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Recommended Citation
D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement*, 78 Antitrust L.J. 201 (2012), *available at* http://scholarship.law.ufl.edu/facultypub/298

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CARTELS, CORPORATE COMPLIANCE, AND WHAT PRACTITIONERS REALLY THINK ABOUT ENFORCEMENT

D. DANIEL SOKOL*

The intention of this article is to reconcile what is perceived to be a golden age of effective cartel enforcement[1] with an apparent lack of effective cartel compliance even by sophisticated companies. While the Chicago School's approach[2] has been quite contentious in some areas of antitrust,[3] the United States and other countries generally accept Chicago School cartel enforcement assumptions and policy prescriptions overall.[4] Yet, in spite of a strong world-

* Associate Professor, University of Florida Levin College of Law. I would like to thank Amitai Aviram, Caron Beaton-Wells, Chris Bruner, Stu Cohn, John Connor, Brandon Garrett, Joe Harrington, Barry Hawk, Herb Hovenkamp, Jerry Israel, John Johnson, Kim Krawiec, Bob Lande, Christopher Leslie, Joe Murphy, George Paul, Nancy Rapoport, Rob Rhee, Barak Richman, Mike Seigel, Chris Slobogin, Giancarlo Spagnolo, Valerie Suslow, workshop discussants at the University of British Columbia, University of Chile, University College London, University of San Diego, University of Toronto, and the University of Florida Levin College of Law for a summer research grant. I also want to thank my research assistants Leigh Anne Siddle and Josh Mize.

[1] Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Address Before the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf.

[2] The Chicago School has revolutionized antitrust in both academic and policy circles. At the heart of Chicago School antitrust is a devotion to utilizing price theory analysis and a belief in minimizing error costs that may occur from false positives in enforcement. While the Chicago School is not monolithic, it is shorthand for a particular school of thought. *See, e.g.*, Stephen Martin, *Remembrance of Things Past: Antitrust, Ideology, and the Development of Industrial Economics*, *in* THE POLITICAL ECONOMY OF ANTITRUST 25 (Vivek Ghosal & Johan Stennek eds., 2007); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1228–43 (1989).

[3] *See e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005); HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008); Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 ANTITRUST L.J. 663 (2010).

[4] Vivek Ghosal, *Regime Shift in Antitrust Laws, Economics, and Enforcement*, 7 J. COMPETITION L. & ECON. 733 (2011). *But see* John M. Connor, *Recidivism Revealed: Private International Cartels 1990–2009*, 6 COMPETITION POL'Y INT'L (2010) (suggesting more of a pendulum swing across administrations in cartel enforcement).

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wide commitment to cartel enforcement,[5] particularly one that has been more successful than at any time in the past,[6] cartels remain a significant problem.[7]

The Chicago School approach, based on an optimal deterrence framework, is cast in terms of expected profits. However, a cartel member is an organization, and the people involved are employees, all of whom respond to different incentives because of agency costs of whether or not to advance firm profitability short or long term. Based on this understanding, this article develops a richer model of cartel operations within the firm and cartel enforcement by antitrust agencies, and moves beyond the traditional Chicago School approach to examine both firm and individual incentives as well as the interplay between them. The contribution of this article is to show the limitations to the optimal deterrence-inspired cartel enforcement policy currently used by the Department of Justice Antitrust Division.

Because the number of cartels remains unknown, it is difficult to determine if enforcers have achieved optimal deterrence.[8] The uncertainty as to whether enforcers have reached optimal deterrence is a significant empirical challenge to cartel scholarship and policy. As Joseph Harrington explains:

> The data obstacle to addressing these questions is that we only observe *discovered* cartels, so we do not know the frequency of cartels in the economy. Until we find a way in which to surmount that obstacle, the ultimate impact

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[5] OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (1998), *available at* http://www.oecd.org/dataoecd/39/4/2350130.pdf; OECD, Prosecuting Cartels Without Direct Evidence of Agreement (2006), *available at* http://www.oecd.org/dataoecd/19/49/37391162.pdf; OECD, Guidelines for Fighting Bid Rigging in Public Procurement (2009), *available at* http://www.oecd.org/dataoecd/27/19/42851044.pdf; ICN, Cartel Settlements (2008), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf; ICN, ANTI-CARTEL ENFORCEMENT MANUAL (2008–2010), *available at* http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx; ICN, Co-operation Between Competition Agencies in Cartel Investigations (2007), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf; ICN, Interaction of Public and Private Enforcement in Cartel Cases (2007), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf; ICN, Anti-cartel Enforcement Template (2005). Nevertheless, there may still be global under-deterrence. *See* Michal S. Gal, *Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance*, 51 VA. J. INT'L L. 57 (2010) (providing an alternative mechanism to combat global under-deterrence).

[6] John M. Connor, Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008 (2009), *available at* SSRN: http://ssrn.com/abstract=1467310.

[7] Emmanuel Combe, Constance Monnier & Renaud Legal, *Cartels: The Probability of Getting Caught in the European Union* (BEER Paper No. 12, 2008), *available at* http://www.coleurop.be/content/studyprogrammes/eco/publications/BEER/BEER12.pdf; John M. Connor & Robert H. Lande, Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917657; Peter L. Ormosi, *How Big Is a Tip of the Iceberg? A Parsimonious Way to Estimate Cartel Detection Rate* (CCP Working Paper 11-6, 2011), *available at* http://competitionpolicy.ac.uk/en_GB/c/document_library/get_file?uuid=186cc0ec-a536-406d-9792-603f4f6ed95c&groupId=107435.

[8] Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 470–74.

Electronic copy available at: http://ssrn.com/abstract=2079336

> of leniency programs on cartel formation and the lifetime of cartels will remain an open question.[9]

As a result of the empirical limits to better inform theoretical approaches to cartel enforcement, many of the original Chicago School assumptions on cartels remain unchanged. This is perhaps surprising given the significant empirical inroads made in the finance, organizational theory, ethics, and accounting literatures on compliance, white-collar crime, and the understanding of the incentives within the firm that can be applied to cartel enforcement and compliance.

The empirical evidence provided by the practitioner surveys collected for this article challenges the traditional assumptions behind the success of the DOJ's cartel program. Perhaps the most interesting finding is that firms regularly game the leniency program to punish their competitors. For various reasons, firms and the DOJ have strong incentives to settle rather than to litigate cases in which the legality of cartel conduct may be in doubt. The surveys also expose limitations to the optimal deterrence framework for firms and individuals regarding incentives and behavior.[10] These findings suggest the need for an enforcement focus on sub-units within the firm as well as various processes to change behavior that would improve enforcement and deterrence. Finally, the surveys suggest certain structural limitations in organizational behavior within firms that have prevented antitrust compliance programs from becoming embedded in a way that would reduce cartel activity.

The success of any cartel enforcement program is substantially linked to the creation and effective implementation of a compliance culture. This article provides an analysis of media coverage of cartel enforcement from 1990–2009. The analysis suggests that successful enforcement has not created sufficient awareness of cartel behavior among the public. Relative to other types of financial crimes, such as accounting fraud, the public seems unaware or uninterested in cartel activity. The lack of public awareness and the resulting lack of social penalties impact deterrence and detection. In the individual cartelists' cost-benefit calculation, the lack of public awareness of cartels and lack of corresponding moral outrage for cartel crimes reduces the cost of participation in a cartel. The conclusion summarizes the article's findings and outlines potential future steps in cartel research.

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[9] Joseph E. Harrington, Jr., *Optimal Corporate Leniency Programs*, 56 J. INDUS. ECON. 215, 238 (2008).

[10] It is not clear what the optimal level of cartel deterrence is (or more precisely, whether any given cartel should have been deterred, given the costs of such deterrence), but academics seem to be united in the belief that antitrust enforcement has not reached optimal deterrence. A more efficient design of enforcement and compliance mechanisms would reduce enforcement costs and/or lower cartel harm, so even if cartels are currently optimally deterred, a more efficient process could increase social welfare further.

I. BASICS OF THE U.S. CARTEL ENFORCEMENT SYSTEM

There are a number of factors that make up the deterrence system for cartels. These factors include government criminal[11] and civil prosecutions,[12] and private civil lawsuits.[13] Though not mandatory, the U.S. Sentencing Guidelines provide a base-level fine of 20 percent of affected commerce based on an estimate that the gain from the illegal cartel activity is 10 percent of the sale price.[14]

One of the daunting challenges to optimal deterrence is creating sufficient incentives for whistle-blowers to arise from among cartel members. Cartel detection is difficult because the cost of cartel conduct, though large in the aggregate, is small for individual victims (such as consumers). When consumers detect price changes, they are in a position to report such behavior to the antitrust authority, which in turn can investigate the cartel. This investigation may cause a cartel member to defect via leniency. The threat of leniency encourages cartel detection. Moreover, it works to destabilize existing cartels, as the potential of defection makes cartel members trust each other less.

The DOJ first instituted a leniency program in 1978.[15] However, very few cartel participants used the original leniency program, probably because the incentives for its use were weak. One estimate suggested that fine levels between 1955 and 1993 were at 0.4 percent of optimal deterrence.[16] Until the maximum level for fines increased from $50,000 to $10 million for entities and $350,000 for individuals in 1990, there had not been a single corporate fine for an illegal cartel that exceeded $2 million.[17]

The Corporate Leniency Policy of 1993 and the Leniency Policy for Individuals of 1994 caused a fundamental transformation of leniency and cartel enforcement. Leniency now drives how antitrust agencies detect most car-

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[11] Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 10–11 (2008). *But see* Jeffrey S. Parker, *Doctrine for Destruction: The Case of Corporate Criminal Liability*, 17 MANAGERIAL & DECISION ECON. 381, 387–88 (1996) (arguing that sufficiently high civil penalties make criminal entity's criminal liability unnecessary).

[12] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 10.12 (5th ed. 1998).

[13] John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 522 (2005).

[14] U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 (2011), *available at* http://www.ussc.gov/Guidelines/2011_Guidelines/index.cfm.

[15] Scott D. Hammond & Belinda A. Barnett, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 18, 2008), *available at* http://www.justice.gov/atr/public/criminal/239583.htm.

[16] Joseph C. Gallo et al., *Criminal Penalties Under the Sherman Act: A Study of Law and Economics*, 16 RES. L. & ECON. 25, 59 (1994).

[17] J. Anthony Chavez, *More Aggressive Action to Curb International Cartels*, 1739 PLI/Corp 807, 830 (2009).

tels.[18] However, one might argue that what counts as "leniency" may give the leniency program too much credit. In some cases, a firm may apply for leniency because the cartel is in the process of being revealed. That is, detection may already be occurring.

The leniency program in its present form is relatively unusual in terms of its detection ability for enforcers vis-à-vis other types of white-collar crime.[19] For example, among 216 recent alleged corporate frauds by large U.S. companies ($750 million or more in assets), detection by government enforcers (the SEC) accounted for a mere 7 percent of all cases. Most instances of detection were prompted by auditors (10 percent), media (13 percent), non-SEC industry regulators (13 percent), and employees (17 percent), among others.[20]

Leniency follows from economic theory under which self-reporting should lead to reduced sanctioning by the government.[21] A number of articles investigate the effects of leniency on cartel stability using a game-theoretic approach. These articles suggest that the introduction of leniency incentives makes it more likely that cartel members will defect.[22]

The allure of leniency can be a powerful motivator for a firm to defect from a cartel.[23] A firm may escape criminal conviction and treble damages (although it will still be liable for single damages) by providing full cooperation with the DOJ in its cartel enforcement action if it is the first to confess to the DOJ about its cartel involvement and meets certain other criteria. Similarly, an individual who participates in a cartel may, upon being the first to confess,

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[18] Hammond, *supra* note 1, at 3. Of the two programs, the corporate leniency program is by far the most used.

[19] Patrick Rey, *Toward a Theory of Competition Policy*, *in* ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS 82 (Mathias Dewatripont, Lars Peter Hansen & Stephen J. Turnovsky eds., 2003).

[20] Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010).

[21] Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. POL. ECON. 583 (1994).

[22] Joseph E. Harrington, Jr., *Detecting Cartels*, *in* HANDBOOK OF ANTITRUST ECONOMICS 213 (Paolo Buccirossi ed., 2008); Giancarlo Spagnolo, *Leniency and Whistleblowers in Antitrust*, *in* HANDBOOK OF ANTITRUST ECONOMICS, *supra*, at 259; 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 2, at 59; Cécile Aubert et al., *The Impact of Leniency and Whistle-Blowing Programs on Cartels*, 24 INT'L J. INDUS. ORG. 1241 (2006); Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 455–60 (2006); Zhongmin Wang, *Collusive Communication and Pricing Coordination in a Retail Gasoline Market*, 32 REV. INDUS. ORG. 35 (2008); Harrington, *supra* note 9; Giancarlo Spagnolo, Divide et Impera: Optimal Deterrence Mechanisms Against Cartels and Organized Crime (Econometric Soc'y 2004 N. Am. Winter Meetings No. 485, 2003), *available at* http://repec.org/esNAWM04/up.24618.1049197921.pdf.

[23] *See, e.g.*, Harrington, *supra* note 9; Massimo Motta & Michele Polo, *Leniency Programs and Cartel Prosecution*, 21 INT'L J. INDUS. ORG. 347 (2003).

avoid criminal penalties and treble damages upon defecting and informing on the cartel to the DOJ.

The impact of the leniency program has been to reduce cartel stability and to reduce the incentive to join a cartel. The experimental economics literature, analyzing both one-shot collusion interactions[24] and repeated interactions,[25] suggests that leniency may be successful to limit both the formation of cartels and their duration.[26] One recent empirical analysis suggests that the leniency program may have reduced cartel formation by 42 percent and increased cartel detection by 62 percent in the United States.[27]

In practice, there are two types of leniency. "Type A" leniency is for applicants who come to the DOJ with information prior to any investigation into the alleged cartel. "Type B" leniency is for applicants who come to the DOJ after the initiation of an investigation. Each type of leniency has specific requirements that must be met.[28]

A further tool to improve cartel detection is the Amnesty Plus program, which creates incentives for firms under investigation for collusion in one market to report a conspiracy in another market. A firm under Amnesty Plus receives leniency for its role in the undetected cartel and receives a substantial additional sentencing discount for its role in the detected cartel for which it was not the leniency applicant. Half of the DOJ's international cartel investigations begin as a result of Amnesty Plus.[29] Additionally, the Penalty Plus program augments penalties for firms under investigation by the DOJ that discover collusive conduct in an additional offense and do not report it under Amnesty Plus.

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[24] *See, e.g.*, Jose Apesteguia et al., *Blowing the Whistle*, 31 ECON. THEORY 143 (2007).

[25] *See, e.g.*, Jeroen Hinloopen & Adriaan R. Soetevent, *Laboratory Evidence on the Effectiveness of Corporate Leniency Programs*, 39 RAND J. ECON. 607 (2008).

[26] Maria Bigoni et al., *Trust, Salience and Deterrence: Evidence from an Antitrust Experiment* (IFN Working Paper No. 859, 2011) (suggesting in an experimental setting that a well-designed leniency program promotes cartel deterrence), *available at* http://ssrn.com/abstract=1744852.

[27] Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AM. ECON. REV. 750 (2009).

[28] Hammond & Barnett, *supra* note 15.

[29] Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Address Before the ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/215514.pdf. *But see* Yassine Lefouili & Catherine Roux, *Leniency Programs for Multimarket Firms: The Effect of Amnesty Plus on Cartel Formation* (Ctr. for Operations Res. & Econometrics Discussion Paper No. 2010/21, 2010) (suggesting that Amnesty Plus may help to sustain cartels in certain settings), *available at* http://www.uclouvain.be/cps/ucl/doc/core/documents/coredp2010_21web.pdf.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) further increased penalties that may improve cartel deterrence.[30] ACPERA increased maximum imprisonment for cartel participants over threefold, to ten years. It also increased the maximum corporate fine from $10 million to $100 million and the maximum individual fine from $350,000 to $1 million.[31] Moreover, in 2006 Congress added antitrust violations to the list of crimes for which it allows wiretapping, which has made finding direct evidence easier for antitrust enforcers.[32]

Leniency in conjunction with fines has shown quantifiable successes. Both fines and jail time have increased significantly. Cartel fines rose from $188 million in the 1980s to $1.6 billion in the 1990s to $4.2 billion in the 2000s.[33] The percentage of defendants sentenced to jail has increased considerably as well. Additionally, there has been a significant increase in the total number of days defendants have spent in jail, with more than double the jail time on average in the 2000s compared to the 1990s.[34]

Even with all of these incentives to shape behavior, most cartel scholars suggest that the current cartel system does not approach optimal deterrence.[35] If the leniency program is working optimally, then it is preventing the formation of new cartels and it is increasing instability in existing cartels. However, recent work on cartel deterrence suggests that even with leniency, there still seems to be significant under-deterrence.[36]

There are reasons to question the benefits of leniency and the effectiveness of the cartels program.[37] The problem with analyzing the various costs and benefits of the current structure of the leniency program is that, as Nathan

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[30] Pub. L. No. 108-237, § 215(a), 118 Stat. 668 (2004) (codified at 15 U.S.C. § 1).

[31] *See* Chavez, *supra* note 17, at 822. Some additional non-cartel specific penalties aid in cartel enforcement. Increased penalties in the Sentencing Guidelines add to the mix of potential enforcement penalties. Another tool is Sarbanes-Oxley. Pub. L. No. 107-204, 116 Stat. 745 (2002). Sarbanes-Oxley-based sanctions may be used to increase cartelists' prison terms beyond the historic limit of thirty-six months for conduct that ended prior to mid-2004.

[32] Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, ABA Section of Antitrust Law Spring Meeting (Mar. 26, 2008) (citing 18 U.S.C. § 2516), *available at* http://www.justice.gov/atr/public/speeches/232716.pdf.

[33] Hammond, *supra* note 1.

[34] *Id.*

[35] *See, e.g.*, John M. Connor, *Effectiveness of Antitrust Sanctions on Modern International Cartels*, 6 J. INDUS. COMPETITION & TRADE 195 (2006); Gal, *supra* note 5; Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008).

[36] Connor & Lande, *supra* note 7 (summarizing the literature).

[37] Maria Bigoni et al., *Fines, Leniency and Rewards in Antitrust: An Experiment* (IFN Working Paper No. 738, 2008), *available at* http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.167.73.

Miller recently concluded, "In virtually all the models, the effects of leniency hinge on specific parameters, the values of which are unknowable theoretically and difficult to estimate empirically."[38] An empirical examination of practitioner views of personal experiences with cartel-related representation in the next part of this article provides insight into the limits of the current practice of DOJ enforcement.

II. PRACTITIONER SURVEYS ON CARTEL ENFORCEMENT

Companies are reluctant to discuss previous cartel participation and make executives available to discuss the various organizational shortcomings within the firms that led to cartel participation. In public, defense counsel make self-serving and often highly political comments that are unlikely to shed light on actual practices. The DOJ cartel enforcers may do the same. Moreover, the public record from decided antitrust cartel cases does not necessarily add much insight. Roughly 90 percent of cartel cases result in a plea bargain.[39] Cases that are litigated may not be representative of all cases. To date, there has not been a systematic investigation of the realities of cartel related practices within law firms. The following practitioner surveys bridge this empirical gap.

A. SURVEY DESIGN, HYPOTHESES, AND METHODS

The survey data I collected for both the quantitative and qualitative surveys: (A) provide a previously unexplored set of descriptive accounts by practitioners in private practice of what happens in cartel enforcement; and (B) use the findings on cartels to suggest a number of new research questions for further study and modes of analysis. There were a number of hypotheses that I tested with the survey data. These included: (1) firms strategically use leniency; (2) individuals appear to be aware of the risk/reward trade-offs of cartel participation; and (3) antitrust cartel compliance programs are not well integrated within companies.

To explore these hypotheses, this article used quantitative and qualitative surveys to investigate the perceptions of antitrust practitioners involved in cartel work. The first survey consisted of a Web-based survey that had a sample size of 234 antitrust lawyers out of a total survey population of 1203 practitioners.[40]

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[38] Miller, *supra* note 27, at 750–51.

[39] Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All (Oct. 17, 2006), *available at* http://www.justice.gov/atr/public/speeches/219332.htm.

[40] This response rate of 19 percent falls within acceptable response rates for Web-based surveys of professionals. *See* MATTHIAS SCHONLAU ET AL., CONDUCTING RESEARCH SURVEYS VIA E-MAIL AND THE WEB 20 (2002).

For the qualitative survey, the practitioners interviewed were self-identified cartel specialists drawn from Chambers USA-ranked antitrust practitioners.[41] Per social science methods, this complemented quantitative and qualitative measurements.[42] The purpose of the qualitative interviews of "elite" antitrust practitioners was to compare the general survey results with the types of client situations that elite cartel practitioners faced.[43] This article assumes that elite practitioners are most likely to be involved in high-profile cartel cases, with frequent client contact, and, therefore, that such practitioners have more knowledge of the nuances of cartel enforcement and the effect of that enforcement on practices within firms.[44]

While the survey asked questions across mergers, cartels, and single firm conduct, this article only discusses those questions that focused on cartels. The questions covered the number and frequency of clients with hard core cartels, both those discovered (in spite of legal advice not to participate) and those not discovered by U.S. antitrust authorities, the impact of private rights, the effectiveness of present cartel policy as compared to the period prior to the

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[41] CHAMBERS AND PARTNERS, http://www.chambersandpartners.com/USA. During the period August to September 2008, 117 Chambers-ranked antitrust specialists were interviewed via telephone, and 51 identified themselves as cartel specialists. These interviews encompassed antitrust specialists in each state where Chambers ranks antitrust practitioners: California, Florida, Illinois, Pennsylvania, Massachusetts, New York, North Carolina, Texas, and Washington, D.C.

[42] Charlene A. Yauch & Harold J. Steudel, *Complementary Use of Qualitative and Quantitative Cultural Assessment Methods*, 6 ORG. RESEARCH METHODS 465 (2003). The questions of the general survey and of the qualitative survey were pre-tested with current government staff who had a previous career in private practice. The questions were also pre-tested with academics knowledgeable about cartel issues and with academics who are experts in survey methodology and qualitative interviews. In total, there are 327 Chambers-ranked antitrust practitioners. Thus, the response rate for the qualitative survey was 37 percent. Additionally, all respondents of both the quantitative and qualitative surveys were contacted by e-mail. Efforts to limit selection and other biases in the surveys are explained in D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON. L. REV. 1055, 1138–40 (2010).

[43] Only each respondent and the author of this article participated in these calls. The calls averaged thirty-five minutes in length. To provide anonymity for the respondents, I gave each of the 51 respondents a number. At the beginning of each interview, each respondent was asked a series of close-ended questions focused on background and employment history, including the nature of their antitrust practice over the past two years. For those who answered that 40 percent or more of their work was cartel-related, a series of open-ended questions were asked regarding the nature of their cartel work. I posed similar (but not the same) questions across interviewees to understand the cartel representations (for example, plaintiff-side cartel lawyers have a different set of experiences than defense-side lawyers, defense-side lawyers with multinational U.S.-based clients had some different experiences than lawyers with primarily foreign-based clients). However, how much time each interviewee spent on each issue and the amount of nuance offered varied based on the individual and their experiences. Beyond simple number counts for those answering "agree"/"yes" or "disagree"/"no" on any particular question, there is additional richness and nuance of the responses that in many instances were highly fact-specific. For many respondents, the answers often began with the qualifier "it depends."

[44] Some might wonder whether lawyer respondents can answer questions about their clients objectively. Yet many of the respondents readily admitted that their clients (firms or individuals) were guilty.

introduction of the corporate leniency program and the 2004 penalty enhancements. The survey also asked about effective deterrence of cartels.

Appendix I provides a full list of questions and responses to the Web-based survey. Since, in nearly all cases, regression analysis indicated that the independent variables were not significant, cross tables were created. These are reported in Appendix II.[45]

The data yielded three causal inferences: (a) there is strategic gaming under the leniency program; (b) the internal antitrust compliance structure varies across type of firm, dependent upon factors including: nationality, size and growth rate, culture, and organizational structure; and (c) compliance programs are not effectively embedded at most levels within firms.

This article divides the results of the surveys by theme. The first theme is related specifically to DOJ enforcement in the area of cartels. The second theme is how firms undertake compliance efforts internally. The third theme examines the role of private rights in the context of cartel enforcement as a substitute or potential complement to government enforcement.

B. Findings and Analysis of the DOJ's Role in Cartel Policy

A number of factors impact the DOJ's ability to effectively deter cartels. This section examines DOJ cartel policy to identify those areas where the current structure of the leniency program and of cartel enforcement overall may suggest areas for improvement.

1. *The Effectiveness of U.S. Cartel Enforcement*

A first-order question is how effective is DOJ cartel enforcement and have there been shifts to suggest that DOJ policy is more or less effective than in the past. The results of the quantitative survey seems to imply a possible link between overall greater additional penalties since the 1990s and more effective cartel enforcement.[46] Fifty-six percent of respondents (104 respondents out of a total of 185) stated that present enforcement is significantly or moderately more effective; only 10 percent (18 respondents out of a total of 185) thought the opposite (i.e., moderately less effective or significantly worse).[47]

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[45] Appendix II is available on the *Antitrust Law Journal* Web page, http://www.americanbar.org/groups/antitrust_law/publications/antitrust_law_journal.html. A summary of the comments from the telephone (qualitative) survey is on file with the author and is confidential information protected under applicable law.

[46] Hammond, *supra* note 1.

[47] *See* Question 16, Appendix I. For purposes of the Internet survey, people who answered "N/A" are interpreted to not have an opinion based on their personal experiences; however, the people who answered "N/A" (42 respondents or 22.7 percent for Question 16) are included in the total number of respondents (185 for Question 16) for the purpose of calculating percentages—this is true for any percentages presented from the Internet survey in the rest of this article.

This is an important accomplishment for the DOJ and suggests that the DOJ has moved closer to optimal enforcement since the introduction of the leniency program.

The next question to consider is whether increasing the severity of penalties for cartel behavior has improved deterrence.[48] The results of the surveys indicate that there has been less success in this area compared to the introduction of the leniency program. In the quantitative survey, when asked about how the 2004 increase in maximum penalties under the Sherman Act changed their responses with regard to the effectiveness of the leniency program overall, only 19 percent (34 respondents out of 183) found that the 2004 revisions led to either significantly or moderately more effective enforcement. Forty-four percent of respondents (80 respondents out of 183) reported that the 2004 increase in penalties did not have an important effect.[49] The practitioner responses on the impact of increased penalties on deterrence correspond to recent work by Nathan Miller, who created a game-theoretical model and applied it to indictments to conclude that ACPERA did not have a significant impact on cartel detection.[50]

The more limited impact of ACPERA leads to a broader question for cartel policy—how successful overall is the policy in leading to optimal deterrence? Most practitioners seem to believe that U.S. cartel enforcement has been a moderate success rather than a great success. When asked "How much do you agree with the following statement, 'Cartels are being effectively deterred' (with effective defined as efficiency enhancing)?," 5 percent agreed strongly (10 respondents out of 186), 46 percent agreed moderately (85 respondents out of 186), and 12 percent were neutral (23 respondents out of 186). Only 7 percent (13 respondents out of 186) disagreed strongly, and 17 percent (31 respondents out of 186) disagreed moderately.[51] The qualitative survey results, discussed below, identify what seem to be some of the limitations of current U.S. cartel enforcement.

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[48] Bigoni et al., *supra* note 26 (concluding in an experimental setting that tough sanctions improve deterrence).

[49] *See* Question 17, Appendix I (44 percent of respondents answering that enforcement is "[t]he same as the present"). "N/A" responses (59 respondents or 32 percent for Question 17) have been interpreted to not have an opinion based on their personal experiences but are included in the total number of respondents (183 for Question 17) when calculating percentages.

[50] Nathan H. Miller, Strategic Leniency and Cartel Enforcement 24 (Nov. 2007) (unpublished paper; early draft of Miller, *supra* note 27) ("As shown, there is no discernible increase in discoveries immediately following the introduction of ACPERA. The results suggest that the ACPERA may have little substantial impact on detection capabilities."), *available at* http://sites.google.com/site/nathanhmiller/miller-cartels.pdf.

[51] *See* Question 18, Appendix I. "N/A" responses (24 respondents or 13 percent for Question 18) have been interpreted to not have an opinion based on their personal experiences but are included in the total number of respondents (186 for Question 18) when calculating percentages.

2. *The Use of Strategic Leniency*

Though the leniency program has been a great success, the economic literature suggests that a too-generous leniency program may create opportunities for firms to behave strategically.[52]

The nature of strategic leniency is that companies seeking leniency (often for Amnesty Plus) provide information for what is in essence questionable or "gray" behavior[53] rather than for clear-cut antitrust violations. This allows companies to use leniency to punish competitors in the same industry. Respondents suggested that clients often are unwilling to take risks to defend themselves against cartel charges through a fully litigated trial. Moreover, the DOJ has incentives to settle matters of gray behavior, as discussed below.

The qualitative survey offers confirmation of the insights from theoretical and experimental research that firms may use leniency strategically to punish rival firms. Nearly all practitioners stated that the strategic use of leniency (strategic in the sense that the leniency program may be used to punish rivals and in some cases even to help enforce collusion) is a reality and the only issue was the frequency and severity of the strategic gaming.[54] Over half of interviewees found that strategic leniency was significant.

Many respondents provided a public choice[55] explanation for DOJ implementation of the leniency program. They noted that cartel enforcement is an easy political sell. There is universal acceptance that cartels hurt consumer welfare. Other areas of antitrust enforcement produce less "bang for the buck." For example, most mergers reviewed by the DOJ receive clearance

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[52] Zhijun Chen & Patrick Rey, *On the Design of Leniency Programs* (IDEA Working Papers 452, 2007), *available at* http://ideas.repec.org/p/ide/wpaper/7038.html.

[53] Gray behavior is essentially an information exchange without an explicit agreement. The following is an example of gray behavior. Two companies, Alpha and Beta, both sell widgets in the same area. A sales representative from Alpha calls a sales representative for Beta and asks what Beta is charging this coming month for widgets. When asked what Beta is charging, the Beta sales representative reveals the Beta price. Was there an agreement in this scenario? Or were the sales representatives simply verifying prices quoted to a customer? Does the knowledge of competitor's prices adversely affect competitive behavior? The answers may be unclear. On information exchanges, see Louis Kaplow, *An Economic Approach to Price Fixing*, 77 ANTITRUST L.J. 343, 388–93 (2011); William H. Page, *A Neo-Chicago Approach to Concerted Action*, *supra* this issue, 78 ANTITRUST L.J. 173 (2012).

[54] Giancarlo Spagnolo, *Self-Defeating Antitrust Laws: How Leniency Programs Solve Bertrand's Paradox and Enforce Collusion in Auctions* (Fondazione Eni Enrico Mattei, Working Paper No. 52.2000, 2000), *available at* http://ssrn.com/abstract=236400; Christopher J. Ellis & Wesley W. Wilson, What Doesn't Kill Us Makes Us Stronger: An Analysis of Corporate Leniency Policy (May 2001) (unpublished paper), *available at* http://pages.uoregon.edu/cjellis/Research/LeniencyPolicy.pdf.

[55] *See generally* DENNIS C. MUELLER, PUBLIC CHOICE III (2003); D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029 (2011).

within the first thirty days.[56] Thus, the frequency of second requests, let alone of merger challenges, is very small. Yet, the total resources spent on merger enforcement are significant.

Because of the improvements in detection and the increased incentives to settle resulting from the leniency program, there is a very high success rate of cartel cases filed by the DOJ.[57] A number of the survey respondents suggested that the Antitrust Division might in fact be the division within the DOJ that litigates the least. These respondents speculated that the DOJ might be reluctant to take cartel cases to trial because of a lack of trial experience.

Practitioners also suggested that the DOJ has institutional reasons to laud the success of the cartel program and to downplay any criticisms of it. The DOJ brings fewer civil cases at present than in previous years. Though this may be due to changes in case law, there is political pressure to be active in antitrust matters in order for the DOJ to justify its budget. To suggest that the current cartel enforcement program may have to be refined would suggest that the "golden child," as one practitioner described the leniency program, makes the DOJ less worthy of political and financial support. According to interviewees, the DOJ has shown an unwillingness to reexamine the leniency program and responds overwhelmingly negatively to any criticism of the program. Practitioners state that the DOJ believes that compliance programs, for example, may interfere with the operation of the leniency program.

Practitioners almost universally describe the DOJ's hostility to any critique of the leniency program. Some explicitly frame this within a public choice framework whereas others do so implicitly. A public choice explanation based on interest group theory suggests that DOJ leadership would seek to minimize criticism to better improve the standing of the agency in negotiations for funding (or funding for cartel rather than non-cartel enforcement within the DOJ) and for the potential personal opportunities for the regulators.[58]

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[56] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HART-SCOTT-RODINO ANNUAL REPORT (2008), *available at* http://www.ftc.gov/os/2009/07/hsrreport.pdf. Because of the pre-merger notification process, merging parties must alert deals to antitrust agencies regardless of anticompetitive effects.

[57] Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, BYU L. REV. 315, 328 n.42.

[58] Joseph E. Harrington, Jr., *When Is an Antitrust Authority Not Aggressive Enough in Fighting Cartels?*, 7 INT'L J. ECON. THEORY 39 (2011); Sokol, *supra* note 55 (describing public choice). Some respondents suggest that an antitrust agency can garner cheap convictions (and raise its tally of successful prosecutions) because criminal cases will be settled by firms wanting to limit the negative consequences of potential liability. The urge to settle the better to take advantage of leniency may as one practitioner described it "have a company sell its employees down the river." That is, sometimes, an antitrust agency investigation might even pressure companies to drop legal support of employees who may then be forced to plead guilty even when they may be innocent. United States v. Stolt-Nielsen S.A., 524 F. Supp. 2d 609, 624, 627 (E.D. Pa. 2007) (including a discussion of Mr. Van Westenbrugge, where the trial record demonstrated

Some theoretical work suggests that when cartel detection is easy, an agency may be prosecuting too few cartels.[59] Because of the impetus to maximize agency and individual prestige, agencies may go after the low-hanging fruit of easy cartel cases rather than cartel cases that require more investigation and more resources, which would result in fewer total cartels uncovered. A leniency program may contribute to this problem by causing too few prosecutions outside of those cartels detected by the leniency program.[60] The qualitative survey supports the view of the theoretical literature that in some settings the leniency program may lead to under-detection.

3. *Amnesty Process and the Risk-Reward Calculation*

A number of practitioners provided comments on the risk/reward calculation that firms make in their dealings with the DOJ on cartel matters. The greater the risk involved in cooperating with the DOJ, the greater the likelihood that firms may choose to take their chances in continuing with a cartel. Practitioners note that to apply for amnesty can be very risky. A company may not even know the extent of its own criminal involvement in a cartel when applying for amnesty, as often firms may come to the DOJ (because of the incentive to be the first firm to request amnesty) even before an internal investigation has been concluded.[61]

Transparency and legal certainty were issues that a number of practitioners raised. Practitioners noticed increased transparency at the DOJ on cartels but many said that there was still not enough procedural transparency. They noted with favor the 2008 DOJ discussion on procedures for how the marker system works for the first firm in a cartel that approaches the DOJ for amnesty.[62] Yet practitioners noted that judges seem reluctant to review settlements with the DOJ. This deference seems to allow substantial discretion to the DOJ.[63] Respondents noted that the EU is tougher, and the fines are much larger. They also nearly universally noted that the EU system was not transparent enough.

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his innocence, despite his serving jail time in a plea deal because payment of his legal fees was stopped); F. SCOTT BROWN, OUT OF THE VALLEY xvii, 107, 108, 132 (2008).

[59] Harrington, *supra* note 58, at 39–40.

[60] Joseph E. Harrington, Jr. & Myong-Hun Chang, *Modeling the Birth and Death of Cartels with an Application to Evaluating Competition Policy*, 7 J. EUR. ECON. ASS'N 1400 (2009).

[61] Joseph A. Tate, To Do or Not to Do: A Measured View of the Benefits of the Antitrust Division's Amnesty Program (undated unpublished manuscript) (on file with author).

[62] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL, ch. III, § F.9.C.i (3d ed. 2008), *available at* http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf.

[63] The aggressive prosecutorial stance is not a new regulatory model. *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 972–75 (2009) (explaining the same process more generally with regard to the DOJ criminal prosecution of corporations).

A number of survey respondents noted that their advice to clients changed as a result of the *Stolt-Nielsen* case.[64] In that case, the DOJ challenged Stolt-Nielsen S.A.'s leniency based on its view that Stolt-Nielsen had not lived up to its commitments under the leniency program. Though the DOJ lost the case, this may have had an effect on the operation of the leniency program. A number of practitioners appear not to trust the DOJ, and this case might have contributed to the mistrust. Moreover, *Stolt-Nielsen* may have changed the internal calculus of cooperation within a given firm. Lawyers mentioned that in a number of cases, individuals seem less likely than before *Stolt-Nielsen* to come forward to in-house counsel with information.[65] One concern that respondents mentioned was that the lack of trust meant that clients do not always tell the truth to in-house or outside counsel about the nature of involvement in a cartel or all of the facts about the cartel.

An amnesty application in the United States may expose a firm to prosecution in other jurisdictions. Though cooperation and coordination in international cartel investigations continues to improve, working through the procedural and substantive rules of different legal systems creates additional uncertainty for amnesty applicants and for other firms in cartels as it is not always certain that a firm may be the leniency applicant across all jurisdictions. Additionally, while outside antitrust counsel have attorney-client privilege in Europe, generally this is not true of in-house lawyers.[66] Qualitative survey respondents noted that the lack of the privilege increases the cost of compliance because outside law firms are more expensive. Practitioners noted that many employees are not aware of this distinction between outside counsel and in-house lawyers in the treatment of attorney-client privilege in the United States and Europe.

Similarly, respondents in the qualitative survey noted that the DOJ has had a flexible definition of what it means to be a "ringleader" of a cartel. Ringleaders have better information about the cartel.[67] Thus the DOJ has allowed a number of ringleaders to qualify for leniency, citing the need for information on the cartel. However, many practitioners have reservations about this practice, questioning a ringleader's knowledge of the cartel as a valid reason for receiving amnesty as part of cartel policy.

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[64] United States v. Stolt-Nielsen S.A., 524 F. Supp. 2d 609, 610 (E.D. Pa. 2007).

[65] In-house lawyers also face potential ethical dilemmas. *See* Christine E. Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201 (2009).

[66] Case C-550/07 P, Akzo Nobel Chems. Ltd. v. Comm'n, 2010 E.C.R. 791 (2010); *see also* Andreas Stephan, *See No Evil: Cartels and the Limits of Antitrust Compliance Programs*, 31 COMPANY LAW. 231, 233 (2010).

[67] Leslie, *supra* note 22, at 478–80.

One suggested change that could be inferred from the potential problems with using ringleaders to aid in detection would be to grant modified amnesty for ringleaders, such as reducing the benefits of amnesty or granting an amnesty with additional requirements. An element of amnesty with additional requirements could include the creation of structural reform within the company to ensure that compliance can become embedded within the firm, as this article develops later. Allowing some form of modified amnesty would recognize the fact that the ringleader of a cartel was the driving force behind the cartel's formation and continued existence. However, by not allowing a ringleader to be eligible for full leniency, cartel formation may be delayed or fully deterred as each firm would prefer another to take the initiative in forming a cartel.

4. *The Role of the DOJ in Creating a Competition Culture*

Culture can be used as a tool to improve compliance as a law-abiding culture creates norms that push for more effective compliance.[68] Moral outrage and shame have a place in cartel enforcement as it creates its own form of deterrence.[69] The greater society's moral outrage at cartel behavior, the costlier undertaking such actions will be for individuals. Likewise, increased moral sanctions allow firms to better monitor and prevent cartel participation by their managers and other employees. The reason for this is that others within the firm will be more likely to view the illegal behavior as morally reprehensible. Firms that participate in cartels will receive social shaming, which will hurt their branding and goodwill.[70] Similarly, a strong competition culture reduces monitoring costs within a firm because other employees will be more likely to report behavior that they find morally abhorrent. Thus, the creation of a "competition culture" that embraces antitrust within the business community and within the broader population can raise the cost of participation in a cartel and aid in deterrence.

The DOJ has spent a significant amount of resources publicizing the leniency program and explaining the deleterious effects of cartels.[71] However, although the competition culture seems to be very well established among corporate counsel and law firms, as the qualitative responses suggest, the competition culture for cartels within society overall is far more limited, as

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[68] Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106.

[69] On the economics of morality generally, see Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 232 (2002).

[70] There might also be a non-economic moral element to the use of shaming sanctions to shape better behavior. Caron Beaton-Wells, *Capturing the Criminality of Hard Core Cartels: The Australian Proposal*, 31 MELB. U. L. REV. 675, 702–03 (2007).

[71] *See e.g.*, Hammond, *supra* note 1.

this section will illustrate with Figure 1 and Table 1. A search of U.S. newspapers using three different databases on Westlaw (United States Papers, All News, and Wall Street Journal), yielded relevant news stories from 815 different U.S. newspapers, magazines and trade presses. Incidence of news stories is a measure of competition culture as more stories would suggest greater awareness among society of cartel crimes and their effects.[72] Figure 1 below provides a summary of the results.

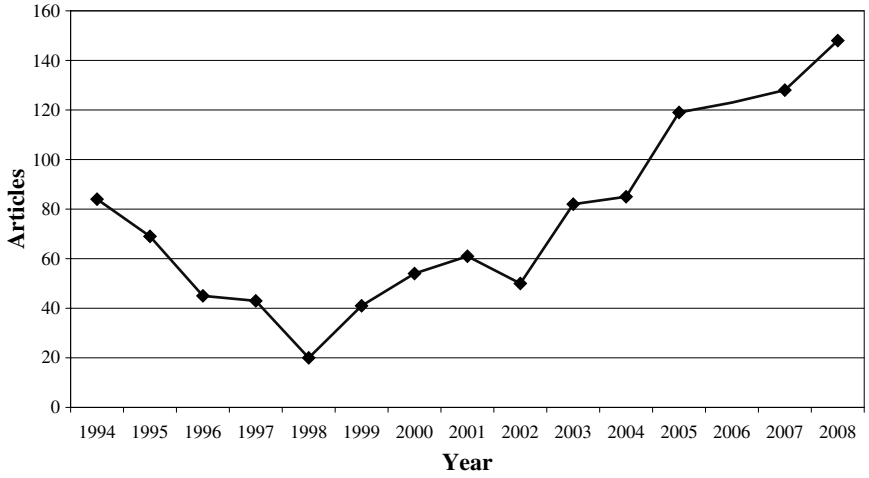

FIGURE 1: CARTEL STORIES IN U.S. NEWS SOURCES 1994–2008

The overall number of cartel-related stories ranged from 20 in 1998 to 148 to 2008, with a general upward trend over the last decade. This overall number is small, as the subsequent paragraphs of this section will explain.

Absolute numbers only reveal part of the story. A comparative examination of these numbers of total news stories with the total number of cartel cases in a given year by the DOJ suggests a limited awareness of competition culture in the United States. If one divides the total number of newspaper stories by the number of cases filed (which does not even include newspaper articles about investigations in the United States or abroad) the total numbers look

[72] In the "Terms & Connectors" search field, I typed in the following search terms: "(CARTEL FIRM INDUSTRY /3 COLLUSION) (PRODUCER /3 COLLUSION) (SHERMAN /3 SECTION /3 ONE 1) ANTI-COMPETITIVE ASSOCIATION /5 (FIX! HIKE! HIKING /3 PRICE) (MARKET /3 ALLOCATION) (PRICE /3 COLLUSION) (BID /2 RIG!) PRICE-FIXING." The three databases (with non-U.S. publications eliminated) were United States Papers, All News, and Wall Street Journal.

even worse. Table 1 provides comparative statistics for the period 1994–2008 (which covers the modern leniency regime):

TABLE 1: CARTEL CASES FILED COMPARED TO NEWS STORIES

Year	Cartel News Stories (815 different newspapers)	Cartel Cases Filed[73]	Stories per Case Filed[74]	*NY Times* Stories Only (narrow search on "accounting /2 fraud")
1994	84	57	1.47	6
1995	69	60	1.15	3
1996	45	42	1.07	5
1997	43	38	1.13	6
1998	20	62	3.23	14
1999	41	57	0.72	21
2000	54	63	0.86	10
2001	61	44	1.39	20
2002	50	33	1.52	137
2003	82	41	2	158
2004	85	42	2.23	121
2005	119	32	3.72	203
2006	123	34	3.62	107
2007	128	40	3.2	48
2008	148	54	2.74	27

Overall, the ratio of total number of news stories per cartel case filed in 815 U.S. newspapers ranged from under one per year to no more than 3.72 stories per case filed per year. This suggests that the general public has very little awareness about cartel activity. It follows that with little awareness, there are few moral penalties that cartelists at either individual or firm level internalize in their risk/reward calculation. To provide an example, only one newspaper, *The New York Times*, was searched on a very narrow search term of "accounting /2 fraud." For that newspaper, there were significantly more stories in four of the years than for all antitrust cartel stories in all of the major periodicals. With the addition of 814 other papers, no doubt the number would have been higher in all of the years for stories that involved corporate accounting fraud. Yet, the amount of global cartel overcharges has been greater in some cartel cases than in the biggest and most newsworthy accounting frauds of the

[73] Lande & Davis, *supra* note 57, at 13 n.42.

[74] Stories per case does not capture the variance across certain cartels. For example, papers might cover a cartel in a consumer good (e.g., chocolates) much more than in non-consumer goods (marine hoses).

2000s—Enron ($1 billion), WorldCom ($3.8 billion), Adelphia ($3.1 billion).[75] For example, the vitamins cartel generated a global overcharge of $7 billion.[76] Relative to other corporate crimes, newspapers, politicians, and the public seem to be indifferent to cartel crimes (at least as measured by how newsworthy a story a cartel case is).[77] If a strong competition culture would involve media awareness and make the social cost of cartels as important as other white-collar crimes, then the probability of detection would increase based upon greater awareness of cartels. The cost of sanctions would also increase as the moral stigma attached to cartels would be greater. Yet it does not seem as if periodicals view cartels with the same level of importance as other white-collar crimes.

Generally with corporate crime, the public demands large sanctions because they empathize with the victims—such as employees or shareholders.[78] This is less the case with cartels, which do not generate the same type of hostility in the United States as do perpetrators of securities or accounting fraud. Moreover, unlike securities fraud where there is no ambiguity about the existence of a crime, in some instances the government may be perceived as facilitating and endorsing cartel-like behavior through state action exemption or export cartels.[79]

Without increased moral outrage, cartel formation and participation are less costly as there are few reputational sanctions for morally objectionable behavior. Moreover, the lack of overall public exposure on cartel issues suggests the need for increased publicity of cartel issues by the government. Other countries celebrate Competition Day, in which antitrust agencies make a public case for the importance of antitrust.[80] In addition to considering a similar celebration, the United States might consider the use of multimedia like the Dutch Competition Authority's short Internet film on leniency to specifically target

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[75] *See* Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES.COM (Aug. 26, 2002, 5:30 PM) (summarizing corporate accounting scandals 2000–2002), http://www.forbes.com/2002/07/25/accountingtracker.html.

[76] John M. Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence*, 16 (Am. Antitrust Inst., Working Paper No. 06-02, 2006), *available at* http://www.antitrustinstitute.org/files/485.pdf.

[77] *See also* Andreas Stephan, *"The Battle for Hearts and Minds": The Role of the Media in Treating Cartels as Criminal*, *in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 381 (Caron Beaton-Wells & Ariel Ezrachi eds., 2010).

[78] Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 939 (2003).

[79] Parker v. Brown, 317 U.S. 341 (1943) (involving a raisin cartel allowed under the state action exemption); D. Daniel Sokol, *What Do We Really Know About Export Cartels and What Is the Appropriate Solution?*, 4 J. COMPETITION L. & ECON. 967 (2008) (discussing export cartels).

[80] There is anecdotal evidence that these events seem to work. There is not merely Competition Day at the country level (e.g., Brazil, Chile, and the Netherlands), but also at the regional level with European Competition Day.

cartel behavior.[81] Finally, the DOJ should sell the anti-cartel message to the public in terms of direct customer harm in the form of increased prices, rather than simply the amount of fines imposed on guilty cartel members.[82]

C. Suggested Modifications to DOJ Cartel Enforcement

Antitrust has not focused its attention in the compliance context on the various components within a firm. Instead, antitrust treats the corporation as a "black box" in which it assumes away the internal workings of the firm and focuses instead at the firm level. Both theoretical and empirical work in a number of different fields, including economics, accounting, finance, organizational theory, and sociology, provide important insights indicating that a firm is not merely a single entity in its actions. Rather, a firm has a number of various components, each of which has its own incentives that shape behavior. This literature suggests that organizational subunits and individuals within them need to be addressed.[83] Based upon these insights, this section will provide an overview of organizational thinking, findings from the surveys, and how theory and the current cartel reality can shape more effective antitrust responses for better cartel detection.

An organization's environment and the amount of individual discretion affect decisionmaking for the entire organization and may constrain the decisionmaking of individuals within them.[84] The qualitative survey evidence suggests that more general theories of firm behavior also hold true in the antitrust context. Understanding organizational structure and incentives may illuminate how to better structure more optimal corporate compliance to police cartel behavior. A shift in cartel enforcement that accounts for different firm functions, processes, and incentives of different units within the firm would create a more effective cartel enforcement system.

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[81] *See* Press Release, Netherlands Competition Authority (NMa), NMa Puts Its Leniency Programme in the Picture (Apr. 23, 2008), *available at* http://www.nma.nl/en/documents_and_publications/press_releases/news/archive/2008/08_10_nma_puts_its_leniency_programme_in_the_picture.aspx.

[82] But sometimes the increase can be very small per consumer, which is part of the problem. In the securities context, Aviram has created a model to explain why public perception of enforcement impacts actual enforcement. Amitai Aviram, *What Do Corporate Directors Maximize? (Not Quite What Everybody Thinks)*, 6 J. INSTITUTIONAL ECON. 47 (2010). The same model can be applied to cartels. In effect, the perception of the importance of cartels by the public has bearing on the incentives of enforcers to divert resources to cartel enforcement. Enforcers have an incentive to enforce against risks that the public overestimates and not to enforce against risks that the public under-estimates.

[83] Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 918–19 (1996) (providing an overview).

[84] Sydney Finkelstein & Donald C. Hambrick, *Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion*, 35 ADMIN. SCI. Q. 484 (1990).

Just as organizational structures seem to matter in designing effective anti-cartel compliance programs, so do individuals within firms. Neo-Chicago antitrust must design a better compliance model to achieve more optimal deterrence than currently exists in the DOJ cartel enforcement system. However, such a system must draw not only from industrial organization economics but from a broader array of disciplines and insights.

A number of the qualitative survey responses focused on several areas where the DOJ might be able to make modifications to its cartel enforcement to strengthen the leniency program through additional motivations to shape firm behavior.

1. *Creation of Cartel Related Compliance Guidelines*

Some respondents in the qualitative survey mentioned the need for cartel-related compliance guidelines. An antitrust enforcement system should calibrate improved compliance to minimize the costs for business and of administrability of the compliance system. One way to change behavior would be for regulators to provide specific compliance guidelines so that employees will know what cartel compliance should look like. The guidelines would identify the particular types of behavior and methods to mitigate risks that have been identified as best practices.[85] In other corporate governance contexts, enforcers have set up codes of conduct to suggest best practices for improving good governance and compliance.[86] Firms that adopt these compliance guidelines would receive lower penalties than those companies that do not integrate such programs. Over time, internal enforcement of these guidelines might change the norms within a company to increase compliance. Some of the practitioner responses provided in the telephone survey suggest that creating compliance guidelines might work in the U.S. context. Indeed, anecdotal evidence from Canadian and UK compliance guidelines suggest that this change is already underway in other jurisdictions and at minimal additional costs.[87]

Under a U.S. cartel compliance guideline, a firm's relative compliance might be judged by the degree of effectiveness of the firm's antitrust compliance program in the past. For example, firms that have been involved in multiple cartels over a period of years would be treated more harshly than first-

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[85] Both Canada and the United Kingdom have taken such steps. *See* COMPETITION BUREAU, CORPORATE COMPLIANCE PROGRAMS (2010), 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, DRIVERS OF COMPLIANCE AND NON-COMPLIANCE WITH COMPETITION LAW (2010), *available at* http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft1227.pdf.

[86] Ruth V. Aguilera & Alvaro Cuervo-Cazurra, *Codes of Good Governance*, 17 CORP. GOVERNANCE: AN INT'L REV. 376 (2009) (describing this trend).

[87] *See supra* note 85.

time offenders, since evidence of past behavior indicates the likelihood of a corrupt culture and of continued weak compliance controls.

2. *Other Mechanisms*

Other areas of business law also provide examples of effective ways of increasing compliance in corporate governance. One possibility is to increase corporate penalties when senior management is involved in the illegal activity. Another is to require a senior executive, such as the chief compliance officer or CEO, of a firm that reaches a certain U.S. turnover threshold to certify that the firm has an adequate compliance program, similar to Sarbanes-Oxley certification. Penalties would attach to the individual senior manager should a cartel be uncovered by the DOJ.

Another possible mechanism is the DOJ's ability to bar cartelists from being government suppliers. According to the survey respondents, this is rarely used by the DOJ, although it is sometimes threatened. In perhaps the most famous cartel case, lysine, the DOJ did not use debarment from government contracts against Archer Daniels Midland (ADM).[88]

Another possibility, a whistle-blowing bounty, has been covered in the antitrust literature.[89] A bounty may be able to work in conjunction with leniency to improve detection, as the South Korean experience suggests.[90] Greater experimentation with the use of bounties that do not reduce the success of leniency should be considered by the DOJ so long as such provisions do not interfere with internal compliance mechanisms.

Regarding individual sanctions, as noted earlier, one possibility is to debar directors, managers, and other employees from an industry. However, there also need to be positive incentives. Most importantly, this means creating incentives to report wrongdoers rather than turning a blind eye because of the risk of retribution for internal whistle-blowing.

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[88] On the lysine cartel, see John M. Connor, *Case 11: Global Cartels Redux: The Lysine Antitrust Litigation (1996)*, *in* THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 300 (John E. Kwoka, Jr. & Lawrence J. White eds., 2000).

[89] Because of space limitations, this article does not go into detail on the topic of whistle-blowing but merely notes that there is an existing literature on the topic with additional extensions that can be explored. *See, e.g.*, Aubert et al., *supra* note 22; William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766 (2001).

[90] D. Daniel Sokol, *Detection and Compliance in Cartel Policy*, CPI ANTITRUST CHRON., Autumn 2011, Vol. 9, No. 2.

D. CARTEL BEHAVIOR AND SHAPING INCENTIVES WITHIN THE FIRM

1. *The Need to Increase the Understanding of the Dynamics of Behavior Within the Firm*

Qualitative survey respondents nearly uniformly suggested that U.S. antitrust law and policy demonstrate a limited understanding of how individuals interact criminally with the firm. Instead, the firm tends to get treated monolithically and not as a complex organization for cartel purposes. This section, building off the survey responses, suggests the limitations to such an approach.

Most of the DOJ's cartel policy focuses on the behavior of firms. Yet, understanding the internal workings of firms would allow for more optimal deterrence as this understanding would allow for calibrating policy around the incentives within a given firm to comply with antitrust law.

Social norms create controls on behaviors within organizations.[91] Undesirable socialization may allow people to overlook ethical issues.[92] Compliance programs and codes of ethics have become a fundamental part of not merely antitrust compliance but compliance overall for companies. One reason that companies adopt compliance programs and codes of ethics is for the legitimating function of creating a culture of competition and law-abidingness for the firm.[93] However, codes of ethics do not independently create compliance. Indeed, a code of ethics may be as much an external signal that there is a compliance program as an attempt to actually change firm culture.[94] Compliance is something that must be integrated into a firm. That is, if a firm culture is deeply ingrained, merely introducing a code will not change it.[95]

To influence cultural norms, compliance programs need to be integrated into firm culture to create institutional mechanisms for law-abiding employees and managers.[96] Current compliance programs in antitrust may now include nothing more than a day of lectures with some PowerPoint slides. However,

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[91] Donald Lange, *A Multidimensional Conceptualization of Organizational Corruption Control*, 33 ACAD. MGMT. REV. 710, 712–22 (2008).

[92] Blake E. Ashforth et al., *Re-Viewing Organizational Corruption*, 33 ACAD. MGMT. REV. 670, 672 (2008); Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCHOL. REV. 193, 194 (1999).

[93] Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571 (1995); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1407–08 (1999).

[94] Laufer, *supra* note 93, at 1408.

[95] WILLIAM C. FREDERICK, VALUES, NATURE, AND CULTURE IN THE AMERICAN CORPORATION 297 (1995).

[96] CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002).

this does not solve compliance problems, and may, in fact, breed cynicism on the part of employees. Such programs do not change the inherent nature of a corporation's culture.[97] Many of the survey respondents in the qualitative portion of the study stressed the need for compliance programs that were more interactive and regularly updated and modified across the different levels of individuals to make antitrust cartel compliance more effective.

Some non-compliance may be caused by mixed messages that employees or executives receive from a corporation. On the one hand employees may be asked to behave ethically. On the other hand, there might be requisite employee performance goals. Alec Baldwin's character in the film *Glengarry Glen Ross* famously states, "We're adding a little something to this month's sales contest. As you all know, first prize is a Cadillac Eldorado. Anybody want to see second prize?" [Holds up prize] "Second prize is a set of steak knives. Third prize is you're fired."[98]

The very nature of many compliance programs causes the creation of an atmosphere of mistrust.[99] Companies give managers discretion to undertake policy changes, such as implementing a system of internal reporting. This suggests a certain level of trust. One might argue that internal reporting of infractions for compliance programs may encourage trust within organizations because employees may believe that their employers will act morally and self-report to regulators.[100] However, the downside of internal reporting is that in some organizational settings, trust within the organization may mean that the organization may not report compliance infractions to government if the firm benefits financially from such infractions.[101] Simultaneous to creating trust, companies with serious internal compliance controls create distrust within a company because the firm must monitor its agents. This may create a negative work environment in which managers may be overly cautious of any kind of

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[97] LINDA KLEBE TREVIÑO & KATHERINE A. NELSON, MANAGING BUSINESS ETHICS, ch. 5 (5th ed. 2011).

[98] GLENGARRY GLEN ROSS (New Line Cinema 1992) (quote as reported on IMDB.com, http://www.imdb.com/title/tt0104348/quotes); *see also* Yuri Mishina et al., *Why "Good" Firms Do Bad Things: The Effects of High Aspirations, High Expectations, and Prominence on the Incidence of Corporate Illegality,* 53 ACAD. MGMT. J. 701 (2010) (suggesting that performance beyond expectations may lead to an increased risk of corporate illegality).

[99] Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, Other Ills*, 29 J. CORP. L. 267, 318 (2004).

[100] Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433 (2009).

[101] Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165 (2008).

violation, lest they even have the appearance that they may be participating in a cartel. This might chill procompetitive behavior.[102]

One important finding in the qualitative study was that practitioners believe that the DOJ treats any compliance program that does not halt all cartel activity as a failed compliance program. The problem with such a policy is that it creates incentive for under-investment in compliance. Moreover, this is exactly contrary to the language of the Sentencing Guidelines that says that a violation is not necessarily evidence of a failed compliance program.

The DOJ's strict liability approach contradicts the main academic literature in the area of entity liability and punishment. There are a number of justifications for entity liability. Perhaps most important is that firms may not change their behavior with only a system of individual liability. Entity liability also overcomes the problem of judgment-proof individuals and situations where firms divide up responsibility among multiple actors (and hence no one individual can be liable), or situations where firms withhold information from enforcers.[103] The seminal article on entity liability advocates a mixed regime of negligence and strict liability.[104] A mixed regime is preferable because a pure strict liability regime will not ensure compliance in circumstances where the increased likelihood of uncovering harm by the compliance program outweighs the firm's ability to prevent such harm. As such, the firm has a disincentive for any sort of compliance program that would monitor firm behavior.[105] Therefore, some sort of negligence regime needs to be incorporated into a composite approach to also punish behavior where an entity has demonstrated a "failure to discharge its policing duties."[106]

The lack of sufficient incentives for serious compliance allows for unethical behavior to flourish and ultimately create an unethical culture. As Matt Damon (in the role of Mark Whitacre) explained in the movie *The Informant!* about ADM and the lysine cartel, "It's not just lysine. It's citric. It's gluconate. There was a guy who left the company because he wouldn't do it. He was forced out. The gluconate guy, he's out of a job."[107] The social norm

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[102] *But see* Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621 (2008) (suggesting that antitrust should encourage distrust by employees of the firm via whistle-blowing to improve cartel detection).

[103] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 695–96, 699 (1997).

[104] *Id. But see* Kimberly D. Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 581–83 (2005) (casting doubt on the effectiveness of composite regimes).

[105] Arlen & Kraakman, *supra* note 103, at 708; Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

[106] Arlen & Kraakman, *supra* note 103, at 726.

[107] THE INFORMANT! (Warner Bros. 2009) (quote as reported on IMDB.com, http://www.imdb.com/title/tt1130080/quotes).

at ADM was that employees were let go if they did not participate in the firm's activities and follow the firm's culture.[108]

The strict liability regime for antitrust shapes incentives within the firm to continue with criminality because there is very limited benefit to proactively spending on serious compliance when the firm (and individuals therein) benefit from non-detection.[109] When asked, "In the past 2 years, what number of discovered hard-core cartels (no matter who discovers the cartel) involving your clients were situations where your clients never sought or ignored prudent legal advice prior to a U.S. investigation that results in an adverse ruling?," 32 percent of practitioners responded that they had between one to twenty clients who fit the category affirmatively responsive to the question.[110]

The results regarding the likelihood of undertaking cartel activity suggests that a significant number of firms and employees within the firms operate within a corporate culture that at a minimum does not support lawfulness and good governance. When asked as a follow up to the previous question, "What proportion of hard core cartel clients never sought legal advice, or ignored prudent legal advice," 40 percent (73 practitioners out of 185) responded "not applicable," and 40 percent of practitioners (74 out of 185) responded that it was 0–20 percent. Ten percent of practitioners (19 respondents out of 185) reported 81–100 percent of clients ignored prudent legal advice. The remaining practitioners responded 21–40 percent (4 percent of practitioners), 41–60 percent (4 percent of practitioners), and 61–80 percent (2 percent of practitioners) respectively.[111]

2. *Do Hard Core Cartel Offenders Know Their Conduct Is Illegal?*

With so many firms and individuals not asking for or ignoring legal advice, the question arises as to what extent cartel offenders understand that their behavior is illegal. Put differently, do cartelists understand that the behavior

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[108] On the impact of social norms on compliance generally, see David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1797–98 (2007).

[109] How much of the continuation of cartel activity is due to the strict liability regime and how much may be due to penalties that are too weak is not clear. Both may be causes, and there may be a relation between too few "carrots" and too few "sticks." Such a discussion, which is beyond the scope of this article, would necessarily have to be theoretical, as empirical verification presents significant challenges. However, survey respondents suggested that both sets of factors contributed to the current state of less than optimal deterrence.

[110] *See* Question 12, Appendix I. "N/A" responses (70 respondents or 37 percent for Question 12) are included in the total number of respondents (189 for Question 12) when calculating percentages.

[111] *See* Question 13, Appendix I. "N/A" responses (73 respondents or 40 percent for Question 13) are included in the total number of respondents (185 for Question 13) when calculating percentages.

they undertake is illegal or at least pushing the envelope of legality?[112] However, the question of whether or not compliance is effective in embedding antitrust knowledge and to what extent this knowledge deters activity among individuals within a given firm remains unknown except anecdotally.[113]

Christopher Leslie argues that a number of international cartel cases demonstrate the failure of antitrust compliance programs.[114] He goes so far as to state, "Criminal antitrust law is clear: executives and mid-level managers engaged in cartel activity know that they are breaking the law."[115] However, the survey data paints a more mixed picture.

Respondents in the telephone survey nearly universally stated that compliance programs do not seem to become embedded within the firm. Senior management and general counsel are sensitive to cartel matters; however, this does not seem to translate to other managers. Other managers may understand some behavior is illegal (as revealed by comments such as, "I promise not to set prices with my competitors") but not other related behavior. In one case, a practitioner mentioned that his client thought it was acceptable to discuss the company's maximum price with competitors in a competitive bid. A number of practitioners provided anecdotes of visiting the offices of cartel participants and finding antitrust compliance training binders in the office. The cartel participants usually claimed that they had never participated in compliance training, nor had they been informed that cartel participation was illegal. In one case the cartelist in question even attended an antitrust compliance training the previous month.

In many cases entire industries become recidivists when a generation retires and the next generation relearns how to coordinate with competitors. This illustrates the social norm within society and within the industry. Conversely, better training appears to correspond to fewer occurrences of cartel behavior.[116]

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[112] Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007) (providing empirical evidence of people's views on criminality generally and surveying the previous literature).

[113] There may be multiple audiences for antitrust compliance within a firm. The first are those employees who are potentially active cartel participants. Such employees may know something is technically illegal but not understand the potential liability to themselves or to the company were detection to occur. The second group is what one might term "helpers" and witnesses. These are people within the firm who sense that there is something not quite right but do not know that it is illegal or the penalties that may attach to the firm or that there is something that these individuals can do about it. Compliance training should be designed to reach both sets of individuals.

[114] Leslie, *supra* note 102, at 1682.

[115] *Id.* at 1683.

[116] Margaret C. Levenstein & Valerie Y. Suslow, *Cartel Bargaining and Monitoring: The Role of Information Sharing*, *in* THE PROS AND CONS OF INFORMATION SHARING 59–64 (Swedish

According to qualitative survey respondents, there are different types of cartelists among individuals and firms. Each of the types of cartelists possesses its own unique traits. For clients among U.S. Fortune 100 companies, many survey respondents indicated an explanation for cartel behavior based on rational choice. Managers and senior executives knew and understood the risks of cartel participation. They took a calculated gamble that did not pay off. In other cases, some clients were unsophisticated people in highly concentrated industries who ignored compliance programs. They may not have realized the consequences, thought the harm to others was minimal or nonexistent, or believed their actions benefited the company.

Generally, foreign firms, including Global Fortune 500 firms, seem not to have a cartel compliance culture. According to nearly all respondents in the qualitative portion of the survey, particularly those who regularly represent foreign firms and individuals, cartel crimes are accepted as part of doing business in many foreign firms, although in recent years respondents suggested that European firms have improved their awareness that cartel activity could lead to significant penalties and have begun a process of changing their internal tolerance of such activity. This was far less the case for Asian firms. These responses support empirical research on how cultural differences impact U.S. attempts at regulation. A number of foreign clients lacked a sophisticated understanding of compliance, including leniency applicants. According to respondents, Europeans and Asians are more likely to know that they are price fixing than Americans.

However, Europeans and Asians are less likely to label price fixing as morally wrong because it has been consistently part of traditional firm cooperation in countries where cooperation is more likely the social norm.[117] Additionally, there is a tradition of government-created cartels in these countries and, in some cases, government-sponsored export cartel policies. This behavior in antitrust mirrors that of other regulatory areas where foreign firms are more likely to be subject to enforcement action.[118]

Interestingly, even U.S. firms that have good compliance within the United States may not have the same level of compliance abroad.[119] A number of

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Competition Authority 2006) (suggesting that trade associations in the United States seem to have learned and changed the culture, while trade associations in Europe have not).

[117] For a supporting study, see Andreas Stephan, *Cartel Laws Undermined: Corruption, Social Norms, and Collectivist Business Cultures*, 37 J.L. & SOC'Y 345 (2010).

[118] *See* Srilata Zaheer & Elaine Mosakowski, *The Dynamics of the Liability of Foreignness: A Global Study of Survival in Financial Service*, 18 STRATEGIC MGMT. J. 439, 445–46 (1997) (describing how foreign firms get treated differently than local firms).

[119] This may be part of the mixed message of antitrust enforcement. Since the U.S. government allows for legal export cartels, there is a disconnect between export cartels abroad and cartel behavior at home. On the one hand, the Supreme Court calls cartels "the supreme evil of antitrust." Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408

practitioners mentioned that U.S. subsidiaries in Asia and Europe experience cartel problems. The practitioners speculated that both country and firm culture could cause this.

Culture also impacts compliance with U.S. law. Many foreign companies lack cartel compliance programs in the United States and, even if they have them, respondents mentioned that these are not taken seriously. However, survey respondents indicate that compliance levels across countries appear to be shifting, caused in part by generational changes.

Compliance and culture also differ across firms within the United States. The telephone survey results suggest that smaller U.S. firms may not have compliance programs because of firm size or lack of legal sophistication. In other cases compliance is not embedded into the organization because of rapid growth. Yet other firms may be overwhelmed by the cost of a serious compliance program. Overall, qualitative survey respondents noted that there are strong incentives to fix prices (firm size, growth, reporting relationships, pay, and performance appraisal structures and processes) but weak incentives not to do so.[120] They asserted that more jail time needs to be part of individual penalties, as criminal liability often deters individuals, although there was a wide range of beliefs regarding the necessary sentencing guidelines (from one to as many as ten additional years). Additionally, a number of respondents noted that some clients had compliance programs that failed to stop cartel behavior. Programs involving day-long lectures and simple memos describing proscribed behavior seem to have only limited effectiveness, as these do not embed a compliance culture within an organization. In yet other cases, respondents noted that some clients believed that they have immunity from antitrust liability based on how they conducted their business operations.[121] Survey respondents did not focus on ideas for programs that they felt were effective.

(2004). This suggests moral condemnation. Yet, the United States (and other) governments are willing to support export cartels so long as only external markets face a welfare loss and thus legitimate the supreme evil of antitrust.

[120] Research on cartels and compliance in Australia provide similar results. 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 (2006); Christine Parker & Vibeke Lehmann Nielsen, *How Much Does It Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the Trade Practices Act,* 32 MELB. U. L. REV. 554 (2008); Christine Parker & Vibeke Lehmann Nielsen, *Corporate Compliance Systems: Could They Make Any Difference?*, 41 ADMIN. & SOC'Y 3 (2009).

[121] William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 SMU L. REV. 597 (2009) (providing a historical example of this belief).

3. *Individual Versus Firm Incentives*

A core part of non-antitrust literature in both economics and finance is the concept of agency costs.[122] Within a firm, the agent of the firm may have incentives that differ from those of management, and firms work to reduce this misalignment through improved monitoring. An important finding based on the qualitative interviews regarding incentives within the firm relates to the misalignment of individual and firm incentives in cartel matters. The weak link in anti-cartel compliance may be at the individual rather than the firm level.[123] If antitrust were to empower individuals through rewards for whistle-blowing, this might lead to greater detection than through the use of leniency alone.

Agency costs and the ability of the firm to effectively monitor rogue agents also play into the importance of focusing antitrust cartel detection at the individual level rather than just at the firm level. For example, a law breaker may ignore risks because he believes that he will not get caught.[124] The inability of antitrust agencies to detect existing cartels (relative to individuals within firms) and the relatively low levels of punishment for individuals who are discovered engaging in cartel behavior may affect the risk/reward calculation of a particular manager in participating in a cartel.

Qualitative survey respondents noted that an individual may face pressure to cooperate in criminal cartel investigations from the corporation, which has distinct interests from those of the individual. For example, the company will want the individual to have conversations with the company's counsel, even though counsel represents the interests of the company and not the individual. Criminal sanctions erode trust between employer and employee, possibly creating a chilling effect for compliance purposes if the employee fears that the employer may not legally support him if criminal sanctions are possible.[125] This is particularly the case when the government pressures a firm to waive attorney-client privilege.[126] In some instances, the penalties for disclosing might be outweighed by the cost of disclosure for executives involved in a cartel. An individual may not be protected under attorney-client privilege in communications with in-house counsel. Moreover, in addition to the cost of

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

[123] Aubert et al., *supra* note 22 (suggesting whistle-blowing bounties for antitrust).

[124] Leslie, *supra* note 102, at 1678–79; Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1304 (2008).

[125] Ellen S. Podgor, *Educating Compliance*, 46 AM. CRIM. L. REV. 1523, 1527 (2009).

[126] Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 318 (2008); Cindy A. Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 DEL. J. CORP. L. 921 (2009).

hiring a personal lawyer, the individual faces possible threat of retaliation by the firm for exposing corporate wrongdoing.

4. *Not Disclosing Cartel Activity to Counsel*

A few practitioners indicated that, from the company perspective, there may be reasons why firms do not disclose involvement in a cartel to the government. As noted above, post *Stolt-Nielsen*, leniency may not necessarily be granted for cooperation with the investigation. This exposes a company to potentially significant risk. In such cases, respondents reported that prior to detection of either an internal or external cartel, discussions about cartels are hidden from outside lawyers and sometimes even in-house counsel.[127] Many of the respondents noted that the perception of lawyers within corporations by other executives and employees contributed to this deception. Personnel in the business unit tend to view in-house counsel with suspicion—as people who give advice that often hinders (at least in the short term) profitability. Moreover, people within the business unit view in-house counsel as a loss center rather than as a unit within the firm that creates value.

There is also a trust issue between the business unit and the general counsel's office. Many within the company are reluctant to go to in-house counsel when they know they are in a gray area, as they believe raising issues about cartel behavior could cause them to risk punishment.

Limited budgets also create pressure to prevent in-house counsel from involving outside counsel to perform a proactive diagnostic of cartel compliance. In some cases, respondents even mentioned that when they offer to perform a free diagnostic on cartel compliance to a company in return for a guarantee that the firm would be hired for any potential cartel-related compliance problem, nearly all respondents said that companies are unwilling to agree to such representation. Respondents speculated that perhaps companies do not really want to know about wrongdoing because things "seem" to be going well and any internal investigation that uncovers wrongdoing will negatively affect profitability.[128] Similarly, practitioners suggested that the breadth and depth of antitrust compliance as a serious issue among senior leadership is only discussed by boards after detection of the cartel.

E. REWARDING INTERNAL FIRM CHANGES

The findings regarding the nature of compliance within firms suggest that the DOJ should put increased focus on creating the proper mix of incentives

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[127] This raises an important issue about my reliance on a survey of outside counsel, who may not be fully aware of important conditions within firms regarding cartel behavior.

[128] However, some caution may be valid as outside firms may have incentive to find some kind of wrongdoing, no matter how tenuous, merely to get the legal work.

within firms and the individuals who work therein. Law may change behavioral norms by creating incentives.[129] Over time organizational norms become routine and this changes behavior within the organization.[130] The pressures of norms within an organization affect the behavior of the individual actors.[131]

Antitrust suffers from a number of the same compliance problems as other fields, such as securities, accounting, and tax. However, antitrust is distinct in the sense that detection of criminality is possible both internally and also externally by the defection of other cartel members. Thus, a firm should be willing to invest in some level of compliance if only because, by incrementally spending more than its competitors, it is more likely to detect internally cartel activity relative to its competitors and therefore more likely to benefit from leniency.

For areas of complex business, regulating "processes" rather than just "outcomes" has become more important.[132] One element to a process-oriented approach is to change behavior within the firm. Agency costs provide a theoretical tool to create appropriate mechanisms for changing processes and to provide incentives to create effective compliance programs.[133] Shifting the compliance process from antitrust enforcers to firms allows for more of a localized response. Firms are heterogeneous, with specific organizational issues. Thus, norm creation that a firm faces requires more localized responses to mitigate the incentives for illegal behavior to address the particular agency cost problems at play in that particular organization. Firms have better information than do enforcers as to internal firm processes. If the purpose of a compliance program is to create better internal processes that lead to "success" through internal detection of cartel activities, the delegation of discretion from antitrust enforcers to firms allows firms to tailor a program based on the particular firm's dynamics.[134]

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[129] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996).

[130] Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 492 (1997).

[131] Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); Lange, *supra* note 91.

[132] Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669, 673–74 (2010); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691, 696–700 (2003).

[133] Arlen, *supra* note 105, at 834 ("Corporate crimes are not committed by corporations; they are committed by agents of the corporation."); Michael C. Jensen & Meckling, *supra* note 122, at 308–10.

[134] IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 110–13 (1992).

The discussion in this section of the interplay of firms, individuals, and incentives has important implications for how to better shape cartel policy. To create better incentives for monitoring on the part of firms in the antitrust context, penalties are needed that would motivate improved monitoring both for firms and the individuals within them. Assuming no change in corporate law, antitrust needs to better align the incentives for firm governance to increase the costs of non-compliance (thereby pushing firms to create better internal compliance mechanisms and not to rely upon "cosmetic compliance"). Antitrust also needs to increase the benefits of compliance. By combining increased penalties with a reward system, a firm's compliance behavior may be positively shaped.

It is possible to create a benchmark approach to cartel enforcement. Certain guideline-based practices would allow enforcers to compare internal compliance programs to those cartel guidelines. Weaker compliance programs (at least on paper) would receive additional penalties because such programs suggest that a company has taken fewer steps to ensure compliance. Similarly, those companies possessing compliance programs stronger than the guideline-based benchmark would receive lesser penalties, as this indicates that better compliance was present. The U.S. Sentencing Guidelines already have standards of compliance. The Sentencing Guidelines refer to its own indicia of an effective compliance program, with reference to risk assessment, industry norms, and investments in proportion to the size of the firm. The Antitrust Division has ignored this because it complicates the leniency program. It might help if the Antitrust Division had internal experts on criminal compliance to integrate compliance theory into DOJ practice. Recent changes that concentrate on civil compliance in the DOJ Antitrust Division's General Counsel's office should extend to the criminal side of the compliance equation.

However, there are limits to benchmarking and a process-based approach. The effectiveness of self-regulation has been questioned empirically.[135] Self-regulation may be based on faulty assumptions that create a type of cosmetic compliance. One outcome of such compliance is that it might create a false sense of security for both regulated and regulators.[136] Moreover, without clear guidance on what makes a compliance program robust as opposed to a "cosmetic compliance program" it may be hard to distinguish between the two types of compliance programs. As a result, all compliance programs may end up being a way for lawyers to make money and for companies to identify and stop whistle-blowers before they get to the authorities, thereby reducing the

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[135] Kimberly D. Krawiec, *The Return of the Rogue*, 51 ARIZ. L. REV. 127, 144–45 (2009) (providing a literature review).

[136] *Id.* at 173–74.

probability of conviction and deterrence—all at the expense of consumers. Moreover, if antitrust focuses only on inputs/processes, this may lead to problematic results. In the area of financial regulation, self-regulation was not reliable to prevent banks' mismanagement of internal VaR models for the Basel II requirement.[137]

The problem with the process-based approach is that it only focuses on inputs. Conversely, as related by practitioners in the surveys, the DOJ values outputs (e.g., was a company a member of a cartel?). Though the DOJ seems to overly focus on outputs, much of the new governance scholarship seems to focus on process and inputs. Ultimately, the DOJ needs a better system to determine when the output (criminality) is a function of bad inputs (e.g., poor compliance program) as opposed to an aberration of a "bad apple" of an otherwise a well-implemented compliance program.

F. Private Rights and Their Implication in Cartel Policy

The linkage between public and private antitrust enforcement in cartels is changing. Whereas historically most cartel cases were brought by government enforcers, the overall historic trend has been that government cases are a small percentage of the total number of antitrust cases.[138] While some academic work analyzes the different motivations underlying public and private antitrust[139] and the impact of private rights on cartel deterrence,[140] little research has been performed on the impact of private antitrust suits on the decisionmaking of individuals and firms that collude.

Both defense and plaintiff-side cartel lawyers noted in the qualitative and quantitative surveys that private rights of action contribute to the total amount of civil penalties and hence to the calculation by a firm regarding how much compliance to implement. Treble damages can be costly, and this may affect the calculation within a firm of whether to increase monitoring and compliance efforts to prevent cartel formation. Treble damages result in settlements because defense-side trial lawyers are unwilling to litigate such cases due to the potential for an adverse outcome.[141] In this sense, litigated cases are unrepresentative of all cases; indeed, the stakes are higher in such cases. In spite of treble damages being costly, the survey respondents suggested that such dam-

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[137] *Id.*

[138] Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 675–76 (2010).

[139] D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. (forthcoming 2012) (discussing the different motivation for public versus private antitrust cases and providing a literature review).

[140] Lande & Davis, *supra* note 35.

[141] Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L. J. 115 (1993).

ages were still too low to greatly impact firm-level decisionmaking. Rather, corporate boards are far more concerned with Sarbanes-Oxley compliance due to greater consequences for the board. The same is the case with executives because Sarbanes-Oxley requires certification of compliance.[142] There is nothing analogous in antitrust.[143]

These observations by qualitative survey respondents suggest that private litigation in the cartel setting has not transformed the risk/reward calculation for individuals within many companies. When asked in the quantitative survey how much more concerned clients are about U.S. private enforcement versus government enforcement and sanctions, a mere 3 percent (5 respondents out of 187) agreed strongly that private enforcement is of greater concern, while 22 percent (41 respondents out of 187) agreed moderately. Fifty-eight percent (108 people out of 187) of respondents were neutral or disagreed on this question.[144] This suggests that jail time and reduced civil penalties from government enforcement matter more than private enforcement.

Plaintiff- and defense-side cartel lawyers also reported that the vast majority of private cartel cases in which they were personally involved resulted from government enforcement (investigation or indictment).[145] Moreover, both plaintiff- and defense-side respondents noted a change in the ability to bring private actions in recent years. Some argued that *Twombly*[146] caused the elimination of the most unreasonable cartel claims. For a number of practitioners, the impact of *Twombly* has been significant in terms of reducing the number of weak cases. However, other respondents asserted that *Twombly*'s impact was minimal because most of the cases filed would have survived *Twombly*. Perhaps one can make sense of the responses by noting that the standard under *Twombly* deters cases that would not survive from being filed.

None of the practitioners indicated that private rights are a deterrent for individuals. According to practitioners, private rights do not substitute for public enforcement because cartelists are more concerned with incarceration

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[142] Sarbanes-Oxley Act of 2002 § 302(a), 15 U.S.C. § 7241(a).

[143] The closest antitrust comes to this is indirectly—many companies require employees to certify that they will abide by the code of conduct, which includes an antitrust component. These are not mandated by law but theoretically are sanctionable by discharge.

[144] *See* Question 15, Appendix I. "N/A" responses (33 respondents or 18 percent for Question 15) have been interpreted to not have an opinion based on their personal experiences but are included in the total number of respondents (187 for Question 15) when calculating percentages.

[145] *But see* Lande & Davis, *supra* note 35 (noting that private plaintiffs have brought a number of cases to light before government enforcers).

[146] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (creating a higher pleading standard for conspiracy claims).

than corporate fines.[147] This consensus among respondents (and at the DOJ)[148] goes against the views of Richard Posner and Gary Becker (among others) that prison terms are less efficient than civil penalties.[149]

III. CONCLUSION

Neo-Chicago cartel policy must evolve to reflect new insights in other fields of corporate compliance and to utilize these insights within an antitrust context. The practitioner surveys suggest that while, overall, the leniency policy works, it is not as effective as DOJ rhetoric suggests. Strategic leniency seems to drive many leniency applications. Moreover, firms and individuals behave in far more nuanced ways than previous cartel research has acknowledged. Individuals at different levels in an organization seem to behave differently regarding cartel participation and detection. Other factors, such as organizational structure, country, and firm cultures, also seem to have an impact. Antitrust must create appropriate incentives for individuals at various levels within the firm to help prevent cartel formation and to improve cartel detection. Finally, a strong compliance culture does not seem to be well embedded within most firms.

The surveys do not answer all of the questions addressing the effectiveness of U.S. cartel enforcement and the leniency program. The surveys do, however, highlight other issues that remain unexplored. One of the next steps is to determine the appropriate form for detection and how internal and external sources of detection interact. There is no developed theoretical literature that explains the relationship between internal and external detection of cartel participation. For example, does a high probability of internal detection affect external detection? As an empirical question, most articles assume a fixed probability of detection, though there is some work that assumes it depends on the price level.[150] Some recent work has pushed beyond that assumption by assuming detection is influenced by price changes or other features of the price path.[151]

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[147] It was not clear from the responses how much jail time scared cartelists—even jail for a short period of time seemed to attach a stigma and create incentives not to violate the antitrust laws.

[148] *See e.g.*, Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19 (2009).

[149] RICHARD POSNER, ANTITRUST LAW 270–71 (2d ed. 2001); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

[150] David Besanko & Daniel F. Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 AM. ECON. REV. 870 (1990); Chen & Harrington, *supra* note 22; Joseph E. Harrington Jr., *Optimal Cartel Pricing in the Presence of an Antitrust Authority*, 46 INT'L ECON. REV. 145 (2005); Motta & Polo, *supra* note 23.

[151] Joseph E. Harrington, Jr. & Joe Chen, *Cartel Pricing Dynamics with Cost Variability and Endogenous Buyer Detection*, 24 INT'L J. INDUS. ORG. 1185 (2006); Robert C. Marshall, Leslie

Another outstanding research question entails determining when leniency gets used in the life cycle of a cartel. That is, is leniency used more strategically in situations where a cartel is already dying than when a cartel is just beginning? If leniency were predominantly used for dying cartels, this would suggest that leniency is less effective than we might think because it does not sufficiently deter firms from participating in cartels.

Individual penalties can only go so far. For white-collar crimes, judges seem to be unwilling to impose extreme jail sentences.[152] However, this problem is not merely limited to individuals but to corporations because judges may be unwilling to fine a company too large an amount.[153] In the single firm conduct antitrust setting, courts create procedural hurdles because of what they perceive to be excessive damage awards.[154] A similar phenomenon might occur with cartels if the only approach in cartel enforcement is to keep raising the level of fines. If penalties are substantial, then firms may begin a campaign against "excessive" fines by antitrust enforcers.[155] Any discussion of cartel enforcement and leniency must take into account judicially imposed remedies because weaker remedies by courts and juries may impact the thinking of individuals and companies to participate in cartels (and their decision to defect from the cartel via leniency).

Overall, this analysis of cartels and compliance shows the limits of traditional Chicago School thinking on cartels. The survey evidence suggests that the cartel enforcement program, strong as it may be, may have some elements in need of reform. Neo-Chicago antitrust must embrace a more nuanced view of the firm and its various components and processes to reach a more effective level of cartel enforcement.

M. Marx & Matthew E. Raiff, *Cartel Price Announcements: The Vitamins Industry*, 26 INT'L J. INDUS. ORG. 762 (2008).

[152] Stucke, *supra* note 8.

[153] U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 14 (2004), *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf.

[154] 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).

[155] Christine Parker, *The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC'Y REV. 591, 603 (2006).

APPENDIX I: CARTELS

Below are the questions asked in the online (quantitative) survey.

A number of different potential limitations are noted with regard to the online survey and the qualitative surveys (i.e., telephone interviews). These include: selection bias, sampling bias, and response rate bias. In a previous work, ways in which to minimize these potential biases are discussed in detail.[156]

12. In the past 2 years, what number of discovered hard-core cartels (no matter who discovers the cartel) involving your clients were situations where your clients never sought or ignored prudent legal advice prior to a U.S. investigation that results in an adverse ruling?			
	answered question		**189**
	skipped question		**45**
		Response Percent	**Response Count**
		30.7%	58
1–5		29.6%	56
6–10		2.1%	4
11–20		0.5%	1
21+		0.0%	0
Not applicable		37.0%	70
13. In the past 2 years, what proportion of discovered hard-core cartels (no matter who discovers the cartel) involved your clients who never sought or ignored prudent legal advice prior to a U.S. investigation that results in an adverse ruling?			
	answered question		**185**
	skipped question		**49**
		Response Percent	**Response Count**
0–20%		40.0%	74
21–40%		3.8%	7
41–60%		4.3%	8
61–80%		2.2%	4
81–100%		10.3%	19
Not applicable		39.5%	73

[156] Sokol, *supra* note 42, at 1138–40.

14. In the past 2 years, by total number of matters, how often have clients come to you with hard-core cartel issues that to your and/or their knowledge never got investigated by U.S. government (federal and state) enforcers as opposed to situations where the underlying behavior ultimately led to U.S. investigation of your client?

	answered question		**187**
	skipped question		**47**
		Response Percent	**Response Count**
0		35.3%	66
1–5		35.3%	66
6–10		1.6%	3
11–20		0.5%	1
21+		0.0%	0
Not applicable		27.3%	51

15. In the cartel setting, clients are more concerned about the effect of U.S. private litigation than with U.S. government (federal and state) based enforcement and sanctions both criminal and civil?

	answered question		**187**
	skipped question		**47**
		Response Percent	**Response Count**
Agree strongly		2.7%	5
Agree moderately		21.9%	41
Neutral		10.7%	20
Disagree moderately		27.3%	51
Disagree strongly		19.8%	37
Not applicable		17.6%	33

16. Is federal government cartel enforcement presently more effective (with effective defined as efficiency enhancing) as opposed to U.S. federal government enforcement actions brought prior to the revisions of the Corporate Leniency Program (1993) and an increase in maximum penalties under the Sherman Act (1990)?

	answered question		**185**
	skipped question		**49**
		Response Percent	**Response Count**
Significantly more effective enforcement		26.5%	49
Moderately more effective enforcement		29.7%	55
The same as the present		11.4%	21
Moderately less effective enforcement		6.5%	12
Significantly worse enforcement		3.2%	6
Not applicable		22.7%	42

17. Would your answers to the questions 12–15 involving the effectiveness of anti-cartel enforcement change based on enforcement prior to the increase in maximum penalties under the Sherman Act (2004)?			
	answered question		**183**
	skipped question		**51**
		Response Percent	**Response Count**
Significantly more effective enforcement		4.9%	9
Moderately more effective enforcement		13.7%	25
The same as the present		43.7%	80
Moderately less effective enforcement		4.9%	9
Significantly less effective enforcement		0.5%	1
Not applicable		32.2%	59
18. How much do you agree with the following statement "cartels are being effectively deterred" with effective defined as efficiency enhancing?			
	answered question		**186**
	skipped question		**48**
		Response Percent	**Response Count**
Agree strongly		5.4%	10
Agree moderately		45.7%	85
Neutral		12.4%	23
Disagree moderately		16.7%	31
Disagree strongly		7.0%	3
Not applicable		12.9%	24