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Sentencing Antitrust Felons

SENTENCING ANTITRUST FELONS

Congress enacted the Sherman Antitrust Act,[1] the basic criminal statute in the federal scheme of antitrust enforcement,[2] in 1890, in response to widespread monopolization of the American economy.[3] Although the Act represents a recognition that monopolization is a social and economic evil to be avoided, criminal enforcement of the Act has been lax. Furthermore, the debate over the appropriateness and deterrent effect of criminal sanctions for violations of economic regulatory legislation still persists.[4] This controversy concerns not so

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[1] Sherman Antitrust Act §§ 1-7, Ch. 647, 26 Stat. 209, *as amended*, 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

[2] The other antitrust remedial statutes are the Robinson-Patman Antidiscrimination Act, which provides for a fine of $5,000 and imprisonment for one year for violations of the section proscribing discrimination in rebates, discounts or advertising service charges, 15 U.S.C. § 13a (1970), and the Clayton Act, which provides for a private treble damage action. 15 U.S.C. § 15 (1970).

[3] Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

[4] The following authors endorse the criminal sanction as a remedy for antitrust violations: E. SUTHERLAND, WHITE COLLAR CRIME (1949); Ball & Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197 (1965); Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301 (1967) [hereinafter cited as Flynn]; Note, *Antitrust Criminal Sanctions*, 3 COLUM. J. L. & SOC. PROB. 146 (1967) [hereinafter cited as *Criminal Sanctions*]. Others argue that criminal sanctions should not be imposed when the proscribed conduct is morally neutral, as with antitrust violations. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) [hereinafter cited as Kadish]. Still others criticize the use of criminal sanctions in the antitrust context although acknowledging that they are the most effective deterrent currently available. *See, e.g.*, Berge, *Some Problems in The Enforcement Of The Antitrust Laws*, 38 MICH. L. REV. 462, 470 (1940).

Economists advocate the imposition of monetary penalties through public rather than private enforcement efforts as the most cost efficient and effective deterrents. *See* K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 81-96, 112-38 (1976) [hereinafter cited as ELZINGA & BREIT]; R. POSNER, ANTITRUST LAW 221-32 (1976) [hereinafter cited as POSNER]. They argue that the criminal penalties currently employed against antitrust violators do not accomplish the basic deterrent objective.

The economic theory of criminal behavior assumes that crimes are committed only when the expected utility of the criminal conduct is greater than the expected utility of any other activity. *See* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Economists argue that deterrence can be accomplished by making criminal conduct more costly to the actor than legal pursuits. *Id.* Thus, the optimum level of deterrence for antitrust violations is achieved by imposing upon the violator a cost (fine) at least equal to the cost his activity imposes upon society. POSNER, *supra* at 221. Compensation for the victims of antitrust crimes is considered a subsidiary purpose of punisment while retribution, rehabilitation, and incapacitation

much the imposition of criminal fines,[5] but whether violators of the antitrust laws should be imprisoned.[6]

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of the defendant, commonly mentioned by legal scholars as justifications for the imposition of criminal sanctions, are ignored. *See* M. FRANKEL, CRIMINAL SENTENCES 106 (1973) [hereinafter cited as FRANKEL]; Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CINN. L. REV. 597, 599-600 (1973).

Even assuming that the social cost of an antitrust violation is calculable with reasonable accuracy, *see* POSNER, *supra* at 224, still other factors must be considered in determining the appropriate level of monetary penalty. If the probability of discovery and conviction of an antitrust offense is less than 100 per cent, the potential violator will discount the punishment cost by the probability that the punishment will ever be imposed. Thus, if the social cost of a particular antitrust violation is $1 million and the probability of being caught is .25, the potential violator will multiply the social cost by that probability to calculate his anticipated punishment cost of $250,000. *Id.* at 223-24. If anticipated profits for the violation are greater than this amount, the antitrust violation will be committed. Therefore, the social cost must be divided by the probability of punishment to arrive at the optimal level of fines; in this case $4 million. *Id.* at 224. The above example assumes, however, that all potential violators are indifferent to risk and have no preference between the certainty of a small punishment and the slight probability of a severe punishment. Assuming that potential antitrust violators may be either risk avoiders or risk preferrers, *see* ELZINGA & BREIT, *supra* at 120, an additional factor must be considered in ascertaining the relationship between the level of penalty and the certainty of its imposition that will achieve optimum deterrence. The deterrent effect of the certainty of punishment will vary according to the violator's risk preference, so that a risk avoider will prefer the certainty of a small punishment and will engage in more antitrust violations when probability of detection is high but the expected punishment cost is low. *Id.* The risk preferrer, on the other hand, will expect greater utility from his violations when the chance of punishment is small but the penalty high. *Id.* The degree of deterrence accomplished by any given level of penalty is, therefore, dependent upon both the probability that the punishment will be imposed and the attitudes of potential violators toward risk. *Cf.* Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN L. 145 (1973) (authors studied only the FBI Index crimes).

This cost-benefit theory of punishment need not be monetary and is capable of expression in terms of a prison sentence. Nonetheless, there exists substantial opposition to incarceration as a sanction for antitrust crimes. *See* ELZINGA & BREIT, *supra* at 123; POSNER, *supra* at 225; Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401, 438 (1958). Imprisoning antitrust criminals imposes a cost upon society and consumes real resources, while the collection of a fine is, in essence, merely a costless transfer payment. POSNER, *supra* at 225. Further, it is difficult to translate the cost to society of a particular violation into a nonpecuniary value—so many days in jail. *Id.* Thus, the monetary penalty, when restructured to allow all of the social costs of the anti-competitive conduct to be transferred to the violator, is arguably the most efficient sanction.

[5] *See* Flynn, *supra* note 4, at 1307 n. 41 where the author noted that in 90% of the criminal cases between 1890 and 1959 the only remedy imposed upon the convicted individuals and their corporations was a criminal fine, while prison sentences were the sole remedy in only 1% of the cases. Both criminal fines and prison terms were imposed in the remaining 9% of the cases. *Id.*

[6] *See* authorities cited in Flynn, *supra* note 4, at 1301 n.3.

Throughout the history of the Sherman Act, violators have received relatively mild punishment,[7] even in cases involving blatant per se violations of the Act.[8] The imposition of a prison sentence was an exceptional punishment,[9] employed as a sanction in fewer than four percent of the Justice Department's criminal prosecutions in the period 1890-1969.[10] Not until the Electrical Equipment Conspiracy cases of 1960[11] were jail sentences imposed upon upper level executives of a widely held corporation[12] absent evidence of economic racketeering. Although recent data indicate an increase in the frequency of prison sentences,[13] there is nothing to indicate that judicial reluct-

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[7] *Id.* at 1305; *see also* Note, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 285-87 (1961) [hereinafter cited as *Community Control.*]

[8] The Supreme Court has concluded that certain agreements and practices are per se violations of the Sherman Act "because of their pernicious effect on competition," Northern Pac. R. v. United States, 356 U.S. 1, 5 (1957). Such agreements or practices are presumed unreasonable and, therefore, violative of the Act without extensive inquiry into their actual effect on competition. *Id. See generally* L. SULLIVAN, HANDBOOK OF ANTITRUST LAW at 165-86 (1976). The following are established "per se" violations of the Sherman Act: price fixing, United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940); division of markets, United States v. Topco Assoc., 405 U.S. 596 (1972); group boycotts, Fashion Originators Guild, Inc. v. FTC, 312 U.S. 457 (1941); tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947).

[9] Prison terms generally were reserved for labor leaders and businessmen who employed threats or violence in conjunction with an antitrust violation. *Community Control, supra* note 7, at 291. Interestingly, antitrust violators receive significantly more lenient sentences than other types of white collar offenders. *See* Statement of Donald I. Baker Before The Tenth New England Antitrust Conference Concerning the Sentencing of Antitrust Felons, Nov. 20, 1976, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 790, D-1 (1976).

[10] Posner, *A Statistical Study of Antitrust Enforcement*, 12 J.L. &. ECON. 365, 389 (1970).

[11] *See generally,* C. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES (1973).

[12] Prior to the electrical equipment cases, prison sentences had been imposed primarily on the executives and officers of small, closely-held corporations in which management responsibilities were concentrated in a few individuals. *See* Flynn, *supra* note 4, at 1305. One possible explanation for this phenomenon is the difficulty of determining guilt above the level of those who overtly carry out the conspiracy. In large corporations, upper level management is able to insulate itself from criminal liability by claiming ignorance of the conduct of subordinates. *See* ELZINGA & BRIET, *supra* note 4, at 38; text accompanying notes 78-81 *infra. See also* United States v. McDonough Co. [1959] *Trade Cas.* ¶ 69,482 (S.D. Ohio).

[13] *See* POSNER, *supra* note 4, at 32. Professor Posner's statistics indicate that prison sentences were imposed in only eight cases in the nineteen year period 1950-1969, while sentences of imprisonment were imposed in six cases in the four year period 1970-1974. *Id.* at 33. In 1975, twelve individuals were sentenced to prison in six separate cases. *See Dept. of Justice Sentencing Memorandum in the Case of* United States v. Alton

ance to incarcerate antitrust criminals has been overcome.[14]

This judicial reluctance to sentence antitrust violators to prison or to impose the maximum allowable fine presumably has rested on a belief that conviction of the crime itself constituted sufficient punishment to the white collar criminal, often a respected member of the community.[15] Thus, the courts considered that conviction alone de-

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Box Board Co., ANTITRUST & TRADE REG. REP. (BNA) No. 784, D-1, D-3 Appendix A (1976) [hereinafter cited as *Alton Sentencing Memorandum*].

[14] A similar pattern of leniency is discernible in the imposition of criminal fines both on individuals and their corporations. Prior to 1955, the maximum fine that could be imposed upon either a corporation or an individual defendant was $5,000. Sherman Act, ch. 647, 26 Stat. 209 (1890). Actual fines levied averaged less than half that amount. *Community Control, supra* note 7, at 286. In 1955, Congress amended the Sherman Act and raised the maximum fine to $50,000, Act of July 7, 1955, ch. 281, 69 Stat. 282 (1955). Nonetheless, the average fine imposed under the amended statute was considerably less than the maximum allowable. The average corporate fine between 1955 and 1965 was only $13,420 and individual fines averaged $3,365. *Antitrust Procedures and Penalties Act: Hearings on S. 782 of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess., 233 (1973) (statement of Mark Green).

Even where corporate profits from the illegal activity ran into the millions of dollars, the statutory maximum fine was rarely imposed. In the Electrical Equipment Conspiracy cases, for example, *see* note 11 *supra*, twenty-nine corporations and forty-four executives were indicted on charges of bid-rigging and price fixing. The value of the goods involved in the scheme exceeded one billion dollars. The average corporate fine imposed in the case was $16,500 and the highest individual fine imposed was $12,500. The maximum fine of $50,000 was levied only once in 159 sentences. *Community Control, supra* note 7, at 287; *see* Flynn, *supra* note 4, at 1308 n. 45.

[15] There is a popular notion that, in the professional and social milieu of antitrust defendants, conviction of a crime results in serious stigmatization of the offender. *Criminal Sanctions, supra* note 4 at 152; *White Collar Justice*, 19 CRIM. L. REP. (BNA) pt. II at 12 (1976). Opponents of this theory contend, however, that inefficiency in the enforcement of the antitrust laws results from the fact that such offenses are not perceived by the general public as morally wrong. *See* Kadish, *supra* note 4 at 435-38. If conviction of antitrust crimes results in stigmatization of the offender by his peers, then the public arguably does attach moral opprobrium to these offenses. *Criminal Sanctions, supra* note 4 at 154-55. Additionally, the reclassification of Sherman Act violations from misdemeanors to felonies indicates that Congress, as representative of the public generally, considers antitrust violations to be serious crimes. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 15 U.S.C. §§ 1-3 (Supp. V 1975).

One commentator has asserted that:

> Those who insist that moral culpability is a necessary element in crime argue that criminality is lacking in the violations of laws which have eliminated the stigma from crime. This involves the general question of the relation of criminal law to the mores. The laws with which we are here concerned are not arbitrary, as is the regulation that one must drive on the right side of the street. The Sherman Antitrust Law, for example, represents a settled tradition in favor of free compe-

terred future violations and no further punishment was necessary.[16] Moreover, imprisonment of white collar criminals normally was unnecessary for the protection of society or the rehabilitation of the offender.[17] Nonetheless, the degree of social stigma which attaches to conviction of an antitrust violation is insufficient to deter potential offenders and additional sanctions may be necessary.[18]

In 1974, Congress responded to the lenient attitudes of the courts toward the sentencing of white collar criminals[19] by enacting the Antitrust Procedures and Penalties Act.[20] Section 3 of the bill substantially increased the penalties for violations of the Sherman Act. The maximum fine was increased from $50,000 to $100,000 for individual defendants[21] and the maximum prison sentence was increased from one year to three years.[22] In addition, violations of the Sherman Act were reclassified from misdemeanors to felonies.[23]

Although the legislative history of the bill as it relates to criminal sanctions is not extensive,[24] the floor debates in the House of Repre-

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> tition and free enterprise . . . . A violation of the antitrust laws is a violation of strongly entrenched moral sentiments.

E. SUTHERLAND, WHITE COLLAR CRIME 45 (1949).

[16] *See White Collar Report,* 19 CRIM. L. REP. (BNA) pt. II at 10-11 (1976).

[17] *See* United States v. Alton Box Board Co., 5 TRADE REG. REP. (CCH) ¶ 61,336 at 71,166 (N.D. Ill. 1977). Two of the traditional justifications for imprisonment as a criminal sanction are the need to incapacitate or isolate the offender for the protection of society and to rehabilitate the criminal. FRANKEL, supra note 4, at 106. While antitrust crimes are costly to society, the violating businessman presents no physical threat to the public. Incapacitation generally is necessary only for those offenders whose release from confinement would "present a substantial threat to the public safety." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, CH. 2, SENTENCING, *reprinted in* JUSTICE AND SENTENCES: PAPERS AND PROCEEDINGS OF SENTENCING INSTITUTE FOR THE FIRST AND SECOND UNITED STATES JUDICIAL CIRCUITS 224 (1974) [hereinafter cited as THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT]. Further, antitrust felons are not in need of psychiatric or any other type of rehabilitation currently available in prison. FRANKEL, *supra* note 4, at 90. *Cf.* United States v. Alton Box Board Co., 5 TRADE REG. REP. (CCH) ¶ 61,336 at 71,169 (N.D. Ill. 1977) (court indicated that some antitrust criminals may be in need of rehabilitative treatment).

[18] *See, e.g.,* Flynn, *supra* note 4, at 1316-18; *Criminal Sanctions, supra* note 4, at 154.

[19] *See* 120 CONG. REC. H36340 (1974) (Remarks of Rep. Hutchinson).

[20] Pub. L. No. 93-528, 88 Stat. 1706, 15 U.S.C. §§ 1-3 (Supp. V 1975).

[21] *Id.*

[22] *Id.*

[23] *Id.* For a thorough discussion of the possible consequences of classifying crimes as felonies rather than as misdemeanors, see generally Project, *The Collateral Consequences of Criminal Conviction,* 23 VAND. L. REV. 929 (1970).

[24] Hearings were held by the Judiciary Committees of both Houses of Congress in

sentatives illuminate the legislative intent behind increased penalties.[25] Most of those who spoke on the House floor favored the bill. Several representatives stressed that the statutory maximum penalties should be increased so that violators need no longer receive small fines or short prison sentences.[26] The purposes of the penalty increase were to deter antitrust crimes and to provide punishment commensurate with the gravity of the offense.[27] Additionally, several speakers

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1973 and 1974. However, the bill then considered did not contain the penalty provisions ultimately enacted. As originally passed by the Senate, *see* 119 CONG. REC. S24596 (1973), and reported out by the House Judiciary Committee, *see Hearings on S.782 Before the Sub-Comm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. (1973), the legislation provided for only an increase in fines to $500,000 in the case of corporations and to $100,000 for individual defendants. Prompted by the President's message to Congress on October 8, 1974, *see* 120 CONG. REC. H34421 (1974), the House Judiciary Committee reconsidered the bill and increased the corporate maximum fine to $1,000,000 and reclassified the crime from a misdemeanor to a felony with a corresponding increase in the maximum prison term from one year to three years. *See* 120 CONG. REC. H36339 (1974).

[25] 120 CONG. REC. H36339 (1974).

[26] *See, e.g., id.* at H36340 (Remarks of Rep. Hutchinson).

[27] The following comment is representative of the remarks made by several legislators emphasizing the important deterrent function of the more severe criminal sanctions:

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

Remarks of Rep. Heinz, *id.* at H36341.

The administration shared a similar interpretation of the statute. The President noted that the increase in penalties was long overdue and that the bill would provide a significant deterrent "and will give the courts sufficient flexibility to impose meaningful sanctions." Statement of the President on Signing the Bill Into Law, 10 WEEKLY COMP. OF PRES. DOC. 1600 (Dec. 23, 1974).

Only Representative Danielson argued that the increased penalties would not be an effective deterrent. He suggested that monetary penalties against corporations, designed to deprive them of all profits accruing as a result of the violation, *see* note 4 *supra*, and civil sanctions against individuals barring them from employment as executives for a period of five years would have a more substantial deterrent effect. 120 CONG. REC. H36345 (1974). Some concern was expressed over the possibility that, because of the vagueness of the Sherman Act provisions, businessmen might be convicted of a felony and subject to serious punishment for conduct which previously had not been considered criminal. This point was not seriously debated, 120 CONG. REC. S38586 (1974) (Remarks of Sen. Hruska), however, and probably is not an important concern in view of the longstanding Justice Department policy to bring criminal

emphasized the importance of impressing upon the public the seriousness and costliness of antitrust crimes in order to dispel the popular notion that such crimes are merely "technical violations."[28]

Despite a clearly expressed congressional desire to increase the severity of punishments imposed for violations of the Sherman Act, enactment of the Antitrust Procedures and Penalties Act[29] does not assure this result. The ultimate choice of sanction for antitrust crimes, as well as for other federal crimes,[30] remains with the sentencing judge. Judicial discretion in the matter of sentencing is limited only by the statutory maximum penalty,[31] and is reviewable only for serious abuse of, or failure to exercise, discretion.[32] Further, because Congress has failed to codify any statement of the goals and purposes that properly may be served through the sentencing process,[33] judges

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charges only against those whose conduct amounts to an established per se violation of the Act. *See* Flynn, *supra* note 4 at 1321 n. 106, *quoting* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 350 (1955). Moreover, businessmen generally have access to competent counsel and should be aware that their conduct is criminal. *See Criminal Sanctions, supra* note 4, at 149 (1967).

[28] Correspondence of Asst. Atty. Gen. W. Vincent Rakestraw, 120 CONG. REC. H36339 (1974).

[29] Pub. L. No. 93-528, 88 Stat. 1706, 15 U.S.C. §§ 1-3 (Supp. V 1975).

[30] The practice of allowing judges nearly complete discretion in assigning sentences is not unique to the federal system. Most state court judges exercise a similar discretion in applying criminal sanctions. *See* THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 11-13 (1976) [hereinafter cited as TASK FORCE]; Note, *Statutory Structures for Sentencing Felons to Prison,* 60 COLUM. L. REV. 1334 (1960) [hereinafter cited as *Statutory Structures*].

[31] *See* United States v. Tucker, 404 U.S. 443 (1972); United States v. Flohr, 472 F.2d 1165 (9th Cir. 1973). *See also* FRANKEL, *supra* note 4; Frankel, *Lawlessness In Sentencing,* 41 U. CINN. L. REV. 1 (1972); Project, *Parole Release Decision-making and the Sentencing Process,* 84 YALE L.J. 810, 888 (1975); Comment, *Discretion In Felony Sentencing—A Study of Influencing Factors,* 48 WASH. L. REV. 857 (1973). The Sherman Act is typical of most federal criminal legislation in setting only a maximum and no minimum penalty. 15 U.S.C. §§ 1-3 (Supp. V 1975). Thus, the decision whether to fine or to imprison the defendant is within the trial judge's discretion. Likewise, the judge is free to set the amount of the fine and the length of the prison term at any level between zero and the statutory maximum prescribed by Congress. *See Statutory Structures, supra* note 30 at 1138 n.2.

[32] *See* United States v. Tucker, 404 U.S. 443 (1972); Yates v. United States, 356 U.S. 363 (1958); Giblin v. United States, 523 F.2d 42 (8th Cir. 1975), *cert. denied,* 424 U.S. 971 (1976); United States v. Foss, 501 F.2d 522 (1st Cir. 1971); United States v. Dubley, 436 F.2d 1057 (6th Cir. 1971); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960); FRANKEL, *supra* note 4, at 75-76.

[33] FRANKEL, *supra* note 4, at 106-07. In an effort to remedy the problem of unguided judicial discretion, Senator Kennedy has recently introduced legislation that would establish sentencing goals and criteria to be applied by federal judges, a sentencing

have been left free to select these objectives largely on the basis of personal preference.[34] Despite the absence of a congressional statement concerning sentencing objectives for the general run of federal crimes, the legislative history of the Antitrust Procedures and Penalties Act makes explicit at least two goals that Congress hoped to achieve through sentencing in antitrust cases: punishment and deterrence.[35] Unless individual judges ignore this expression of congressional intent, further disagreement over sentencing objectives in antitrust cases seems unlikely.

Nonetheless, the congressional expression of sentencing objectives does not restrict judicial discretion in determining what level of sentence within the statutory limits will best accomplish these objectives. The antitrust laws, like most other federal criminal statutes, merely set an upper limit on the severity of punishment[36] without indicating in what sort of case this penalty, rather than some lesser one, should be imposed. Since the courts receive little or no legislative guidance on the question of what factors generally should be considered in aggravation or mitigation of sentence,[37] the potential for sentencing disparity remains. While there are some commonly agreed upon factors, such as record of prior offenses and violence as a circumstance of the crime's commission,[38] courts are not obligated to consider any specific factors, nor are they given any guidance as to what effect the presence or absence of certain factors should have upon the sentence.[39] Other variables, such as guilty pleas, may require special consideration in the determination of a proper sentence.[40] Some judges feel that a defendant who has pleaded guilty has benefitted the government by saving the expense of a trial and that this should be considered in mitigation of sentence.[41] Other judges disagree,[42] but all are free to follow their personal inclinations

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commission to promulgate specific sentencing guidelines, and procedures for appellate review of sentences. 123 CONG. REC. S405 (daily ed. Jan. 11, 1977).

[34] *Id.*

[35] *See* note 27 *supra.*

[36] *See* note 31 *supra.*

[37] Frankel, *Lawlessness in Sentencing,* 41 U. CINN. L. REV. 1,5 (1972).

[38] TASK FORCE, *supra* note 30, at 42.

[39] *Id.* at 20. The Twentieth Century Fund Task Force recommended that legislatures define which factors may be considered by a sentencing judge in aggravation or mitigation of sentence. The court would then be permitted a limited discretion to raise or lower a sentence within a narrowly defined range based on the presence of these factors. *Id.* at 20-21.

[40] Frankel, *Lawlessness in Sentencing,* 41 U. CINN. L. REV. 1,5 (1972).

[41] *Id. See, e.g.*, United States v. Wiley, 184 F. Supp. 679, 684 (N.D. Ill. 1960).

[42] *See, e.g.*, United States v. Derrick, 519 F.2d 1,3-4 (6th Cir. 1975) (defendant may not be given a longer prison sentence because he chose to exercise his Sixth

on the subject.[43] Thus, individual sentencing decisions are the products of divergent judicial discretion, loosely guided by the legislative determination of the appropriate maximum penalty.

The result of this broad discretion generally has been a wide disparity in the sentences imposed for substantially similar crimes.[44] In the area of antitrust crimes, the disparity has been less pronounced, since offenders usually have received fairly mild punishment.[45] The judge's discretion, however, remains the determinative factor in the sentencing of antitrust criminals and, with the increase in the statutory maximum penalties, there is a corresponding increase in the potential for wider disparity among sentences.

Recognizing the importance of judicial discretion in the sentencing process, the Antitrust Division of the Department of Justice recently has begun a concerted effort to influence the exercise of that discretion in the sentencing of antitrust violators. The Justice Department, following the lead of Congress, recommended that prison sentences for those convicted of per se violations of the Sherman Act be more severe and imposed more often.[46] In its recently issued sentencing recommendation guidelines, the Justice Department argued that incarceration is the most effective method of achieving both specific and general deterrence.[47] Imprisonment accomplishes spe-

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Amendment right to a jury trial).

[43] *See* United States v. Derrick, 519 F.2d 1,3-4 (6th Cir. 1975) where the Sixth Circuit acknowledges that had the trial court chosen not to express its reasons for assigning the particular sentence the appellate court would have had no basis for reversing the sentence. *See also* FRANKEL, *supra* note 4, at 25.

[44] *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, *supra* note 17, at 223; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE GOALS AND STANDARDS, REPORT ON CORRECTIONS 146 (1973); Cook, *Sentencing Behavior of Federal Judges: Draft Cases—1972*, 42 U. CINN. L. REV. 597 (1973).

[45] *See* text accompanying notes 7-14 *supra*.

[46] *See* Justice Department Memorandum from Assistant Attorney General Donald I. Baker to all attorneys and economists of the Antitrust Division, Feb. 24, 1977, *Guidelines for Sentencing Recommendations In Felony Cases Under the Sherman Act, reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 803, F-1 (1977) [hereinafter cited as *Sentencing Guidelines*]. The Department justified its recommendation for stiffer penalties by noting that Congress increased not only the maximum fine but also the maximum prison penalty for Sherman Act violations, indicating a legislative judgment that imprisonment should play an important role in punishing antitrust crime. *Id.* at F-2. *See also*, ANTITRUST & TRADE REG. REP. (BNA) No. 790, AA-1 (1976); United States v. Alton Box Board Co., 5 TRADE REG. REP. (CCH) ¶ 61,336 at 71,166 (N.D. Ill. 1977). Congress apparently was convinced that stiffer penalties would deter antitrust violations. 120 CONG. REC. H35340 (1974).

[47] *See Alton Sentencing Memorandum*, *supra* note 13, at D-1, D-2; *Sentencing Guidelines*, *supra* note 46, at F-3.

cific deterrence of convicted antitrust violators by making the prospect of repeated violations unattractive.[48] General deterrence is accomplished by making an example of those convicted and imposing penalties that are severe enough to dissuade others who may be tempted to violate the antitrust laws.[49]

The Department reasoned that when relatively mild fines are the only penalty imposed for antitrust crimes, businessmen tend to view the conviction as nothing more than a reasonable license fee to engage in criminal conduct.[50] It concluded that only when the probable punisment for the crime substantially outweighs[51] the potential profits will antitrust violations be deterred.[52] Businessmen confronted with the probability of imprisonment as the penalty for conviction of Sherman Act violations likely would attempt to avoid punishment at all costs,[53] and therefore, prison sentences should be a viable deterrent.[54]

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[48] *See* U.S. v. Alton Box Board Co., 5 TRADE REG. REP. (CCH) ¶ 61,336 at 71,164 (N.D. Ill. 1977).

[49] Some commentators believe that antitrust violations are particularly susceptible to general deterrence.

> Viewed in the large, the characteristic of the conduct typically proscribed by economic regulatory legislation most relevant for the purpose of criminal enforcement is that it is calculated and deliberative and directed to economic gain. It would appear, therefore, to constitute a classic case for the operation of the deterrent strategy.

Kadish, *supra* note 4, at 435 (footnote omitted).

[50] *See Sentencing Guidelines, supra* note 46, at F-1 to F-2.

[51] The phrase "substantially outweighs" is used to indicate that penalties imposed for antitrust violations must be greater than, and not merely equal to, potential profits if the appropriate deterrent effect is to be achieved. As Asst. Atty. Gen. Baker recently noted, "if the probability of getting caught and convicted is low, the punishment will have to be much greater than criminal revenues to achieve deterrence." Statement of Donald I. Baker Before the Tenth New England Antitrust Conference Concerning the Sentencing of Antitrust Felons, Nov. 20, 1976, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 790, D-1, D-3 (1976). *See* note 4 *supra.*

[52] The profit making potential of criminal pricefixing conspiracies is undeniable. *See* M. GREEN, THE CLOSED ENTERPRISE SYSTEM 170 (1972). For example, the profits resulting from pricefixing in the Electrical Equipment conspiracy cases were estimated at $840 million, yet the defendants, both individual and corporate, paid total fines of only $1,954,000. *Id.* at 156. *See* note 14 *supra.* Generally, the level of criminal fines imposed in the past on executives and corporations has been less than the gains realized from their anticompetitive conduct. *Criminal Sanctions, supra* note 4, at 150.

[53] Although it is commonly stated that antitrust violators have a greater abhorrence of imprisonment than other criminals, *see, e.g.*, 120 CONG. REC. H36343 (Remarks of Rep. Seiberling), no evidence of the truth of the proposition is available. ELZINGA & BREIT, *supra* note 4, at 43.

[54] Because corporations are permitted to indemnify their executives, individual criminal fines have had a minimum deterrent effect. *Criminal Sanctions, supra* note 4, at 150. *See, e.g.*, DEL. CODE tit. 8 § 145(a)-(d)(1975). New York, for example, permits

The introduction to the *Sentencing Guidelines*[55] recently issued by the Justice Department indicates that the Department views deterrence as the principal objective of criminal sentences for antitrust violators.[56] Although the selection of goals and purposes to be served by the sentencing process primarily is a legislative judgment rather than an administrative or a judicial one,[57] Congress has failed to outline systematically what those objectives should be.[58] Nonetheless, the Justice Department's emphasis on deterrence in recommending prison sentences accords with the available evidence of what Congress intended to accomplish by increasing the penalties for Sherman Act violations.[59] Lacking any explicit legislative sentencing policy for the broad range of federal crimes, the Justice Department reasonably chose to adopt what seems to have been the goal that Congress sought through passage of the Antitrust Procedures and Penalties Act.[60]

Although no sentences have yet been imposed under the felony statute,[61] the Justice Department has argued that courts sentencing under the former misdemeanor statute should be guided by the congressional determination, evidenced by the amendment, that antitrust violations constitute serious crimes for which imprisonment is appropriate.[62] How the courts will respond to the Justice Depart-

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a corporation to indemnify its officers for fines and litigation expenses if the executive has pleaded nolo contendere and if the board of directors finds that he was not guilty of misconduct. *Simon v. Socony-Vacuum Oil Co.*, 17 Misc. 202, 38 N.Y.S.2d 270 (S. Ct. 1942). Indemnification is permitted because the executive's plea of nolo contendere benefits the corporation by reducing the likelihood of private treble damage actions against the corporation by preventing use of the conviction as prima facie evidence in the private civil action. *See* Section 5 of the Clayton Act, 15 U.S.C. § 16(a) (1970). *See generally* Note, *Indemnification of the Corporate Official For Fines and Expenses Resulting From Criminal Antitrust Litigation*, 50 GEO. L.J. 566 (1962).

[55] ANTITRUST & TRADE REG. REP. (BNA) No. 803, F-1 (1977).

[56] *Sentencing Guidelines, supra* note 46, at F-1 to F-2.

[57] *See* text accompanying note 34-36 *supra; see also* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE GOALS AND STANDARDS, REPORT ON CORRECTIONS, 143 (1973).

[58] *See* authorities cited in note 34 *supra.*

[59] *Id.*

[60] *See* note 27 *supra.*

[61] Several defendants, however, have been indicted under the amended statute, *see* Interview with Assistant Attorney General Donald I. Baker, ANTITRUST & TRADE REG. REP. (BNA) No. 787, AA-2 (1976). Defendants whose illegal conduct occurred prior to the amendment of the statute "must be tried for, found guilty of, and sentenced within the limitations of the statute as it existed at the time of their violation of the law." United States v. Alton Box Board Co., 5 TRADE REG. REP. (CCH), ¶ 61,336 at 71,165 (N.D. Ill. 1977).

[62] *See Alton Sentencing Memorandum, supra* note 17, at D-1. The government obviously did not recommend sentences in excess of the then prevailing statutory maximum penalty. In the case of one defendant, however, the Justice Department did

ment's sentencing requests is uncertain. In *United States v. Alton Box Board Co.*,[63] a case involving misdemeanor rather than felony indictments, the court refused to consider the 1974 amendments in sentencing executives who pleaded nolo contendere to charges of price fixing.[64] The *Alton* court rejected as "highly improper"[65] the suggestion that congressional intent in increasing Sherman Act penalties should guide the court's sentencing determination in a case brought under the former misdemeanor statute.[66] Nonetheless, the court indicated, in dictum, that under the statute as amended, imprisonment will be more frequent[67] and, were it sentencing these de-

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recommend the then maximum sentence of one year imprisonment and a $50,000 fine. ANTITRUST & TRADE REG. REP. (BNA) No. 806, AA-1 (1977). It was not imposed. *Id.*

[63] 5 TRADE REG. REP. (CCH) ¶ 61,336 (N.D. Ill. 1977). The indictment in *Alton Box Board Co.* named twenty-three major manufacturers of folding paper cartons and forty-eight executives of those corporations who had conspired over an extended period of time to fix prices by a system of cover bidding. Although the defendants had pleaded nolo contendere and had not been adjudged guilty, the Justice Department contended that nolo pleas were the equivalent of guilty pleas for sentencing purposes, *see* notes 42 & 43 *supra*, and accompanying text, and that the court should not consider the pleas as entitling these defendants to special consideration. *See generally* FRANKEL, *supra* note 4. The court apparently accepted this argument. There is no indication that the judge considered the pleas of nolo contendere as mitigating factors in imposing sentence. 5 TRADE REG. REP. (CCH) ¶ 61,336 (N.D. Ill. 1977).

It has been asserted that uncontrolled acceptance of nolo contendere pleas "has led to shockingly low sentences and insignificant fines which are no deterrent to crime." United States v. Jones, 119 F. Supp. 288, 289 n.1 (S.D. Cal. 1954) (quoting memo of Atty. General). *See Alton Sentencing Memorandum,supra* note 17 at D-1; United States v. McDonough Co., [1959] TRADE CAS. (CCH) ¶ 69,482 (S.D. Ohio). Defendants, both individuals and corporations, commonly plead nolo contendere to Sherman Act charges. *See* Flynn, *supra* note 4, at 1325. The prevalence of nolo pleas may be explained by a desire to avoid the expense of litigating the charge fully or to avoid the social stigma that attaches to a plea of guilty. Note, *Section 5 of the Clayton Act and the Nolo Contendere Plea,* 75 YALE L.J. 845, 846-47 (1966). Another reason for such pleas is the advantages offered by the proviso to Section 5 of the Clayton Act, 15 U.S.C. § 16(a)(1970). *See* note 54 *supra.* Consideration of nolo pleas in mitigation of sentence by some courts is a further example of the exercise of sentencing discretion. *See* text accompanying notes 42 & 43 *supra.*

[64] United States v. Alton Box Board Co., 5 TRADE REG. REP. ¶ 61,336 at 71,162 (N.D. Ill. 1977).

[65] *Id.* at 71,165.

[66] *Id.* The court originally did impose prison sentences of from five to sixty days on fifteen of the indicted executives. Wall St. J., Dec. 1, 1976, at 4 col. 3. However, the court later reduced the jail sentences of eight of the defendants and instead imposed various terms of "alternative type" sentences. 5 TRADE REG. REP. ¶ 61,336 at 71,169-70. These alternative sentences required the defendants to perform public services through a program designed to provide employment for ex-convicts. *Id.* at 71,169-70 n.9. A table of the total sentences imposed on each of the 48 defendants in the case may be found appended to the court's opinion. *Id.* at 71,184-85.

[67] 5 TRADE REG. REP. ¶ 61,336 at 71,167.

fendants under the felony statute, the court "could more easily find imprisonment indicated in all instances . . . ."[68] This conclusion represents a substantial break with past sentencing practice under the Sherman Act[69] although it falls short of assuring success for the government in obtaining stiff sentences for antitrust felons.

The Justice Department's *Sentencing Guidelines*[70] were designed to structure and to systematize the government's sentencing recommendations in upcoming felony cases. The guidelines provide a policy for departmental sentencing recommendations that may result in an overall increase in the level of penalties sought and can insure consistency from case to case.[71] Although the guidelines are designed for use by the Justice Department in making sentencing recommendations, they clearly were drafted for use by the sentencing judge as a framework for the exercise of judicial discretion.[72] Use of the guidelines will make available to the sentencing judge the government's expertise and broad perspective in the matter of sentencing.[73]

The Department's guidelines recommend a base sentence of 18 months imprisonment.[74] From this base point, individual sentences will be computed with regard to the presence or absence of five aggravating factors and three mitigating factors. Sentence recommendations will be increased above the 18 month base level where the amount of commerce affected exceeds $50 million.[75] The government pointed out that the average sentencing recommendation of 18 months already includes an "amount of commerce" factor generally found in a typical conspiracy. As the level of commerce affected

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[68] *Id.* The court noted, however, that exceptional circumstances, such as ill health, might indicate a different sentence.

[69] *See* notes 5 & 14 *supra.*

[70] *See Sentencing Guidelines, supra* note 4 at F-1.

[71] *Id.* at F-1 to F-2.

[72] *Id.* Unless the guidelines are to some extent adopted by the courts, the Justice Department's goal of having sentences "broadly consistent over time and across the country" is unattainable. *Id.* at F-2.

[73] *Id.* at F-2.

[74] Eighteen months is one half of the statutory maximum prison term. *Id.* at F-2 to F-3. The eighteen month base sentence was chosen after taking into account the parole provisions of Title 18. 18 U.S.C. §§ 4161-66; 4201-10 (1970 & Supp. V 1975). These sections provide for parole release eligibility after a portion of the sentence has been served, generally one-third for some sentences of from one to three years. 18 U.S.C. § 4202 (1970). Additionally, time off for good behavior may be deducted from the sentence. *See* 18 U.S.C. §§ 4161-66 (1970). The Justice Department's guidelines recommend that the sentencing judge consider the effect of these parole provisions on the amount of time that will actually be served under any given sentence. *Sentencing Guidelines, supra* note 46, at F-2 to F-3.

[75] *Sentencing Guidelines, supra* note 46, at F-3.

increases above this average figure, the base sentence should be adjusted upward by one to six months.[76] Also, where the individual defendant serves in an upper echelon position within his corporation an increase in the base level sentence will be appropriate.[77] Here again, the base level sentence assumes that the defendant is an average employee and proof otherwise will result in a higher recommended sentence. Moreover, the reluctance of juries to convict and of judges to imprison individual Sherman Act violators has been attributed to the fact that it is often difficult to pinpoint guilt above the level of the overt actor.[78] Judges and juries apparently feel that the defendants before them often are not the policy formulators who are responsible for the crime.[79] Considering the defendant's position in the corporation as an aggravating factor will do little to overcome this hesitancy. Because upper echelon executives in large, widely-held corporations are able to insulate themselves from criminal prosecution by claiming ignorance of the conduct of subordinates, they are less likely to be indicted for Sherman Act violations.[80] Thus, the impact of considering position in the corporation as a factor aggravating sentence will continue to be borne generally by the executive of the small enterprise, where the individual officer is, in effect, the corporation.[81]

In addition to the above mentioned aggravating factors, the Justice Department's *Sentencing Guidelines* suggest an increase in the base level sentence when the defendant's participation in the conspiracy is unusually long,[82] when predatory or coercive conduct is employed in furtherance of the conspiracy,[83] and when the defendant previously has been convicted of other antitrust crimes.[84] A previous conviction is considered the most serious of the aggravating factors and will result in the recommendation of the maximum three year

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[76] *Id.* If the conspiracy is extremely small or localized and the amount of affected commerce is small, a reduction of sentence may be appropriate. *See* text accompanying notes 90-92 *infra.*

[77] *Sentencing Guidelines, supra* note 46, at F-3.

[78] *See* authorities cited note 12 *supra.*

[79] *See Community Control, supra* note 7, at 292 n.50.

[80] ELZINGA & BREIT, *supra* note 4, at 38.

[81] *See* authorities cited note 12 *supra.*

[82] *Sentencing Guidelines, supra* note 46, at F-4. Voluntary withdrawal from a conspiracy may be considered a factor in mitigation of sentence, although entitled to little weight unless the defendant also informed the government of the illegal activity. *Id.*

[83] *Id.*

[84] *Id.*

prison term. Consideration of past criminal record is commonly recognized as an appropriate factor to be weighed in sentencing decisions[85] and is properly emphasized by the Justice Department.

Only three factors are to be considered in mitigation of sentence. First, cooperation with the government may prompt a recommended sentence that is below the 18 month base level.[86] In view of the limited investigative and enforcement resources of the Antitrust Division, encouraging businessmen to report illegal activity to the government may prove a valuable aid to overall enforcement[87] and should be promoted. Second, personal, family, or business hardship, if proved by the defendant, may require a reduction in sentence.[88] Third, if the conspiracy is extremely small or localized something less than the base level sentence may be recommended.[89] To the extent that a small local conspiracy will affect only a small amount of commerce, it appropriately may be considered a less serious violation. This guideline, however, also mentions that the imprisonment of the chief executive of a small, local firm may have serious consequences for the business, but there is no apparent reason why this fact may not be considered under the heading "personal, family, or business hardship."[90] Perhaps the Department intended this hardship factor as a catchall provision to relieve against the possibility that the executives of smaller corporations will receive stiff prison sentences while their counterparts in larger, widely-held corporations will go free.[91]

By establishing a base sentencing recommendation, the government has taken a valuable first step toward achieving sentencing uniformity in antitrust cases, a prerequisite to the achievement of general deterrence. At a minimum, potential violators must be convinced that if apprehended and convicted, they will be punished.[92] Further, the base sentence appropriately establishes a punishment

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[85] FRANKEL, *supra* note 4 at 25; TASK FORCE, *supra* note 30, at 42-43.

[86] *Sentencing Guidelines, supra* note 46, at F-4.

[87] *See* Statement of Asst. Atty. Gen. Donald I. Baker Before the Tenth New England Antitrust Conference Concerning the Sentencing of Antitrust Felons, Nov. 20, 1976, *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 790, D-1, D-2 (1976).

[88] *Sentencing Guidelines, supra* note 46, at F-5.

[89] *Id.*

[90] *See* text accompanying note 88 *supra.*

[91] *See* text accompanying notes 78-81 *supra.*

[92] Certainty in the criminal sentencing context refers to knowledge on the part of potential violators that conviction of antitrust crimes is followed by certain penal consequences. Moreover, the deterrent impact of any given penalty is also dependent on the certainty with which apprehension and conviction will follow a violation. *See* note 4 *supra.* Given the level of Justice Department enforcement funding, however, only the former type of certainty appears reasonably achieveable.

for the average antitrust violator while the aggravating and mitigating factors allow judicial discretion to distinguish between degrees of culpability for antitrust crimes.

The effectiveness of the guidelines in achieving uniformity and deterrence necessarily depends on judicial acceptance of both the deterrant purpose and the factors to be considered in imposing sentences. The importance of avoiding wide disparity in sentences should commend itself to the judiciary, both because disparity lessens deterrent impact and because, as a matter of simple justice, similar defendants should receive similar punishments.[93] The legislative history of the Antitrust Procedures and Penalties Act seems persuasive that the goal of sentencing in antitrust cases is to deter future violations.[94] As noted by the *Alton* court, Congress has preempted the decision and has indicated that a court should regard antitrust violations as serious crimes for which prison terms are appropriate.[95]

While agreement is less certain on the question of what factors ought to be considered in aggravation or mitigation of sentences, judicial rejection of one or more of the factors suggested by the Justice Department[96] need not undermine the basic deterrent strategy if the 18 month base sentence is implemented. The base sentence is crucial to deterring future crimes in that it clearly indicates to potential violators that upon conviction of an antitrust crime they will be severely punished.[97]

In opposition to the government's drive to secure prison terms for antitrust violators, several groups that have systematically studied sentencing procedures and alternatives have concluded that impris-

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[93] The problem of sentencing disparity has received much attention in the various proposals for reform of the general criminal sentencing process. *See, e.g.*, 123 CONG. REC. S405 (daily ed. Jan. 11, 1977); TASK FORCE, *supra* note 30, at 4-5 & 12; AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 49 & 60-61 (1967); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, *supra* note 17, at 223-24.

[94] *See* note 27 *supra*.

[95] United States v. Alton Box Board Co., 5 TRADE REG. REP. (CCH) ¶ 61,336 at 71,167 (N.D. Ill. 1977). Judge Parsons, who sentenced the *Alton* defendants, strongly emphasized that he did not view deterrence as a goal of sentencing but only as an acceptable byproduct. *Interview with Chief Judge Parsons*, ANTITRUST & TRADE REG. REP. (BNA) No. 806, AA-2, AA-7 (1977). The Supreme Court, however, has indicated that, in its view, deterrence is an appropriate goal of sentencing. Pell v. Procunier, 417 U.S., 817, 822 (1974).

[96] A recently suggested list of aggravating and mitigating factors to apply to all crimes, not just antitrust violations, is contained in TASK FORCE, *supra* note 30, at 44-45.

[97] *See* note 92 *supra*.

onment has been used as a sanction far too frequently in criminal law enforcement generally.[98] Most studies have concluded that, in the average case, confinement is not the preferred remedy.[99] However, antitrust violations arguably are not average crimes and failure to imprison antitrust criminals would unduly depreciate the seriousness of the offense by perpetuating the belief that such crimes are merely "technical violations."[100]

Whether the deterrent strategy outlined by Congress and implemented by the Justice Department guidelines will have the desired effect of reducing antitrust crime is uncertain. Nevertheless, the courts should be persuaded that Congress intended this deterrent hypothesis to be tested by the imposition of more severe sanctions upon antitrust violators. Indeed, one congressman has indicated that if the courts do not sentence antitrust violators, and sentence them severely, Congress will consider imposing a mandatory minimum sentence for Sherman Act violations.[101] Hopefully, the courts will heed this congressional directive and will impose more severe penalties on antitrust criminals, thus avoiding the possibility of mandatory minimum sentences that disadvantage the exceptional defendant who, because of special circumstances, is deserving of lenient treatment.

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[98] *See* authorities cited note 44 *supra.*

[99] *Id.*

[100] *See generally* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 2.5(c) (1967); AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 7.01 (1962). The legislation introduced by Senator Kennedy also suggests that the sentencing judge should consider whether a stiff sentence is required to avoid depreciating the seriousness of the offense. *See* note 33 *supra.*

[101] Rep. Hutchinson stated:

> Judges complain that we tie their hands whenever we write minimum mandatory sentences into the law. Yet they leave little choice for Congress when they treat serious wrongdoers leniently. We refrained from imposing minimum mandatory sentences this time with the hope that the courts would understand our firm resolve to crack down on antitrust violators.

120 CONG. REC. H36340.