); Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and High-Powered Incentives*, 79 J. FIN. ECON. 145, 148, 177 (2006).

127 LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE 174–76 (2004).

128 *Id.* at 189–92; Lucian A. Bebchuk & Jesse M. Fried, *Paying for Long-Term Performance*, 158 U. PA. L. REV. 1915, 1919–20 (2010); Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247, 251–52 (2010); Sanjai Bhagat & Roberta Romano, *Reforming Executive Compensation: Focusing and Committing to the Long-Term*, 26 YALE J. ON REG. 359, 367 (2009).

129 *See, e.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) ("Punishment is *not* just a way to make offenders suffer; it is a special social convention that signifies moral condemnation.").

130 Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 536 (1996) ("Stigma shares with fines the advantage of deterring the criminal without creating real costs . . . ."). *But see* Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL

tels,[132] there need to be non-financial incentives to encourage people within an organization to blow the whistle on others whom they suspect of wrongdoing, either internally or directly to government enforcers.[133] The more that people within the company view cartel behavior on par with capital crimes,[134] the greater the moral outrage that others will feel toward the perpetrators of such crime and the more stigma that will attach to the perpetrator. The mere threat of such stigma should be able to deter some individuals from participating in cartel activity.

Stigma also may be felt at the company level in terms of negative stock market returns due to the loss of branding. For example, in the Netherlands, though information about a massive Dutch construction cartel was already publicly available (and the sanction was already calculated into the stock price), one study found that after a television show about the cartel appeared, the stock price of firms mentioned in the television show fell by ten percent.[135]

Currently, there seems to be a very low level of social stigma associated with cartel crimes in the United States. Part of this is due to the very low level of media coverage of cartel activity within the United States relative to other types of corporate crime and the limited media outreach of U.S. antitrust enforcers relative to other jurisdictions.[136] However, some of the lack of stigma for cartel cases is more directly

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STUD. 355, 356 (2007) (suggesting that stigma is most effective when it is used only rarely).

131 Rasmusen, *supra* note 130, at 520 (demonstrating that a convicted criminal can suffer from either economic or social stigma).

132 Aubert et al., *supra* note 59, at 1244–48; William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 766 (2001).

133 Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2225 (2010) (noting that only eighteen percent of accounting fraud is detected internally by other employees); Janet P. Near & Marcia P. Miceli, *Effective Whistle-Blowing*, 20 ACAD. MGMT. REV. 679, 703 (1995) (suggesting two reasons people do not report in-house: fear of retaliation and expectation that nothing will be done).

134 There is some evidence this may be occurring. *See, e.g.*, Andrea Schoepfer et al., *Do Perceptions of Punishment Vary Between White-Collar and Street Crimes?*, 35 J. CRIM. JUST. 151, 160 (2007) (noting data reveals "those most likely to have access to white-collar crime opportunities" consider the two crimes to be "equally serious and warranting similar punishments").

135 Johan J. Graafland, *Collusion, Reputation Damage and Interest in Codes of Conduct: The Case of a Dutch Construction Company*, 13 BUS. ETHICS: EUR. REV. 127, 127, 130–31 (2004). Typically what causes stock prices to decline is uncertainty. Once a fine is paid the stock typically goes up. Graafland suggests that moral shaming had an economic effect. *See id.* at 131.

136 Sokol, *supra* note 12, at 216–20.

tied to a poor compliance culture by cartel-member firms. Connor and Lande reveal alarming statistics about the acceptance of illegal cartel behavior. They note:

> We were able to determine the present whereabouts of 35 (34%) out of 103 managers known to have received a prison sentence in cartel cases between 1995 and 2010. Of those 35, 9 (26%) are currently employed by the company for which they worked during the cartel, and another 9 (26%) seem to be working at a different company within the same industry. . . . We were also able to discover the current whereabouts of four people who received fines, but no prison sentence during the period between 1995 and 2009. Two of them are employed by the same company for which they worked during the cartel, one appears to be working in the same industry, and the other is working in another industry.[137]

U.S. antitrust law is different from other areas of law, such as securities law, where convicted or civilly sanctioned offenders may be barred from the industry and can be debarred from doing business with the government.[138] Antitrust law chooses not to use debarment.[139] Where there are no explicit restrictions, such as through the terms of a company's plea agreement, to rehire convicted cartel felons, social shaming could increase the cost of participating in such activity.

a. Senior Management Within an Organization

A crucial dimension of better incentives for improved compliance takes into account the distinction between managerial incentives and shareholder incentives, and between the incentives of a middle manager and those of a senior manager. This next subsection examines the interrelationships between different individuals within the firm and across firms to better understand what might constitute effective compliance in the antitrust setting.

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137 John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 441–42 (2012) (footnotes omitted).

138 *See, e.g.*, Jayne W. Barnard, *SEC Debarment of Officers and Directors After Sarbanes-Oxley*, 59 BUS. L. 391, 391 (2004). Of course, debarment is tricky because debarring a number of competitors may lead to a single firm (or perhaps no firm) being left to bid for the government work. Thus, the debarment threat for firms in a cartel may be hollow. At the individual level, debarment may be a more realistic penalty.

139 *See, e.g.*, Connor & Lande, *supra* note 137, at 437 & n.38 (noting that while some commentators have proposed using debarment as a method of deterrence, it is not widely used).

Senior management is an important component of firm governance and compliance.[140] Different management styles affect corporate decision-making in a number of areas, such as investment and financial policy, tax compliance, and organizational strategy.[141] The focus on senior management in antitrust law is particularly important. The majority of individual defendants in cartel cases have been at the level of a company's corporate officers.[142]

The proclivity of criminality within top management may be due to the large amount of power that top management possesses. Therefore, the preferences of top management will affect strategic outcomes of a corporation.[143] Some work suggests that longer CEO tenure[144] and top management team tenure[145] negatively affect the

140 Marianne Bertrand & Antoinette Schoar, *Managing with Style: The Effect of Managers on Firm Policies*, 118 Q.J. ECON. 1169, 1173 (2003) (explaining that the traditional neo-classical economic view of the corporation is that the particular top leadership did not matter). *But see* DEP'T OF DEF., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON MANAGEMENT OVERSIGHT IN ACQUISITION ORGANIZATIONS 14 (2005), *available at* http://www.acq.osd.mil/dsb/reports/ADA435469.pdf (providing evidence of how employees look for cues from senior management on ethics and corporate culture); Sydney Finkelstein & Donald C. Hambrick, *Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion*, 35 ADMIN. SCI. Q. 484, 501 (1990) (same); Donald C. Hambrick & Phyllis A. Mason, *Upper Echelons: The Organization as a Reflection of Its Top Managers*, 9 ACAD. MGMT. REV. 193, 193 (1984) (same); Donald C. Hambrick, *Upper Echelons Theory: An Update*, 32 ACAD. MGMT. REV. 334, 341 (2007) (same).

141 Bertrand & Schoar, *supra* note 140, at 1176, 1204; Scott D. Dyreng et al., *The Effects of Executives on Corporate Tax Avoidance*, 85 ACCT. REV. 1163, 1187 (2010) (finding executive-specific effects that firm characteristics cannot explain).

142 Joseph C. Gallo et al., *Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study*, 17 REV. INDUS. ORG. 75, 104–07 (2000); Andreas Stephan, *Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels* 8–10 (Econ. & Soc. Research Council Ctr. for Competition Policy & Norwich Law Sch., Univ. of E. Anglia, Working Paper No. 09–09, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432340.

143 Mason A. Carpenter et al., *Upper Echelons Research Revisited: Antecedents, Elements, and Consequences of Top Management Team Composition*, 30 J. MGMT. 749, 750, 774 (2004); Arijit Chatterjee & Donald C. Hambrick, *It's All About Me: Narcissistic Chief Executive Officers and Their Effects on Company Strategy and Performance*, 52 ADMIN. SCI. Q. 351, 372 (2007) (finding a relationship between narcissistic CEOs and extreme company performance). Some argue that because top management personnel base decisions on their own experiences, this might suggest more of a behavioral explanation to top management. *See, e.g.*, Colin Camerer & Dan Lovallo, *Overconfidence and Excess Entry: An Experimental Approach*, 89 AM. ECON. REV. 306, 306, 313–16 (1999) (evaluating how overconfidence can affect individuals' "economic behavior").

144 Danny Miller, *Stale in the Saddle: CEO Tenure and the Match Between Organization and Environment*, 37 MGMT. SCI. 34, 34, 49 (1991).

145 Finkelstein & Hambrick, *supra* note 140, at 498.

strategic dynamics of a corporation.[146] As any stability usually favors cooperative outcomes,[147] then more stable firm management in an industry should facilitate collusion.

There are various internal control devices to better align the incentives of shareholders and management, so as to improve the quality of oversight and reduce incentives for cartel activity. For example, companies might issue debt to constrain management from over-investment.[148] Separation of the CEO and chairman positions improves the board's ability to monitor the CEO.[149] Similarly, providing equity for directors might give rise to improved monitoring of management by directors by better aligning director interests with shareholder interests.[150] Moreover, board diversity serves to better monitor CEOs, based on CEO turnover.[151]

The ethical tone of top management affects organizational responses to wrongdoing.[152] If top management tolerates or is involved in illegality, this norm permeates within the organization.[153] Younger managers may be "trained" by the older generation to participate in cartels.[154]

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146 Andrew D. Henderson et al., *How Quickly Do CEOs Become Obsolete? Industry Dynamism, CEO Tenure, and Company Performance*, 27 STRATEGIC MGMT. J. 447, 458 (2006).

147 George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 48 (1964) ("[C]ollusion is severely limited . . . when the significant buyers constantly change identity.").

148 Campbell R. Harvey et al., *The Effect of Capital Structure When Expected Agency Costs Are Extreme*, 74 J. FIN. ECON. 3, 4, 27 (2004).

149 John E. Core et al., *Corporate Governance, Chief Executive Officer Compensation, and Firm Performance*, 51 J. FIN. ECON. 371, 372, 382, 404 (1999); Jap Efendi et al., *Why Do Corporate Managers Misstate Financial Statements? The Role of Option Compensation and Other Factors*, 85 J. FIN. ECON. 667, 703 (2007).

150 Mine Ertugrul & Shantaram Hegde, *Board Compensation Practices and Agency Costs of Debt*, 14 J. CORP. FIN. 512, 529–30 (2008); Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831, 864–65 (1993).

151 Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 292, 298, 301–02, 307–08 (2009); Michael S. Weisbach, *Outside Directors and CEO Turnover*, 20 J. FIN. ECON. 431, 458–59 (1988).

152 Linda Klebe Treviño et al., *A Qualitative Investigation of Perceived Executive Ethical Leadership: Perceptions from Inside and Outside the Executive Suite*, 56 HUM. REL. 5, 28–29 (2003).

153 *See* Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1270–71 (1999).

154 Geis, *supra* note 92, at 123–26.

The more ethical top management seems to be, the more ethically others in the organization tend to behave.[155] Similarly, the more top management is involved in creating codes of conduct, the more effective such codes are in practice.[156]

In an antitrust context, the tone of senior management matters to the organization. From a pro-compliance standpoint, if the CEO mandates and attends antitrust trainings, middle managers are more likely to take such compliance seriously. The CEO must project a sincere desire to comply with antitrust law. This will set the tone for the entire organization in terms of its compliance.[157] The CEO must be fully committed to the antitrust compliance program and consistent in such commitment.[158] The more powerful the messenger, the more likely that others within the organization will conform to the message because of the CEO's ability to offer compliant managers greater resources, legitimacy, and power.[159] Therefore, the involvement by top management in cartel activities may merit tougher penalties, since senior management involvement signals compliance weakness and a corrupt culture overall.

b. Middle Management and Other Employees

Within the firm, middle management may not have the same incentives for committing violations or complying with the law as senior management. Indeed, the rewards are greater for senior management than mid-level management. Regarding middle management, for example, in a divisional organizational model, each divisional unit may try to maximize the short-term profitability of that particular division instead of the entity as a whole.[160] This suggests

155 Linda K. Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 J. MGMT. 951, 966–68 (2006).

156 *See* Jeffrey R. Cohen & Dennis M. Hanno, *Auditors' Consideration of Corporate Governance and Management Control Philosophy in Preplanning and Planning Judgments*, 19 AUDITING: J. PRAC. & THEORY 133, 143 (2000).

157 *See generally* Anne Riley & Margaret Bloom, *Antitrust Compliance Programmes–Can Companies and Antitrust Agencies Do More?*, 1 COMPETITION L.J. 21 (2011).

158 AM. BAR. ASS'N, ANTITRUST COMPLIANCE 20 (2d ed. 2010) (providing an example of DuPont CEO who regularly raises antitrust compliance with senior leadership of the company and provides a signal of its importance).

159 *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150, 157 (1983); Christine Oliver, *Strategic Responses to Institutional Processes*, 16 ACAD. MGMT. REV. 145, 145, 146, 148–49, 173 (1991).

160 Hyun-Han Shin & René M. Stulz, *Are Internal Capital Markets Efficient?*, 113 Q.J. ECON. 531, 533 (1998).

that organizational structure may be a contributing cause for misalignment of incentives.

Culture may shape the behavior of middle managers. To become successful leaders in companies, middle management and lower-level employees may mimic the behavior of senior management.[161] This may include behavior such as cartel involvement if such cartel participation allows these middle managers to move up the ranks.

Middle managers may be under significant pressure to meet various performance targets.[162] The financial rewards or possibilities for prestige or promotion for managers may be different than for the firm as a whole.[163] Other motivations also may be at play. A cartelist may rationally risk criminality because he/she wants to save jobs in his/her group or division. The cartel participant believes that as long as other firms do the same during a time of economic downturn, a cartel will naturally break up when the economy improves.[164] Leniency may be a way in an ethical corporation to increase the monitoring of senior management committing cartel crimes by mid-level management because leniency allows for self-reporting.

4. Industry-Level Factors

The industry in which a firm operates may affect outcomes. There are factors exogenous to a particular firm that also may affect its predisposition to criminal behavior. Industry structure and poor industry performance may indicate criminality.[165] Similarly, firms in some industries are more prone to criminality than others based on industry culture.[166]

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161 *See* Joseph Galaskiewicz & Stanley Wasserman, *Mimetic Processes Within an Interorganizational Field: An Empirical Test*, 34 ADMIN. SCI. Q. 454, 454–56 (1989); Pamela R. Haunschild & Anne S. Miner, *Modes of Interorganizational Imitation: The Effects of Outcome Salience and Uncertainty*, 42 ADMIN. SCI. Q. 472, 474–75 (1997).

162 Cindy R. Alexander & Mark A. Cohen, *New Evidence on the Origins of Corporate Crime*, 17 MANAGERIAL & DECISION ECON. 421, 421, 433 (1996).

163 Philip G. Berger & Eli Ofek, *Diversification's Effect on Firm Value*, 37 J. FIN. ECON. 39, 40 (1995).

164 People make similar calculations as to illegal behavior in other areas of corporate crimes, such as pollution. Robert A. Kagan, *Environmental Management Style and Corporate Environmental Performance*, *in* LEVERAGING THE PRIVATE SECTOR 31, 42–43 (Cary Coglianese & Jennifer Nash eds., 2006).

165 Barry M. Staw & Eugene Szwajkowski, *The Scarcity-Munificence Component of Organizational Environments and the Commission of Illegal Acts*, 20 ADMIN. SCI. Q. 345, 351 (1975) (describing that companies cited for illegal acts were less munificent than those that were not cited).

166 Baucus & Near, *supra* note 98, at 9, 27–28; Daboub et al., *supra* note 118, at 141–43.

Specific to antitrust compliance, antitrust scholarship provides a sense of the types of industry factors on which cartel stability seems to depend for its operation.[167] For example, industry or product cycle, competition within the sector, and cultural factors as to the nature and stability of the cartel influence the effectiveness of leniency.[168] Industry features such as high concentration, entry barriers, relatively inelastic demand, homogeneous products, and greater demand shocks affect the decisions of firms within an industry to participate in a cartel. These industry factors are important for enforcement because cartel stability mitigates the effectiveness of leniency.[169]

Industry growth impacts internal compliance. Where there is rapid growth in an industry, it may be that internal controls may not yet be strong enough to prevent wrongdoing.[170] Accordingly, such industries may be more prone to cartel behavior because formal and informal monitoring mechanisms are not in place.[171] The monitoring mechanisms within the firm also impact the ability of a firm to create a distinct culture relative to that of other firms in the same industry.[172]

167 RICHARD A. POSNER, ANTITRUST LAW 79–93 (2d ed. 2001) (providing fourteen different factors to consider for tacit collusion); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1, 5 (1973); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969); Stigler, *supra* note 147, at 44–56. *But see* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 239–61 (1988) (suggesting extensions and limitations to Stigler and others).

168 Harold Houba et al., *Maximal Cartel Pricing and Leniency Programs*, TINBERGEN INST. DISCUSSION PAPER NO. 2008-120/1, at 31–34, *available at* http://papers.tinbergen.nl/08120.pdf (arguing that more stable industries and stronger industry culture make leniency less effective).

169 *Id.*

170 Kimberly D. Krawiec, *The Return of the Rogue*, 51 ARIZ. L. REV. 127, 168 (2009).

171 Some academics speculate that price fixing may be more likely where the industry is in decline. *See, e.g.*, Sally S. Simpson, *The Decomposition of Antitrust: Testing a Multi-Level, Longitudinal Model of Profit-Squeeze*, 51 AM. SOC. REV. 859, 872 (1986). There is not strong direct evidence in the academic literature indicating that financially weaker firms are more likely to cartelize. *See* Andreas Stephan, *Price Fixing in Crisis: Implications of an Economic Downturn for Cartels and Enforcement*, 35 WORLD COMPETITION 511 (2012).

172 Cartels also require relatively stable contacts between the actors, which are less likely to be the case in new/nascent/fast-developing industries.

II. CHANGING PENALTY STRUCTURES

A. *Compliance Programs and the Creation of Super Leniency*

To encourage cartel detection, DOJ Antitrust provides leniency for corporations and individuals.[173] The leniency program allows for firms to self-report their cartel activity in return for zero government penalties. In the United States, leniency creates a prisoner's dilemma to encourage defection—the firm that is the leniency applicant receives amnesty from criminal prosecution and a reduction from treble to single damages if it fully cooperates. Other firms involved in the cartel may receive lower financial penalties if they provide additional information to DOJ Antitrust that results in detection of other cartels, under a program known as Amnesty Plus. The possibility that firms might defect from a cartel and inform on its cartel members destabilizes many existing cartels and deters other cartels from being formed.[174] DOJ Antitrust now detects most cartels as a result of the leniency program.[175]

Yet, the leniency program has certain limits. In particular, the leniency program does not reward the adoption of a rigorous compliance program (other than being the first to self-report).[176] Indeed, the leniency program utilizes a strict liability regime for wrongdoing. This is a departure from other areas of corporate crime where a compliance program allows for a penalty reduction under the Federal Sentencing Guidelines and programs are taken into account in enforcers'

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173 Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Speech Before the National Institute on White Collar Crime (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf.

174 The opposite may also be true. Leniency programs help with detection, but they can increase incentives to form a cartel because they reduce the expected fines firms have to pay (since there is some chance they won't pay any criminal fines as a result of leniency).

175 Hammond, *supra* note 173, at 3. Of the two programs, the corporate leniency program is by far the most used. What DOJ Antitrust means by detection is not always clear. It may be that the leniency program detects the cartel or it may be that first DOJ has a leniency applicant, but the "detection" process starts with some type of investigative work prior to any firm applying for leniency.

176 Outside of the antitrust area, a compliance program also may be (at least in part) a basis for a decision not to charge under the operative DOJ charging discretion memos. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-28.800 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800; U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 14, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

decisions on how to proceed against the company.[177] The motivation behind penalty mitigation and taking programs into account is to encourage companies to proactively set up compliance programs to minimize wrongdoing and build an infrastructure of good governance.

Informally and at various practitioner conferences (such as those organized by the American Bar Association Section of Antitrust Law), DOJ Antitrust officials have stated that the proper application of the Guidelines almost always results in no credit being given for a compliance program in the sentencing calculations in an antitrust case because these violations are almost always participated in, condoned by, or occur with the willful ignorance of, high-level or substantial authority personnel. Under the Sentencing Guidelines, the three point credit for compliance programs simply does not apply (or, in the case of substantial authority personnel, there is a rebuttable presumption against credit) in such cases. Hypothetically, where the offense occurs without high-level involvement, DOJ Antitrust might give credit for a compliance program.[178] However, in its public discourse, some DOJ Antitrust officials have mentioned an antitrust carve out from Sentencing Guideline Section 8C2.5(f) regarding compliance mitigation.[179]

The law on the books provides no such carve-out.[180] DOJ Antitrust has tended to conflate the Guidelines penalty analysis with the Department of Justice's approach to prosecutorial discretion, although the two are distinct. The Department, in all cases except antitrust, does take programs into account with no automatic carve-outs that are based on the fact that individual employees committing a

177 Technically, a compliance program can receive credit in an antitrust case under the United States Sentencing Guidelines, although it is difficult. The substantial authority personnel reference only creates a rebuttable presumption against credit; there have been no cases I know of attempting to meet this standard, but corporate cases almost never go to trial.

178 I could not find such reported cases.

179 The 2010 modifications to the Sentencing Guidelines now allow credit even if a high-level person is involved. There are four qualifiers, one being voluntary disclosure. DOJ Antitrust says this equates to the leniency program, but this is factually wrong.

180 Section 2R1.1(d)(2) limits any mitigating factor so the fine is never less than 75% of the base. U.S. SENTENCING COMMISSION, GUIDELINES MANUAL, § 2R1.1(d)(2) (2011), *available at* http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/2r1_1.htm. Plus, the definition of substantial authority personnel, with language proposed in 1991 by the Antitrust Division, is designed to make credit impossible. It is better described as a de facto carve out. But, of course, almost no big company ever goes to trial, so it is more symbolic than anything else.

violation may have had authority and discretion.[181] The rest of the Department of Justice will consider compliance programs in the various stages of dealing with corporations; DOJ Antitrust appears to avoid programs at all stages of the process.

Leniency alone is not sufficient to deter all cartels given current detection rates. Those cartels that can adapt to leniency through better cartel management may avoid detection.[182] Leniency programs may have resulted in less inclusive cartels because having too many members increases the possibility of detection, at least among those cartels that have been detected. While a more inclusive cartel means higher cartel profits, each additional member is one more firm who could apply for leniency.[183] As a result of this higher cost of cartel participation, cartels have become more effective in the concealment of their activity.[184]

What current antitrust cartel policy lacks are positive incentives to create robust and effective compliance programs to improve cartel detection. This Article proposes that the leniency applicant firm receive no government sanction and no private damages in return for full cooperation if the applicant can show that it had an *effective* compliance program in place (as determined via the creation of antitrust compliance guidelines) that detected the cartel conduct. The current system creates criminal immunity and removes treble damages for the leniency applicant. The proposed approach would destabilize cartels through an increased threat of defection because the leniency applicant could keep its illegal gains. Moreover, it would create incentives for firms to spend additional resources *ex ante* on antitrust compliance because the amount spent on additional effective compliance would be less than the cost of detection. This would create better incentives for detection.

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181 *See, e.g.*, Press Release No. 12-534, U.S. Dep't of Justice, Crim. Div., Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-crm-534.html.

182 Joe Chen & Joseph E. Harrington, Jr., *The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path*, *in* THE POLITICAL ECONOMY OF ANTITRUST, *supra* note 38, at 59.

183 For a similar situation in the tax context, see generally Mark P. Gergen, *The Logic of Deterrence: Corporate Tax Shelters*, 55 TAX L. REV. 255 (2002). A tax shelter promoter faces the calculus that more sales of the shelter provide greater profit in the short-term, but greater risk of discovery and sanction in the longer term.

184 *See* Robert C. Marshall et al., *Antitrust Leniency with Multi-Product Colluders* 31 (July 2, 2013) (working paper), *available at* http://www.bateswhite.com/media/pnc/7/media.727.pdf.

A robust compliance program could work with the existing leniency program. The better the compliance program, the greater the incentive for a firm to defect from the cartel through leniency (assuming that the legal regime creates sufficient rewards for good compliance).

Early detection allows a firm to reap the benefits of an effective compliance program.[185] Motivating a penalty reduction is that one firm within the cartel will have better compliance results than the others. The penalty reduction encourages incentives for the weakest link to defect from a cartel. A better set of proactive incentives (assuming that a company meets the Sentencing Guidelines steps for effective compliance) will create enough encouragement for at least one firm within the cartel to invest in proactive compliance against potential wrongdoing.

Under current practice, in following the Sentencing Guidelines, a company paradoxically increases its likelihood of sanctioning by the government. By ignoring the Guidelines and providing cosmetic compliance, a company increases the potential payoff from illegal activity (by keeping both its compliance costs and risk of detection low), while increasing the benefit from its illegal behavior.[186]

With the proposal for super leniency, addressing what constitutes effective compliance becomes paramount.[187] It is difficult to determine what constitutes a "good" compliance program *ex ante.* Yet, what may make antitrust different from other areas of white collar crime may lie in the mechanics of price fixing. It may be easier for an outsider to monitor for criminal cartel-threatening activity than to monitor for, say, foreign corrupt practices. In many cases, criminal antitrust violations are relatively straightforward doctrinally and con-

185 Strategically, by coming in for the reward of more generous leniency, a firm also punishes its competitors, who must pay a larger fine, face criminal penalties, and bear the extra imposition of, as this Article proposes, a corporate monitor. The incentive for a firm may be to participate in a cartel but to defect before anyone else does. However, each firm may have this same logic. Super leniency thereby creates increased instability because of the fear that another firm will defect before yours does.

186 This critique is not limited merely to U.S. anti-cartel efforts. In a survey of 999 of the largest 2500 Australian businesses, Parker and Nielson found compliance with competition laws to be highly variable, with implementation half-hearted and incomplete in many cases. Christine Parker & Vibeke Lehmann Nielsen, *Do Businesses Take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia,* 30 MELB. U. L. REV. 441, 444, 482–83 (2006).

187 Super-leniency does not replace traditional leniency but is an addition to it. This way those companies who lacked a rigorous compliance program but were lucky and uncovered a cartel are still rewarded for coming forward.

ceptually, and the criminal action is undertaken by relatively high level executives. One example is the price index and direct communications between the conspirators in the air cargo cartel. Another typical antitrust case is the well-known lysine cartel of the 1990s that resulted in a bestselling book and a movie starring Matt Damon in which executives from the lysine industry met in hotels to discuss price fixing.[188]

This Article's policy proposal can be contrasted with other recent policy suggestions. Spagnolo and his co-authors have pushed for a lottery for the leniency applicant, in which the leniency applicant would be awarded all of the fines of the other cartel members.[189]

In a real world setting, there are dangers to effective cartel policy from too much leniency, such as the cartel lottery. One danger is that the bounty awarded from the fines paid by other cartel members gives the firm receiving the bounty a competitive advantage such that other firms may exit the market, thereby creating potential antitrust problems of monopolization. In addition, it may be difficult to sell the bounty system to the public at large. In this case, a member of a criminal conspiracy that hurts consumers goes without significant punishment and in fact is rewarded with a bounty. This can give rise to backlash against any penalty reduction to cartel enforcement.[190]

Antitrust authorities that promoted a competition culture to society might get pushback from a populace that wants to see firms receive punishment for wrongdoing rather than a windfall. For example, press coverage in the U.K. for mere traditional leniency against Virgin Airways in its fuel surcharge cartel with British Airways gave rise to significant criticism of the U.K.'s Office of Fair Trading, because the leniency applicant seemed to escape without sufficient penalties.[191] The pushback would be even stronger in the presence of significant financial rewards to a company that financially benefits from its illegality and who will be strengthened at the expense of its rivals.

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188 KURT EICHENWALD, THE INFORMANT (2000). Oftentimes, there is sufficient proof based merely on direct evidence akin to the lysine cartel.

189 Maria Bigoni et al., *Fines, Leniency, and Rewards in Antitrust*, 43 RAND J. ECON. 368 (2012); Giancarlo Spagnolo, *Divide et Impera: Optimal Deterrence Mechanisms Against Cartels and Organized Crime* 4-5 (Univ. of Mannheim C.E.P.R., Working Paper, 2003). These works view the firm/decision-maker solely as a profit-maximizer, so there are no criminal penalties. This view also does not disaggregate the firm from the individual decision-makers within the firm.

190 *See* Andreas Stephan, *How Dishonesty Killed the Cartel Offence*, 6 CRIM. L. REV. 446, 453 (2011).

191 Andreas Stephan, *The UK Cartel Offence: Lame Duck or Black Mamba?* 18–19 (ESRC Centre for Competition Policy (CCP) Working Paper No. 08-19, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1310683.

B. Using Corporate Monitors for Criminal Antitrust

1. FCPA and Monitors

Harsher penalties are a mechanism to motivate better compliance. This Article suggests that harsher penalties should take the form of a corporate monitor automatically imposed upon any company found to be involved in criminal antitrust wrongdoing other than the leniency applicant. The use of corporate monitors is increasingly common in other areas of white collar crime, but does not seem to have made a significant impact in criminal antitrust. Two recent cases in which antitrust monitors were placed are outliers because the companies refused to plead guilty, as is the norm in antitrust cases, and one of the companies went so far as to contest (and lose) the price fixing charges at trial.[192]

Corporate monitors have been used for a number of different corporate crimes, not merely the FCPA, although this subsection discusses the FCPA as an example.[193] A recent plea agreement provides an illustration of the sharp contrast in approaches between DOJ Antitrust's approach to compliance and that of DOJ's Criminal Division.

On September 9, 2011, both the DOJ Antitrust Division and Criminal Division entered into a plea agreement with Bridgestone Corporation regarding white collar criminal activity.[194] Bridgestone, a Japanese company, pled guilty for price fixing from January 1999 to May 2007 as part of the international marine hose cartel.[195]

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192 Sentencing Memorandum at 53, United States v. AU Optronics Corp., No. CR-09-0110 SI (N.D. Cal. Sept. 11, 2012) (DOJ Antitrust did not impose monitors on any of the other firms in the LCD cartel, nor did the proposed consent address terms that are standard in white collar crime regarding corporate monitors such as compliance audits and discussion about controls on trade associations), *available at* www.justice.gov/atr/cases/f286900/286934_1.pdf; United States v. Fla. W. Int'l Airways, Inc., 282 F.R.D. 695, 696-97 (S.D. Fla. 2012) (stating that Florida West pled *nolo contendere*). One can think of the role of the monitor in terms of looking for cartel "plus factors." *See* Kovacic et al., *supra* note 7. The monitor would have access to data that would not be available to, say, outside enforcement authorities without discovery.

193 International organizations also require some sort of monitoring as a result of corporate wrongdoing. The World Bank requires that any company who is a World Bank contractor that undertakes voluntary disclosure for corruption be required to implement an effective compliance program. WORLD BANK, VOLUNTARY DISCLOSURE PROGRAM (VDP) GUIDELINES FOR PARTICIPANTS 11 (2011), *available at* http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf.

194 Plea Agreement, United States v. Bridgestone Corp., No. 4:11-cr-00651 (S.D. Tex. Oct. 5, 2011) [hereinafter Bridgestone Plea Agreement], *available at* http://www.justice.gov/atr/cases/f282400/282479.pdf.

195 *Id.* at 3.

Bridgestone also pled guilty to bribery in violation of the FCPA[196] for activities that occurred within this same time period. Its corrupt activities occurred through Bridgestone's various subsidiaries in which its local sales agents had illegal relationships with government officials who worked for state owned enterprises (SOEs) in Latin America.[197] The Bridgestone sales agents paid the officials who worked in the SOEs a percentage of the total deal. Bridgestone managers in Japan were not only aware of these payments but authorized and worked to conceal them.[198]

In both the case of the cartel and the bribes, Bridgestone admitted to criminal behavior on the part of its executives. One might imagine that the remedies for both sets of circumstances would be similar for criminal activity within what one might describe as a corporate culture that permitted, and indeed encouraged, criminal behavior across different international business units.

Attachment B to the plea agreement included a detailed corporate compliance program that Bridgestone entered into to review its internal controls to prevent future wrongdoing. This included the implementation of a "clearly articulated and visible corporate policy against violations . . . including strong, explicit, and visible support and commitment from senior management to the program."[199] It also required that "Bridgestone will develop and promulgate compliance standards and procedures designed to reduce the prospect of violations . . . and will take appropriate measures to encourage and support the observance of ethics and compliance standards . . . at all levels of the company."[200] Additional provisions detailed the type of implementation that would be undertaken as part of the monitoring to ensure that there would be no future violations. These steps included details regarding how to address the behavior of senior and mid-level executives within the firm so as to overcome the criminal behavior that at best was tolerated and at worst actively encouraged.

What is striking about this detailed corporate compliance program is that the compliance program was exclusively set up for the FCPA violations. There was no mention of the cartel activity and no mechanisms set up to prevent future cartel activity. This is particularly interesting since the same firm was involved in both sorts of criminal activities. It is this strange disparity in punishment policies—one that

196 15 U.S.C. § 78 dd-3 (2006).

197 Bridgestone Plea Agreement, *supra* note 194, at 8.

198 *Id.* at 9.

199 *Id.* at Attachment B.

200 *Id.*

takes compliance seriously (FCPA) and another that does not (antitrust) that is the focus of this Section. This Section will explain what a corporate monitor does, the problem that it attempts to solve, and the limits of the effectiveness of corporate monitors to date in the non-antitrust context. After providing this analysis of corporate monitors outside of antitrust, the Section then explains the dynamics of monitoring within antitrust and the curious case of criminal antitrust, which seems relatively unaffected by developments in enforcement in other areas of white collar crime.

Congress enacted the FCPA to combat bribery in 1977. The FCPA prohibits bribery of foreign officials and requires that publicly traded firms maintain accurate accounting controls as part of financial transparency to better detect potentially illegal payments.[201] However, FCPA enforcement became vigorous only in the past decade.[202] In 2004, federal enforcers brought only five actions (two DOJ actions and three SEC actions).[203] In contrast, from 2007 to 2009, FCPA actions averaged thirty-seven actions per year, and in 2010 alone the SEC and DOJ Criminal Division brought a combined seventy-four FCPA actions.[204] The government's increased use of the FCPA has also increased the use of corporate monitors as a remedy in FCPA cases.

2. Monitors and Rehabilitation

If criminal and civil penalties are leading to under-deterrence, then the potential imposition of a monitor for wrongdoing is the type of penalty that may lead companies to invest more in compliance. Such deterrence is useful only when the costs of deterrence for the use of monitors are fewer than other forms of punishment and where the benefits of the use of monitors exceed that of other forms of deterrence. There might be more than just deterrence, however, that drives the use of monitors.

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201 Joseph W. Yockey, *Solicitation, Extortion, and the FCPA* 5 (Univ. of Iowa College of Law, Working Paper No. 11-30, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1896282.

202 Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010).

203 *See* GIBSON, DUNN & CRUTCHER LLP, 2010 YEAR-END FCPA UPDATE (Jan. 3, 2011), *available at* http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx.

204 *Id.*

Rehabilitation has been discussed in criminal law, although it has become somewhat discredited.[205] In the corporate context, one might view rehabilitation as a goal, in addition to that of optimal deterrence, as monitors "treat" corporate offenders to help design compliance programs to eliminate their recidivist tendencies. Accordingly, none of the traditional reasons (cost, fairness, and failure) that explain why rehabilitation has been discredited apply in the corporate context.[206]

On cost, the public does not need to pay for the treatment program the way that it would for an individual. The firm that commits the crime would pay for its own treatment, which therefore is not a benefit that it would otherwise get for committing the crime. On fairness, the typical critique is that the public believes it to be unfair to provide things such as education training or drug treatment to offenders to make their lives better. This is simply not applicable to the corporate context. The final issue is one in which rehabilitation may lead to recidivism anyway. In the corporate context, effective monitoring of a corporation can change the nature of corporate oversight to create better mechanisms to prevent recidivism.

3. Monitors in Practice

As a general matter, a corporate monitor crafts a work plan as to what it will do and how much authority it will have to implement changes that it sees fit.[207] In this sense, monitors have wide latitude of discretion in the use of their power.[208] The duration of corporate monitors is typically between one and three years, although there have been cases of monitors having longer tenures.[209] In situations of corporate governance misconduct, the compliance officer typically

205 *See, e.g.*, FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 2–4 (1981); Philip J. Cook, *Punishment and Crime: A Critique of Current Findings Concerning the Preventive Effects of Punishment*, 41 L. & CONTEMP. PROBS. 164, 171, 204 (1977); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991); Andrew von Hirsch & Lisa Maher, *Should Penal Rehabilitation be Revived?*, *in* PRINCIPLED SENTENCING 26 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

206 On collective guilt, see R. A. DUFF, ANSWERING FOR CRIME (2007); R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001). *But see* Bill Wringe, *Collective Agents and the Communicative Theories of Punishment*, 43 J. SOC. PHIL. 436 (2012) (explaining why collective guilt should not apply in the corporate context).

207 Khanna & Dickinson, *supra* note 10, at 1725.

208 *Id.* at 1723–24.

209 *Id.* at 1723.

reports to the audit committee of the company and to the relevant government enforcer.[210]

To provide additional guidance,[211] the Department of Justice released a document in 2008 known as the Morford Memo.[212] That memo provided some vague limits regarding when a corporate monitor should be introduced. According to the memorandum,

> a monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.[213]

There is a significant legal literature on the use of monitors generally in the context of structural reform litigation and what independent monitors can and cannot accomplish.[214] The costs of monitors include the cost of supervision of the company. They also include the cost of the monitor substituting its judgment for that of management and the board in business decision-making. The threat of the imposition of monitors may increase the commitment within the firm to spend resources on increased detection.

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210 *Id.*

211 *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo]; Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components, U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mucnulty_memo.pdf. One of the elements behind the McNulty memo was that a corporate culture could be so corrupt as to need outside assistance to create structural reform of the company's culture and address systematic problems. As the Thompson Memorandum states, "the government [should] address and be a force for positive change of corporate culture [and] alter corporate behavior." Thompson Memo, *supra.*

212 Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components, U.S. Attorneys, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008), *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-0307 2008.pdf.

213 *Id.* at 2.

214 *See* Baer, *supra* note 111; Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23 (2010); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Garrett, *supra* note 9; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006).

The use or threat of use of monitors shifts the cost from government enforcers to the firms being monitored. If there is wrongdoing that results in the imposition of a corporate monitor, the monitor has the discretion to utilize significant firm resources to restructure the firm in a way that creates credible compliance commitments. However, this discretion has potential setbacks—what appeared to be reasonable and effective at one moment can turn out to be difficult and ineffective later on.

Corporate monitors can add costs up to hundreds of millions of dollars.[215] A corporate monitor's work may include a comprehensive review of documents and various practices of an organization in order to take stock of the micro and macro of an organization to determine how it operates. Such a review may include reviewing various business records and correspondence of employees with those outside of the firm.[216] Siemens, since its FCPA violation (resulting in a $800 million U.S. fine and a similar $800 million fine in Germany),[217] has spent over $100 million on improving its global compliance since 2009,[218] with over 600 compliance personnel around the world and $150 million spent on outside consultants to address compliance.[219]

On the discretion of corporate monitors, there are two forces that pull in different directions. On the one hand, there is the need for specific guidance for companies and monitors to understand how to comply and the limits of what a monitor can and cannot do. However, there is also a need for flexibility to tailor a monitorship to the specifics of a company and its particular organizational environment. As such, the structure of monitors is highly adapted to the context of the violation, the company involved, and the prosecutor.[220] Moreover, the adapted role of the monitor has power and adaptability that antitrust agencies may lack themselves.

The broad powers and discretion have, in some situations, allowed corporate monitors to become far more active in the internal governance of a firm than perhaps they should be, as they substitute

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215 Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J.L. & MED. 89, 100–01 (2009).

216 *See id.* at 93–96 (discussing scope and duties of a corporate monitor).

217 Garrett, *supra* note 6, at 1777.

218 SIEMENS, 2011 ANNUAL REPORT § II, at 74, *available at* http://www.siemens.com/annual/11/_pdf/Siemens_AR2011_ReportSB.pdf.

219 *See Siemens and an FCPA Compliance Defense*, FCPA PROFESSOR (Oct. 10, 2011), http://www.fcpaprofessor.com/siemens-and-an-fcpa-compliance-defense.

220 Garrett, *supra* note 9, at 932–33.

their judgment for management.[221] This is perhaps the ultimate deterrence for cartel members. Firms will be more likely to invest in greater compliance *ex ante* because of the potentially intrusive nature of corporate monitors *ex post.*

A monitor places an outsider in a decision-making process within the firm. Senior management and directors of companies do not want to have a monitor to second guess their every decision. Compounding this fear by managers is that, in some cases, it seems as if in some non-antitrust contexts there has been insufficient oversight of corporate monitors by prosecutors and judges.[222]

The selection of a monitor has presented problems in the non-antitrust setting. It is difficult for prosecutors (and judges) to understand the complex organizational practices of a firm and of the crimes committed therein.[223] For this reason, we might assume that prosecutors would impose monitors who have a strong business background, who understand how compliance works, and who know how to reduce or eliminate corporate criminality. Yet, many of the corporate monitors lack an understanding of the corporate environment. Many monitors that have been selected are former prosecutors, government regulators, or retired judges, rather than people with business experience.[224] Monitors without business experience may not know what

221 *See* Arlen, *supra* note 73, at 62–72.

222 *See* U.S GOV'T ACCOUNTABILITY OFFICE, GAO-10-260T, CORPORATE CRIME: PROSECUTORS ADHERED TO GUIDANCE IN SELECTING MONITORS FOR DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS, BUT DOJ COULD BETTER COMMUNICATE ITS ROLE IN RESOLVING CONFLICTS 6, 11 (2009); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act,* 45 GA. L. REV. 489, 557-58, 562-63 (2011). There is no *ex post* research into the attributes of successful versus unsuccessful monitorships—are the goals of the monitorship met and what inputs impact reaching the goals. *See, e.g.,* Mike Koehler, *The Facade of FCPA Enforcement,* 41 GEO. J. INT'L L. 907, 959–96 (2010) (noting the shortcomings of recent FCPA enforcement).

223 First, *supra* note 214, at 63.

224 U.S GOV'T ACCOUNTABILITY OFFICE, *supra* note 222, at 10; Lisa Kern Griffin, *Inside-Out Enforcement, in* PROSECUTORS IN THE BOARDROOM, *supra* note 41, at 110, 1120. For example, the AIG Monitor examined internal controls regarding financial reporting and oversaw compliance programs for a total cost of $20 million. The monitor, longtime Washington lawyer James Cole, performed oversight at exactly the time that AIG engaged in risky credit default swaps but seemed not to understand its significance to the company's long term financial health. *See* Sue Reisinger, *It's Broken,* LAW.COM CORP. COUNSEL (June 1, 2009), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202431504805&Its_Broken&slreturn=20130829151356; *The AIG DAG,* GOP BLOG (June 28, 2011), http://www.gop.com/news/gop-blog/the-aig-dag/. In Cole's defense, he was limited in the settlement agreement to monitoring the particular terms of the settlement agreement and not beyond. F. Joseph Warin et

programs are effective to implement and may undertake compliance work that does not improve actual compliance but rather increases costs in a way that does not maximize shareholder value of the firm.[225]

III. USE OF CORPORATE MONITORS IN CRIMINAL ANTITRUST

Situations of ineffective compliance and oversight arise in antitrust as regularly as in other areas of law. Yet, if antitrust goes to the heart of a company's business, as the DOJ Attorney's Manual suggests, one wonders why monitors are used in areas such as bribery, oftentimes involving lower-level employees, and not in antitrust, which involves higher levels of corporate wrongdoing. This Part will explain the use of monitors in civil antitrust and advocate that many of the problems with monitors in other white collar crime apply less in the antitrust context.

It may well be that a reason that DOJ Antitrust hesitates to use corporate monitors in the cartel setting is because of the mixed results with the use of monitors in cases of Sherman Act section 2 claims involving single-firm conduct and largely because of the anomalous experience of the *Microsoft* case. However, the imposition of antitrust compliance officers as part of behavioral remedies is common in both merger and civil Sherman Act section 1 contexts. This suggests that antitrust can overcome the problems with corporate criminal monitors that occur in the FCPA setting.

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al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 359 (2011).

225 Nor have monitors been able to fully eliminate recidivism. There have been a number of repeat offenders for FCPA enforcement, including ABB Ltd. (2004 and 2010 violations), *see* Press Release No. 10-1096, U.S. Dep't of Justice, Crim. Div., ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010), *available at* http://www.justice.gov/opa/pr/2010/September/10-crm-1096.html; SEC Litigation Release No. 18775, SEC v. ABB Ltd., Case No. 1:04CV1141 (July 6, 2004), *available at* http://www.sec.gov/litigation/litreleases/lr18775.htm; and Baker Hughes (2001 and 2007 violations), *see* SEC Litigation Release No. 20094, SEC v. Baker Hughes Inc. and Roy Fearnley, Civil Action No. H-07-1408 (April 26, 2007), *available at* http://www.sec.gov/litigation/litreleases/2007/lr20094.htm; Order Instituting Public Proceedings Pursuant to Section 21 C of the Securities Exchange Act of 1934, *In re* Baker Hughes Inc., SEC Release No. 44784, (September 12, 2001), *available at* http://www.sec.gov/litigation/admin/34-44784.htm. This does not necessarily suggest that the monitor was ineffective. Indeed, multinationals have thousands of employees who operate across countries (with different levels of country corruption and expectations of how business is done). In such circumstances, despite even the best compliance procedures, a multinational can be subject to liability even if one employee or a small group of employees acts contrary to the company's pre-existing procedures.

A. *Why Monitors Are Not Used in Criminal Antitrust More Broadly*

If monitors can curb recidivism and reform corporate cultures in firms, this may assist in criminal antitrust and the leniency program. If all companies except for the leniency applicant understand that they will have corporate monitors imposed upon them, this will increase cartel instability, as it will increase the payoff for a cartel member to defect via leniency, thereby improving detection.

The *Bridgestone* plea bargain and the recent *AU Optronics* and *Florida West* cases discussed above in subsection II.B.1 prove that DOJ Antitrust is aware of the possibility of corporate monitors as a remedy for cartel activity. DOJ Antitrust has focused only on leniency and avoidance of violation. It has not spent time on building a competition culture within companies, which puts DOJ Antitrust at odds with other leading antitrust agencies.[226]

DOJ Antitrust is reluctant to include monitors as part of its usual remedy scheme in a criminal cartel setting even though leniency on its own, while effective at detecting a number of cartels, is less effective than the leniency program and the additional penalty of monitors at creating an effective compliance culture that would deter cartel formation in the first instance. However, it may not be surprising that DOJ Antitrust would be unwilling to experiment with tweaks to the leniency program. Organizational theory notes that, "[o]rganizational members who have been socialized or trained into a specific institutional logic are likely to be committed to defending it should it be challenged."[227]

There are less benign explanations than organizational lethargy in the face of uncertainty that suggest that too much improvement to the leniency system may weaken the relative standing of DOJ Antitrust. Since the early 1980s, total government antitrust enforcement has been down significantly relative to levels from the 1950s to

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226 *See, e.g.*, COMPETITION BUREAU CANADA, CORPORATE COMPLIANCE PROGRAMS (2010), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf; OFFICE OF FAIR TRADING, HOW YOUR BUSINESS CAN ACHIEVE COMPLIANCE WITH COMPETITION LAW (2011).

227 Anne-Claire Pache & Filipe Santos, *When Worlds Collide: The Internal Dynamics of Organizational Responses to Conflicting Institutional Demands*, 35 ACAD. MGMT. REV. 455, 460 (2010). Public choice provides a similar rationale regarding the motivations of antitrust agencies. *See, e.g.*, D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1072–74 (2010); D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1041-48 (2011).

1970s.[228] This is a function of a number of factors. One factor is the shift in procedural case law that makes it more difficult to be a successful plaintiff in an antitrust litigation.[229] This shift in procedural antitrust law coincides with a shift in substantive antitrust law that has moved many parts of antitrust doctrine from *per se* illegality to a rule of reason analysis due to a better understanding of antitrust economics by the courts.[230]

These shifts in lower total government enforcement mean that there are fewer "wins" by DOJ Antitrust. That antitrust should be viewed in such crude terms as effectiveness being linked to total number of enforcement actions suggests that there might be a measurement problem as to what the right performance metrics should be.[231]

The criminal antitrust program is the only area of antitrust that generates a significant number of "wins." In contrast, in merger control the antitrust agencies received 1166 Hart Scott Rodino merger notifications in 2010, undertook a second request (serious examination) in forty-six of those notifications, and the DOJ litigated or settled via consent decree nineteen cases.[232] DOJ Antitrust also litigates a very small number of civil antitrust cases in any given year.[233]

A policy shift through the use of monitors would result in closer to optimal deterrence. This would mean fewer criminal pleas due to improved compliance. Fewer "wins" means a potential loss of funding

228 Barak Orbach & D. Daniel Sokol, *Antitrust Energy*, 85 S. CAL. L. REV. 429, 430 (2012) ("Statistical figures indicate that, since the 1970s, the volume of civil antitrust litigation is low compared to prior decades.").

229 *See* Calkins, *supra* note 69, at 1119–22; William H. Page, Twombly *and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards*, 5 J. COMPETITION L. & ECON. 439, 468 (2009) ("The Supreme Court's decision in *Twombly* has imposed a new, more challenging standard of plausibility for alleging agreement under Section 1 of the Sherman Act.").

230 *See* Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 COMPETITION POL'Y INT'L 59 (2007).

231 *See* Bengt Holmstrom & Paul Milgrom, *Multitask Principal—Agent Analyses: Incentive Contracts, Asset Ownership, and Job Design*, 7 J.L. ECON. & ORG. 24 (1991); William E. Kovacic et al., *How Does Your Competition Agency Measure Up?*, 7 EUR. COMPETITION J. 25 (2011).

232 D. Daniel Sokol & James A. Fishkin, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 48 (2011); U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS, FY 2003–2012 at 5-6, *available at* http://www.justice.gov/atr/public/workload-statistics.pdf.

233 *See* U.S. DEP'T OF JUSTICE, *supra* note 232, at 5–6.

for the agency[234] and fewer lucrative jobs for antitrust leadership in the private sector after government service.[235]

B. Monitors in Antitrust Single Firm Conduct

The most important recent antitrust case that involved dominant firm conduct and the use of a monitor, *Microsoft*, is well known and has been detailed elsewhere.[236] This Article therefore briefly discusses only the issues that emerged in the consent decree governing the remedies of this landmark case that deal specifically with the use of a monitor.

In the *Microsoft* saga, the remedy included a monitor to ensure that Microsoft's competitors in the application and browser markets could have equal access to Microsoft's operating system.[237] Judge Kollar-Kotelly set up a monitor to work through technical issues regarding inter-operability and the creation of a protocol licensing requirement.[238] The protocol licensing required Microsoft to make available communications protocols that Windows client operating systems used to interoperate with the server operating system of Microsoft.[239]

The consent decree imposed a three-person technical committee of software designers and programmers to oversee this process through behavioral monitoring.[240] The technical committee process led to a monitoring system that was costly to Microsoft (forty experts were employed by the technical committee, paid by Microsoft) and

234 WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 42 (1971).

235 *See* Fred S. McChesney & Michael Reksulak, *Competition Policy in Public Choice Perspective*, *in* THE OXFORD HANDBOOK ON INTERNATIONAL ANTITRUST ECONOMICS, *supra* note 14; Ed deHaan et al., Does the Revolving Door Affect the SEC's Enforcement Outcomes? (July 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2125560 (discussing how a tough enforcement posture by enforcers aids in the revolving door in securities).

236 *See, e.g.*, WILLIAM H. PAGE & JOHN E. LOPATKA, THE MICROSOFT CASE (2007); Harry First & Andrew I. Gavil, *Re-Framing Windows: The Durable Meaning of the* Microsoft *Antitrust Litigation*, 2006 UTAH L. REV. 641.

237 William H. Page & Seldon J. Childers, *Measuring Compliance with Compulsory Licensing Remedies in the American* Microsoft *Case*, 76 ANTITRUST L.J. 239, 239-40 (2009); *see* David A. Heiner, Microsoft*: A Remedial Success?*, 78 ANTITRUST L.J. 329, 334-48 (2012).

238 Page & Childers, *supra* note 237, at 239.

239 *Id.* at 240.

240 Second Modified Final Judgment, United States v. Microsoft Corp., No. 98-1232, at 9–13 (D.D.C. Apr. 22, 2009), *available at* http://usdoj.gov/atr/cases/f245100/245110.pdf.

took on a quasi-regulatory function in its ability to suggest additional obligations needed for inter-operability.[241] The Microsoft decree lasted for more than ten years.[242]

The monitor's work proved to be less than effective. While there is more competition today than at the time of the Microsoft settlement, neither DOJ Antitrust nor the court anticipated any of the eventual firms that would prove to be serious competitors for Microsoft—Apple, Google, or Facebook.

There are distinct reasons to explain the limited success of the Microsoft monitor:

> [T]his provision [of the monitor and protocol licensing requirement] was problematic from the outset because it did not respond directly to any proven antitrust violation by Microsoft. Monopolization remedies should usually aim to remove impediments that proven violations place in the way of entry, innovation, and expansion. The protocol licensing remedy, by contrast, imposed an affirmative obligation, essentially unrelated to any proven violations, to facilitate possible future entry by unknown firms and technologies. Many of the problems the court and the parties have encountered in enforcing the provision can be traced to this high ambition.[243]

In other antitrust circumstances involving dominant firm conduct, monitors have been more effective. For example, antitrust has been active in monitoring the licensing of intellectual property, such as through the *ASCAP*[244] and *BMI*[245] decrees. Of note, this monitoring has been done by courts rather than through an in-house monitor. Nevertheless, the mere threat of judicial rate-setting is enough for parties to often bargain with each other in the "shadow" of the law.[246]

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241 Nicholas Economides & Ioannis Lianos, *A Critical Appraisal of Remedies in the E.U.* Microsoft *Cases*, 2010 COLUM. BUS. L. REV. 346, 380.

242 *See* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 720-25 (2012) (describing the political issues involved in ending the Microsoft consent decree).

243 Page & Childers, *supra* note 236, at 241.

244 United States v. Am. Soc'y of Composers, Authors & Publishers, 981 F. Supp. 199 (S.D.N.Y. 1997).

245 Broad. Music, Inc. v. CBS, 441 U.S. 1 (1979).

246 Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 307, 326 (2009).

C. *Monitors in Antitrust Merger Cases*

Monitors and conduct remedies seem to be increasingly preferred in the merger context, in particular for vertical mergers.[247] Indeed, there seems to have been a shift within DOJ Antitrust between the 2004 DOJ Antitrust Remedies Guide and the 2011 DOJ Antitrust Remedies Guide on this issue. Whereas the 2004 Remedies Guide showed more concern that behavioral remedies are "more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent,"[248] the 2011 Remedies Guide discusses behavioral remedies as a "valuable tool."[249] Behavioral remedies have been used with increased frequency in the merger context in cases such as *Comcast/NBC Universal*[250] and *Google/ITA*.[251]

Conduct remedies within the merger context require intervention into the management of firms, which has the potential to raise administrative costs.[252] However, conduct remedies reduce information asymmetries that otherwise would exist between the antitrust agency and the merging parties.[253] A conduct remedy that imposes a monitor embeds the monitor in the merged firm to have better access to information and to ensure competition.[254] The monitor must ensure that competition that existed before the merger is preserved.[255] This requires training programs and policing against conduct[256] that reduces competition through coordination between parts of the firm that must be kept separate through a firewall.[257] In this sense, the use of antitrust monitors in the merger context is more similar to what a cartel monitor would do rather than the quasi-regula-

247 *But see* United States v. George's Foods, LLC, 76 Fed. Reg. 38,426 (proposed final judgment June 30, 2011) (using behavioral remedies in the horizontal merger context).

248 U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7–8 (2004).

249 U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 6-7 (2011) [hereinafter MERGER REMEDIES 2011], *available at* www.justice.gov/atr/public/guidelines/272350.pdf.

250 United States v. Comcast Corp., 76 Fed. Reg. 5459, 5461-64 (D.D.C Jan. 31, 2011) (proposed final judgment).

251 United States v. Google Inc., 76 Fed. Reg. 21,026, 21,028-30 (D.D.C. Apr. 14, 2011) (proposed final judgment).

252 *See* MERGER REMEDIES 2011, *supra* note 249, at 12–17.

253 *See id.* at 16.

254 *See id.* at 12–17.

255 *See id.* at 15–16.

256 *See* JOSEPH E. MURPHY, 501 IDEAS FOR YOUR COMPLIANCE AND ETHICS PROGRAM 34, 54 (2008).

257 *See* MERGER REMEDIES 2011, *supra* note 249, at 13–14.

tory function that a monitor would undertake in the monopolization context.[258]

It is noteworthy that in an antitrust context, much like the FCPA context,[259] monitors have significant discretion. The issues that arise in the context of merger orders tend not to be within the text of the antitrust laws, so the monitor must ensure that the merged firm is living up to the terms of the order within the monitor's discretion. Yet antitrust monitors have not abused their discretion the way that FCPA monitors allegedly have.[260] This is largely the case because both DOJ Antitrust and the FTC have compliance offices to work with the monitors to ensure that the monitors are effective.[261]

The effective use of monitors in the antitrust merger context also solves a problem as to effectiveness of monitors in the antitrust criminal context—monitors are outsiders, appointed by outsiders.[262] As such, they have at least two significant problems. One, they will find it hard to get the information they need to be effective. Two, they will find it hard to be accepted as legitimate actors, to be taken seriously by insiders. The antitrust agencies typically solve the first problem by picking qualified monitors (unlike like some of the egregious examples in the FCPA context)[263] who understand the right questions to ask and know where to gather information. For example, the monitor in Coca-Cola's vertical acquisition of its bottler is a former in-house antitrust and compliance lawyer for Kraft.[264] On the second problem, that of legitimacy,[265] sometimes, particularly in a corrupt culture, an organization needs to bring in someone from the outside precisely because the insiders are not effective and the organization needs a cultural change.

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258 *See supra* Sections III.A–III.B.

259 *See supra* subsection II.B.1.

260 *See supra* Section II.B.

261 *See* William J. Kolasky, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Antitrust Compliance Programs: The Government Perspective (July 12, 2002), *available at* http://www.justice.gov/atr/public/speeches/224389.pdf; *Criminal Enforcement*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/public/criminal/index.html (last visited Oct. 21, 2013); *Division of Enforcement*, FED. TRADE COMM'N, www.ftc.gov/bcp/bcpenf.shtm (last visited Oct. 21, 2013).

262 Griffin, *supra* note 224, at 110, 119–22.

263 For discussion on the use of monitors with the FCPA, see *supra* subsection II.B.1.

264 *See* Coca-Cola Co., 150 F.T.C. 10 (2010).

265 *See* Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 573–77 (1995).

D. The Curious Case of Criminal Antitrust

Criminal sanctions suggest a more serious problem than civil sanctions. Thus, criminal penalties tend to be harsher than civil penalties. Paradoxically, it is in civil antitrust that corporate monitors have been imposed rather than in criminal antitrust. In civil Sherman Act section 1 cases, the Antitrust Division has imposed corporate monitors in a number of different types of situations.[266] Since the introduction of the leniency program in 1993, there have been forty separate civil section 1 cases that involved remedial compliance programs. Of these cases, twenty-nine involved the imposition of an "antitrust compliance officer" whose role is similar to that of a corporate monitor, although compliance officers may be someone internal to the firm.

Two cases provide a representative sample of the structure of civil final judgments in a section 1 context and the role that the monitor plays in these settings. One case involved what is known within antitrust merger parlance as "gun jumping." In a gun jumping situation, merging parties integrate before the merger has been finalized. As a result of the gun jumping by Gemstar and TV Guide, the two companies unlawfully fixed prices and allocated markets before the companies were formally granted clearance to merge.[267] The Proposed Final Judgment entered into by the parties provided for the designation of a compliance officer to ensure that the gun jumping would not reoccur in subsequent deals.[268]

Another case suggests more significant responsibilities for the antitrust compliance officer. In a Final Judgment entered into with the National Association of Realtors (NAR), the DOJ sought to limit NAR's policies that restrained competition involving virtual office websites in violation of section 1 of the Sherman Act.[269] The Judgment barred NAR from prohibiting or restricting brokers from using a virtual office for listing information.[270] To police the NAR, the

266 *See, e.g.*, Final Judgment, United States v. Nat'l Ass'n of Realtors, No. 05 C 5140, at 2, 5–6 (N.D. Ill. Nov. 18, 2008), *available at* http://www.justice.gov/atr/cases/f239600/239655.htm.

267 United States v. Gemstar-TV Guide Int'l, Inc., 68 Fed. Reg. 14,996, 14,996 (Antitrust Div., Dep't of Justice Mar. 27, 2003) (proposed final judgment and competitive impact statement).

268 *Id.* at 14,998.

269 Final Judgment, United States v. Nat'l Ass'n of Realtors, No. 05 C 5140, at 2, 5–6 (N.D. Ill. Nov. 18, 2008), *available at* http://www.justice.gov/atr/cases/f239600/239655.htm.

270 *Id.* at 4–5.

Judgment provided for an antitrust compliance officer to monitor NAR and to educate its board members in antitrust compliance.[271]

On the criminal side, with the exceptions of one set of companies involved in the same cartel handled out of the Cleveland field office,[272] and the two more recent cases involving AU Optronics and Florida West,[273] the Antitrust Division has almost never imposed something akin to a corporate monitor or an actual corporate monitor. The lack of significant use of corporate monitors in antitrust criminal plea agreements is particularly surprising given the size and scope of cartel corporate illegality in multinational companies.

E. The Use of Monitors as a Response to Criminal Antitrust Violations

DOJ Antitrust views all compliance programs that result in any violation, including those leading to a leniency application, as failed compliance.[274] However, by DOJ Antitrust's own logic, corporate monitors should be utilized in cartel cases to respond to such "failed" compliance. Increasing the penalties and creating the possibility of monitors raises the stakes for enforcement. The greater sanctions may lead to greater deterrence,[275] as the fear of detection may make it less profitable for some firms to participate in price fixing because of the increased probability of detection internally. This should deter some cartels from being formed and provide an incentive for others to be dissolved.

The reason for the imposition of monitors in criminal antitrust cases is that, based on the current structure of antitrust enforcement, there do not seem to be sufficient incentives for firms to implement effective compliance programs.[276] Without detection of wrongdoing at the individual level, firms benefit from the illegal activity associated with collusion.[277] To counter this, firms and individuals within firms need incentives to monitor internally and rewards for doing so.[278] As

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271 *Id.* at 8.

272 *See* Plea Agreement, United States v. Premio, Inc., No. CR 06-0086 CRB, at 3–5 (Feb. 22, 2006), *available at* http://www.justice.gov/atr/cases/f215800/215819.htm. Another two plea agreements involved other companies who were members of the same cartel.

273 *See supra* note 192 and accompanying text.

274 *See* Kolasky, *supra* note 261. Arguably, they do think programs that lead to leniency have worked, at least to a degree, and their reward is eligibility for leniency by being first to disclose. *Id.* at 4.

275 *See id.* at 13.

276 *See supra* Section I.D.

277 Buccirossi & Spagnolo, *supra* note 125, at 1231–40.

278 *See supra* subsection I.E.2.c.

other articles argue, providing financial rewards for information may improve cartel detection.[279]

Firms need to internalize the consequences of breaches of the law if they are to adopt compliance programs. Monitors force firms to internalize these costs.[280] *Ex ante*, firms will invest more in better compliance merely because of the fear of the imposition of the monitor. This will shift the cost of detection from the government to firms as a privatization of enforcement.[281]

Monitors can help change the corporate culture of a firm to make the culture one of compliance and lawfulness. Creating an ethical compliance environment suggests that individuals have internalized the pro-compliance social norm.[282] This means that an individual will factor the social cost of non-compliance into his or her risk-reward calculation of cartel participation because non-compliance will be internalized as deviant behavior.[283] The individual will also buy into the values behind a free-market economy and will begin to see cartel behavior as a form of theft. This cultural shift toward ethical compliance aids in whistle blowing on others within the organization who commit wrongdoing.[284]

Employee incentives may not be aligned with the firm in terms of compliance because an employee or mid-level manager risks losing his or her job if he or she comes forward with information of illegal activity.[285] Thus, in many cases, the cost of informing outweighs the benefit of remaining silent. The misalignment of incentives between employees and the firm replicates itself in the cartel context. Where the cartel compliance culture at a firm is weak, there is little incentive

279 *See* Aubert et al., *supra* note 59, at 1248–53; Kovacic, *supra* note 132, at 772; Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1668–69 (2008); Giancarlo Spagnolo, *Optimal Leniency Programs* 7 (Stockholm Sch. of Econ., FEEM Working Paper No. 42.2000, 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=235092.

280 *See supra* subsection II.B.3.

281 *See supra* subsection II.B.3. I assume that the total amount spent on such privatized enforcement of compliance costs is not suboptimal.

282 *See* Donald Lange, *A Multidimensional Conceptualization of Organizational Corruption Control*, 33 ACAD. MGMT. REV. 710, 720-21 (2008); Charles O'Reilly, III & Jennifer Chatman, *Organizational Commitment and Psychological Attachment: The Effects of Compliance, Identification, and Internalization on Prosocial Behavior*, 71 J. APPLIED PSYCHOL. 492, 493 (1986).

283 *See* discussion *supra* subsection I.E.3.

284 *See supra* subsection I.E.3.

285 *See, e.g.*, Dyck et al., *supra* note 133, at 2240–45 (examining the incentives and disincentives for employees to reveal fraud).

for employees to come forward to report on others within the organization.

Through more effective use of moral shaming (to which effective, motivational antitrust compliance training provides enormous aid), norms can be changed within companies and society at large.[286] This can be done through changing incentives, such as highlighting the ethical value of compliance, negative media exposure (externally), or holding management accountable internally for wrongdoing.[287] Moral shaming both decreases the cost of detection, because others will be on the lookout, and raises the potential cost of participation in illegal activity, because those who might try to engage in illegal activity will see that it will hurt them, as such behavior will not be tolerated in the company.

Another element of whistle blowing is that it occurs more often in organizations where employees feel empowered by their work environment (unless there is a financial windfall for the individual for doing so).[288] Social context matters when employees decide to whistle blow or to participate in illegal behavior.[289] Some people violate laws because they do not understand them, rather than because they actively seek to do so.[290] The creation of symbols for what constitutes bad behavior, and giving such symbols normative and expressive cultural values, affects legal compliance. Institutional and organizational forces thereby constrain individual decision-making.[291]

A corporate monitor may have the support from top management (because the monitors may report to the board or to the CEO) to get information and to get buy-in from various parts of the com-

286 Richman, *supra* note 49, at 21 (discussing the use of "serious" sentencing in white collar crimes as a method of deterrence).

287 *See* Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106–108, 111–12.

288 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010) (providing whistle blowing incentives). *See generally* Janet P. Near et al., *Explaining the Whistle-Blowing Process: Suggestions from Power Theory and Justice Theory*, 4 ORG. SCI. 393 (1993) (hypothesizing and finding that legalistic responses to whistle blowing by organizations have positive effects).

289 *See supra* subsection I.E.2.c.

290 Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 L. & SOC'Y REV. 23, 29 (1998).

291 *See* Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 505 (1997) (noting the role that organizations can play in determining what the law is interpreted as constraining); Vaughan, *supra* note 290, at 29–30. In the corporate context, one way in which law symbolizes such values is to mandate disclosure of criminal behavior when it is material as part of a company's securities filings.

pany that a pre-existing compliance officer or general counsel of the company lacked.[292] The monitor would work to help the compliance officer become better integrated into the company, so as to reduce information asymmetries, and thereby reduce the costs of compliance. The monitor would help the firm understand the legal regime and develop a culture, routines, and appropriate incentives that support compliance with the laws. A compliance culture also lowers monitoring costs as it allows for early detection of wrongdoing.[293] At the back end, it minimizes penalties because firms (and their agents) are more likely to detect internal wrongdoing[294] and are therefore more likely to be able to win the race for leniency.[295]

The focus on the strengths of monitors as a solution should not suggest that the use of monitors creates no risk.[296] The very strength of the monitor's discretion creates uncertainty about the nature of monitor. With so much discretion, it is possible that the monitor may blunt pro-competitive steps that a firm might take. Moreover, the monitor's discretion may result in uncertainty about the legal penalty, either because the penalty that the monitor imposes is weaker than it should be or because it leads to over-deterrence.[297]

F. Who Monitors Should Be

In an antitrust criminal setting, a proposed monitor needs to be someone who has substantive antitrust skills, and, as set forth by DOJ Antitrust in the *AU Optronics* sentencing memorandum, has extensive expertise in developing, implementing, and overseeing antitrust compliance programs.[298] This overcomes the problem of a poor choice of monitors in the FCPA context.[299] Someone without an antitrust and

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292 *See supra* Section III.C.

293 *See* JOSEPH E. MURPHY, A COMPLIANCE & ETHICS PROGRAM ON A DOLLAR A DAY 4 (2010), *available at* http://www.corporatecompliance.org/Portals/0/PDFs/Resources/ResourceOverview/CEProgramDollarADay-Murphy.pdf.

294 *See id.*

295 The intricacies of corporate monitors across antitrust regimes for cartel violations will be left for a future article.

296 However, it seems to be the case that the discount rate for investing in compliance is less than the cost of the monitor.

297 For a similar phenomenon in tort law regarding legal uncertainty, see John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 1000–03 (1984); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 298–99 (1986).

298 *See* Sentencing Memorandum, *supra* note 192, at 63–64.

299 *See* Griffin, *supra* note 224, at 110, 120 (noting that as a political monitor (without expertise in corporate governance), "[f]ormer Attorney General John Ashcroft's consulting firm notoriously received up to $52 million for monitoring Zimmer after

compliance program background will not be well-suited to integrate antitrust knowledge into the general culture of the company. Yet, being an antitrust expert is not enough. To minimize costs, monitors should be chosen because they are not only antitrust "experts," but also previously worked closely with companies and compliance programs. A monitor who has only worked in a law firm or in government, without much interaction with the business unit of a firm may not understand corporate culture and various methods of communication. Such monitors may not know how to ask for information or how to understand a firm's organizational structures.

This is not to suggest that the only people qualified to serve as antitrust corporate monitors are former in-house practitioners. Some practitioners in law firms or in government know an industry particularly well because of deal flow or litigation within the industry, and some have had experience with compliance programs. The more experience the monitor has, the lower the slope of the learning curve and the more effective his or her ability will be to positively shape compliance within a company. One approach would be for the appointment to be made by a judge who is presented with perhaps three alternative monitors and who is also told about any prior or current relationships between either the company or the prosecutors and each of the prospective monitors.[300]

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the U.S. Attorney specified him in the DPA"). There are two different approaches to monitoring—one is to make the company hire a mutually agreeable private monitor. *See id.* at 119. The other is to have a branch of the DOJ or some other enforcement agency do the job and send its own people into the company and charge a fee for the work. *See id.* at 119, 121. The first approach can be expensive and risks having a monitor who colludes with the company to cover up violations or loose internal controls, *see id.* at 120–22, or who, in the case of Ashcroft, is simply not well-suited for an in-house job. The second approach may mean lower quality monitoring with fewer resources due to compensation and other constraints on government. *See id.* at 119. Government monitors also probably would have to be walled off from the agency so they would not report information to the agency that is more appropriately handled internally at the company. So far, the private monitor seems to be the preferred approach even with all of its shortcomings.

300 18 U.S.C. § 208 (2006) would bar a prosecutor from recommending a monitor with whom the prosecutor is currently negotiating for employment, but this would cover only a narrow range of conflicts. 18 U.S.C. § 207(a), (c)-(d) would bar a former senior or very senior official (e.g., John Ashcroft) from communicating with his former agency with intent to influence on behalf of another person for one to two years, depending upon the level of seniority, and this might be a disqualifying factor during this time period. This also only covers a small percentage of the potential conflicts.

The ACCC booklet on compliance programs has excellent guidance on what independence means in this context. AUSTRALIAN COMPETITION AND CONSUMER COMM'N, CORPORATE TRADE PRACTICES COMPLIANCE PROGRAMS (2005).

G. *What Monitors Should Do*

The compliance program that a monitor should implement needs to be tailored to the risks being addressed, the specific organization, and that organization's dynamics.[301] The monitor must balance efforts to prevent the repeat of corporate crime in a way that does not prevent pro-competitive corporate behavior. This balancing by the monitor requires a certain amount of discretion. However, some sort of guidelines for what effective monitoring might look like (and more broadly, what might make for effective compliance programs) would go a long way toward reducing the abuses that seem to have been not infrequent for corporate monitors in the FCPA context.[302]

Tirole describes active monitoring as prospective monitoring, as opposed to passive monitoring, which is retrospective.[303] A compliance monitor should require antitrust interviews with senior and middle-level management in order to learn the business and to understand the realities of both the formal and informal organizational structures of the firm and the key players therein.[304] A wise compliance monitor would also interview more junior-level employees, including possible "witnesses and helpers," who may be more candid in their descriptions and insights.[305] Training should focus on senior managers and employees who deal with contracts, competitor benchmarking, trade associations, joint ventures, and pricing and marketing strategies.[306] But it must also include the potential witnesses and helpers who may not lead a cartel, but who would be aware of suspicious activities.[307] This includes low level employees who

301 *See* Joseph Murphy & William Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26 ANTITRUST 61, 62 (2012).

302 In the government contracts area, there was a change from a voluntary to a mandatory disclosure regime. *Compare* Federal Acquisition Regulation, 73 Fed. Reg. 67,064, 67,068–76 (Nov. 12, 2008) (codified at 48 C.F.R. pt. 2, 3, 9, 42, 52) (outlining the federal mandatory disclosure program), *with* Letter from William H. Taft, IV, Deputy Sec'y of Def., to members of the contracting industry (July 24, 1986) *in* PUBLIC CONTRACT LAW SECTION ABA, REPORT OF THE SPECIAL COMMITTEE ON VOLUNTARY DISCLOSURE, Ex. 3 (describing the voluntary disclosure program).

303 Jean Tirole, *Corporate Governance*, 69 ECONOMETRICA 1, 9 (2001).

304 *See* Murphy & Kolasky, *supra* note 301, at 62.

305 *See id.*

306 AM. BAR. ASS'N, *supra* note 158, at 80.

307 *See* Murphy & Kolasky, *supra* note 301, at 62 (listing the range of steps that would be expected in "an effective anti-cartel compliance program"). Most employees do not blow the whistle on corporate crime. *See* Dyck et al., *supra* note 133, at 2213.

might be aware of wrongdoing but who might otherwise not feel empowered to do something about it.

A compliance program will only be effective if it changes the culture and relationships within a firm and alters the incentives for individuals. This requires both a desire to change and a sense of what a company must do to effect such change.[308] In many cases, a monitor needs to focus on the illegal nature of price fixing. The crime often is not subtle; the efforts to conceal might themselves be good clues of bad behavior within the corporation that a pro-compliance culture should be able to detect.

Without guidance from DOJ Antitrust on what constitutes a good compliance program, compliance programs have the risk of being both too expensive and ineffective.[309] To better conform compliance to the particularities of antitrust, as envisaged under the Sentencing Guidelines, DOJ Antitrust should create guidelines for effective compliance as other antitrust agencies do, and as DOJ Antitrust itself does for other areas of conduct, including Horizontal Merger Guidelines,[310] Antitrust Guidelines for the Licensing of Intellectual Property,[311] and Antitrust Guidelines for Collaborations Among

308 Recent empirical studies suggest that antitrust compliance programs are not always effective or up to applicable standards. A survey of Belgian companies found that 64% had an antitrust compliance program. GERBEN PAUWELS & JOHAN YSEWYN, THE IMPACT OF COMPETITION LAW AND COMPLIANCE ON BELGIAN BUSINESSES 2 (2010). However, the same study found that only 35% of such compliance programs met the standards of the competition authorities. *Id.* In that survey, those companies that are the most likely to have a compliance program share common traits. They are: large companies (more than 1000 employees), subsidiaries of U.S. and Asian companies, publicly traded, and have confronted an antitrust violation in the past. *Id.* Survey work done in the United Kingdom reveals that the larger the organization, the more aware its employees are of competition law. OFFICE OF FAIR TRADING, COMPETITION LAW COMPLIANCE SURVEY ¶ 4.6 (2011), *available at* http://www.oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1270.pdf. A 2012 survey by the Society of Corporate Compliance and Ethics reported that 64% of responding companies did not do antitrust compliance auditing that would meet the "minimum standards" of the Sentencing Guidelines compliance program standards. *See* Joe Murphy, *Antitrust Compliance Programs: SCCE's Survey Says They Are Less Than They Should Be*, CORP. COMPLIANCE INSIGHTS (June 20, 2012), http://www.corporatecomplianceinsights.com/antitrust-compliance-programs-scces-survey-says-they-are-less-than-they-should-be/.

309 However, an alternate view is that programs do not need to be expensive to be effective. *See* MURPHY, *supra* note 293, at 7.

310 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

311 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), *available at* http://www.justice.gov/atr/public/guidelines/0558.pdf.

Competitors.[312] Indeed, a number of non-U.S. antitrust agencies offer specific guidance on compliance programs. These include the Office of Fair Trading (United Kingdom),[313] the Canadian Competition Bureau,[314] Chile's FNE,[315] and the Australian Competition and Consumer Commission.[316]

A compliance program should require the creation and effective use of an antitrust manual and a clear statement of the company's compliance commitment.[317] This is in line with the Sentencing Guidelines, which discuss "reasonable steps to communicate . . . in a practical manner . . . by conducting effective training programs and otherwise disseminating information."[318] Creating a narrow, tailored set of compliance guidelines and following them would not only help corporate monitors in achieving very specific and circumscribed goals, but this also would allow companies to benefit from taking on the cost of significant compliance because of the benefits received from early detection of wrongdoing.

Improved compliance programs also better allow for communication with enforcers about potential wrongdoing. Better compliance programs would therefore lead to better detection should there be a bad apple that veers from the good corporate culture in spite of incentives that should push for compliance.

One role of the monitor would be to create a long-term mechanism to better integrate the general counsel's office into the senior-level management decision-making, where the worst cartels seem to develop.[319] This can arise from helping the legal team to become better linked to the business unit as a provider of strategic advice.

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312 FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

313 OFFICE OF FAIR TRADING, *supra* note 226.

314 COMPETITION BUREAU CANADA, *supra* note 226.

315 FISCALÍA NACIONAL ECONÓMICA [FNE] [NATIONAL ECONOMIC ATTORNEY GENERAL'S OFFICE], PROGRAMAS DE CUMPLIMIENTO DE LA NORMATIVA DE LIBRE COMPETENCIA [COMPETITION COMPLIANCE PROGRAMS COMPLYING WITH COMPETITION LAW] (2012), *available at* http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf, *translation available at* http://www.compliance-network.com/wp-content/uploads/2012/10/Chiles-Compliance-Program.pdf.

316 AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *supra* note 300.

317 *See* MURPHY, *supra* note 256, at 44–45. Within the structure of such standards as the Sentencing Guidelines, there are many different types of elements a company can add into its program. *See generally id.* (outlining ideas for compliance programs under categories such as training, discipline, and risk assessments).

318 U.S. SENTENCING COMM'N, 2012 USSC GUIDELINES MANUAL § 8B2.1(b)(4)(A).

319 *See* discussion *supra* subsection I.E.3.a.

Another crucial function is to ensure that the chief ethics and compliance officer has appropriate independence and empowerment. As the Canadian Competition Bureau astutely noted: "[T]he person or group responsible for compliance must be in a position to act effectively, in that there is independence, professionalism, empowerment, financial support and a solid understanding of what is taking place within the business."[320] Important elements in such positioning are to have the compliance officer both report to an independent committee of the board and be removable only by the board.

As in other compliance risk areas, it is also important that the subject matter expert, the antitrust lawyer, works closely with the compliance officer so that there is a seamless approach to antitrust compliance. If antitrust compliance is left to the corporate compliance officer, this might be problematic. Bifurcating compliance between a compliance office and a general counsel's office might mean that some compliance programs are more likely to be rewarded than others. The lack of coordination between compliance and legal teams may mean that while there is emphasis on preventing and detecting accounting fraud, it may come at the expense of financial support for cartel-related compliance monitoring and training.[321]

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320 COMPETITION BUREAU CANADA, *supra* note 226, at 6.

321 To properly effectuate antitrust compliance, monitors should ensure that the company has measures such as a code of conduct, training sessions for employees, and a fully empowered compliance officer whose scope includes antitrust and training programs for managers and staff. Creating an effective compliance structure requires creating a way to properly collect and analyze information. The monitor should also conduct an antitrust risk analysis to provide a diagnostic of antitrust risk. *See* Donald I. Baker & Mary J. Houle, *Using the Results of an Antitrust Audit to Educate the Corporate Team*, 59 ANTITRUST L.J. 971, 981 (1991) (describing the beneficial uses of an antitrust audit). *But see* Joseph E. Murphy, *Surviving the Antitrust Compliance Audit*, 59 ANTITRUST L.J. 953, 953–54, 969–70 (1991) (suggesting some downsides to the antitrust audit). Monitors might want to adjust the pay incentive structure of a company or ensure that the compliance officer is positioned on an ongoing basis to do this. The nature of managerial contracts may impact the likelihood of a manager undertaking collusive activities. Incentives can be structured in such a way that decreases the likelihood of a manager engaging in collusion. *See* Giancarlo Spagnolo, *Managerial Incentives and Collusive Behavior*, 49 EUR. ECON. REV. 1501, 1515–16 (2005) (detailing the effects that different managerial incentives have on the presence of collusion). It is important that, as part of the compliance program, the compliance function be given continuing budgetary support. Moreover, the compliance program must be regularly reviewed. Changes in marketing or sales should trigger an antitrust review of the proposed strategy for the likelihood of coordinated behavior. One job of the monitor would be to identify staff (by risk profile) for additional monitoring and training. A member of the company who meets with competitors, such as at trade association meetings, may be more at risk to participate in cartel activity than others in an organization. Riley & Bloom, *supra* note 157, at 28, 30, 34, 37. Antitrust

One could create specific individual incentives for a monitor to adequately assure compliance. One of these incentives could be a certification letter for inclusion in the company's 10K, stating what the monitor has done to assure compliance and that, to the best of the monitor's knowledge, the company is in compliance with the law. Such an assurance letter could give rise to liability under the securities laws if it is knowingly or recklessly incorrect. In addition, one might require a "conditional fee" as an incentive mechanism.[322] Non-compliance would mean no fee for the monitor and "disgorge[ment]" of "fees paid during the period of noncompliance."[323] Analogously, if parents come home and find the TV on, popcorn all over the floor, and the kids' homework still in their backpacks, the babysitter (corporate monitor) does not get paid. These conditional fees might also be worked into management contracts so that management also continues to be responsible for long-term maximization of compliance.

Creating effective incentives for the monitor is as difficult as creating effective incentives for executives. The design problem is difficult because the optimal mix of sanctions and benefits for a monitor doing his or her job is not always clear. If a monitor is paid merely a salary, it might lead to short-term fixes at the company, or the monitor might sacrifice short-term fixes for long-term structural changes that are not easy to measure. Yet, stock-based incentives for a monitor might cause the monitor to sacrifice quality of oversight for short-term profit, which is exactly why the monitor was imposed upon the firm in the first place.

CONCLUSION

The U.S. criminal antitrust system is not broken. Overall, leniency has been the most impressive innovation in antitrust enforcement in the last quarter century. However, the traditional penalty formulation of fines and criminal sanctions seems to be reaching its limit to get closer to optimal deterrence. This Article proposes modifications to both the benefits and punishments associated with leni-

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monitors and compliance officers also should run econometric screens. *See generally* Rosa M. Abrantes-Metz et al., *Enhancing Compliance Programs Through Antitrust Screening*, 4.5 ANTITRUST COUNS. 4 (2010) (applying screening techniques to compliance programs); Rosa Abrantes-Metz & Patrick Bajari, *Screens for Conspiracies and Their Multiple Applications*, 24 ANTITRUST 66 (2009) (providing an overview of the screening process).

322 *See* Claire Hill & Richard Painter, *Of the Conditional Fee as a Response to Lawyers, Bankers and Loopholes*, 1 AM. U. BUS. L. REV. 42, 50–55 (2011) (advocating for and describing a conditional fee system).

323 *Id.* at 51.

ency in order to improve detection. On the benefits side, leniency should be more generous—but only for the amnesty applicant and only if the applicant has an effective compliance system, as the U.S. Sentencing Guidelines contemplate. On the punishment side, cartels need stronger punishments in the form of mandatory imposition of an antitrust corporate monitor for firms other than the leniency applicant. This will create better incentives for some firms to invest *ex ante* in better internal detection.

Corporate monitors create fear among boards of directors and executives because of the discretion that they have to oversee a company and push changes that may have a significant impact on a company's operations and structure. Because the time that monitors spend at firms is limited in duration, there is a low risk of monitor capture. One reason to promote corporate monitors and better internal governance in a cartel setting may be that such policies can substitute for higher criminal sanctions as part of the optimal deterrence trade-off that firms make. Without some other mechanism to increase the cost of illegality (because of limits to fines and incarceration for cartel crimes), it would be rational for firms and individuals therein to participate in cartel activity.

These additional rewards for leniency and punishments through the imposition of a monitor will not eliminate cartel formation and participation. At whatever penalty level the legal regime sets fines and jail time, there will always be some groups of people for whom no amount of penalties will matter because such people convince themselves that they will never get caught.[324] However, reduced penalties for the leniency applicant and the automatic imposition of corporate monitors upon other members of a cartel will bring cartel policy closer to optimal deterrence than the current regime, without adding significant administrative costs, through better incentives for internal detection.

324 Sokol, *supra* note 12, at 230–31 (providing survey evidence of antitrust lawyers on the behavior of cartel clients).