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CARTELS, AGENCY COSTS, AND FINDING VIRTUE IN FAITHLESS AGENTS

CHRISTOPHER R. LESLIE*

ABSTRACT

Although price-fixing conspiracies are inherently unstable, many cartels manage to endure, often for long periods. Many successful cartels have hierarchical structures made up of high-level executives (principals) and lower-level managers (agents). For these cartels, agency cost theory could provide some insights as to how to destabilize them from within. Agency costs exist when a faithless agent pursues her own interests instead of those of the principal. Although agency costs are generally considered inefficient, when the principal's goals are undesirable, the acts of a faithless agent can be beneficial. Because one traditional approach to reducing agency costs is to align the interests of the principal and agent, this Article argues that antitrust policy should maximize agency costs in cartels by decoupling these interests through several interrelated strategies. First, antitrust law should increase the severity and probability of criminal punishment of individuals who participate in price fixing. Second, antitrust law should reward individuals who expose cartel activity by providing them immunity from all criminal and civil liability and by paying antitrust bounties to such faithless agents. Finally, antitrust law should be structured so that employees of a cartel firm will not trust their employers to protect them should the cartel be exposed. This Article discusses how antitrust law can perform this decoupling function while minimizing any negative consequences of creating distrust within firms.

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INTRODUCTION

Federal antitrust authorities had long suspected that the world's two leading auction houses—Christie's and Sotheby's—were engaging in illegal collusion, but they lacked proof.¹ The auction houses had traditionally made the bulk of their money by charging a buyers' commission, whereby the successful bidder in each auction would pay a premium to the auction house above and beyond the winning bid.² Historically, each rival competed to lure sellers who had attractive, high-end items to use its auction services, in the hope that such items would lead to frenzied bidding and, consequently, higher commissions from buyers. But in 1995, both auction houses ceased their fierce competition when each announced a new policy of non-negotiable sellers' commission rates.³ Federal officials suspected collusion, but their investigation yielded insufficient evidence. All seemed lost until Christie's did the previously unimaginable: It presented the authorities with a cache of approximately 500 pages of documents, mainly handwritten notes, from its former CEO that detailed his illegal meetings with his counterpart at Sotheby's and outlined a criminal conspiracy between the firms even greater in scope than previously suspected.⁴ Both firms eventually pled guilty to criminal price fixing,⁵ and the chairman of Sotheby's was convicted and imprisoned for his role in the conspiracy.⁶

Federal agents had not suspected that the multi-hundred million dollar international market in lysine—an amino acid added to animal feed—was being controlled by a well-heeled cartel. Archer Daniels Midland (ADM), a major agribusiness concern, started a new bioproducts division to manufacture lysine in the early 1990s

1. See CHRISTOPHER MASON, *THE ART OF THE STEAL* 213-14 (2004). For a more detailed discussion of the auction house cases, see *infra* notes 88-98 and accompanying text.

2. See MASON, *supra* note 1, at 33-34 (explaining the practice of charging auction winners a "buyers premium").

3. *Id.* at 161-63, 167-69.

4. *Id.* at 245-51.

5. *Id.* at 248-51, 300.

6. *Id.* at 344-45.

and named Mark Whitacre as the division's manager.⁷ Initially, the division failed to take seed.⁸ Whitacre informed his superiors that he discovered the reason for ADM's inability to grow lysine when a stranger called Whitacre, informed him that an internal saboteur at ADM had contaminated the company's lysine, and offered to remedy the problem for \$10 million.⁹ Whitacre explained the situation to his bosses and asked ADM for the money.¹⁰ Through a series of events, the FBI was called in to investigate. When approached by FBI agents, Whitacre panicked because there was no saboteur; he had fabricated the story of industrial sabotage in an attempt to embezzle money from ADM.¹¹ In an effort to divert the government's attention from his own crime, which the FBI had not yet discovered, Whitacre exposed the fact that ADM had been participating in an international lysine cartel.¹² He volunteered to wear a wire and tape his conversations with his bosses about the cartel.¹³ Eventually, Whitacre worked with the FBI to videotape actual cartel meetings.¹⁴ Once prosecutors secured enough evidence, all of the lysine firms pleaded guilty and collectively paid over \$100 million in criminal fines.¹⁵ But for Whitacre's moment of panic, the lysine cartel would probably be functioning today.

Although the lysine and auction house cartels operated very differently, both conspiracies illustrate the difficulty and serendipity of cartel exposure. Price fixing is fundamentally different from most other crimes, in that the offense is self-concealing; it leaves no obvious trace. When police discover a body riddled with bullets, they commence looking for the murderer. When drums of toxic waste are found leaching into a lake, it is safe to conclude that illegal dumping has occurred. Like most felonies, murder and toxic dumping generally leave telltale signs of criminal activity. In all of these crimes, the issue is *who* did it. By contrast, in price-fixing cases, the

7. KURT EICHENWALD, *THE INFORMANT* 12 (2000). For a more detailed discussion of the lysine case, see *infra* notes 99-104 and accompanying text.

8. EICHENWALD, *supra* note 7, at 15.

9. *Id.* at 16-18.

10. *Id.* at 18-19, 36-37.

11. *Id.* at 38-45.

12. *Id.* at 50-53.

13. *Id.* at 69.

14. *Id.* at 144-59, 213-21.

15. *Id.* at 503-06, 521-23.

great mystery is whether the crime happened at all. Because economic theory predicts that rivals will charge similar prices in either perfectly competitive or cartelized markets, the presence of common pricing practices does not necessarily indicate an illegal agreement to restrain competition. As a result, instead of investigators first discovering the crime and then looking for the culprit, cartel conspiracies are most often exposed because an actual participant in the crime steps forward and confesses. In many instances, a confession marks the first time that antitrust authorities are aware that the crime had been committed. This represents an unusual model for law enforcement.

Price-fixing cartels illegally divert billions of dollars from consumers' wallets into the coffers of firms that are committing felonies. The total harm inflicted by such price fixing is impossible to estimate accurately because, by definition, successful cartels are never detected. From just those cartels that have been exposed, however, we know that cartel overcharges are measured in the billions of dollars.¹⁶ Although antitrust authorities have enjoyed recent success in defeating major cartels, much work remains to be done. Exposing and punishing additional price-fixing conspiracies requires understanding how cartels operate and where their weaknesses lie in order to design enforcement strategies that exploit those vulnerabilities.

Agency cost theory may help antitrust officials locate and target a cartel's Achilles' heel.¹⁷ Cartels often have many agency relationships within them. Each firm that belongs to the cartel generally has several employees who manage the firm's participation in the cartel, including attending cartel meetings and negotiating terms, such as the price to be fixed and market share allocations.¹⁸ Each employee who plays a part in the price-fixing conspiracy is an agent of a firm participating in a criminal enterprise.

This Article argues that antitrust enforcement efforts should exploit these agency relationships to destabilize cartels. Part I shows that antitrust enforcement against cartels is necessary. Some scholars have argued that cartels are inherently unstable because

16. See *infra* note 22 and accompanying text.

17. See *infra* Part II.A.

18. See *infra* Part II.B.

of the conspirators' incentives to cheat—by charging a lower price than the agreed-upon fixed price, or by producing a greater quantity than their cartel allocation—and thus, cartels will fall apart even without a vigorous antitrust program.¹⁹ But experience demonstrates that many price-fixing conspirators have figured out how to stabilize a cartel and have consequently been able to secure supracompetitive profits for decades. For those cartels that are not destabilized through the risk or actuality of cheating by participants, prosecutors need to develop alternative mechanisms to create instability. An antitrust program that creates agency costs within individual firms can weaken otherwise strong cartels.

Part II begins a discussion on principal-agent relationships. Many price-fixing cartels have a hierarchical structure in which high-level decisions are made by senior executives while the cartel's day-to-day operations are carried out by lower-level managers and salespeople within each member firm. The connection between the high-ranking executives and their lower-level employees is a classic principal-agent relationship. Although most of the literature on agency costs in employer-employee relationships focuses on how to reduce such costs, this scholarship assumes that the employer-principal is pursuing desirable—or at least legal—goals. That assumption does not hold in cartels because the principals—high-ranking executives within a cartel firm—are perpetuating a criminal conspiracy. A faithful agent facilitates illegal price fixing; a faithless agent exposes the cartel. When, as here, agency costs are socially desirable, the law should try to decouple the interests of principal and agent. This may be difficult to do, Part II explains, because the interests of cartel member firms and their participating employees are generally aligned in fixing prices and concealing the conspiracy.

Part III examines mechanisms to decouple the interests of price-fixing firms and their loyal employees. Every agent within a participating firm who knows about a cartel should be given a meaningful incentive to expose the price-fixing activity. Part III advocates a carrot-and-stick approach. First, faithful agents who quietly carry out their cartel duties should be subject to severe punishment, including a greater likelihood of imprisonment for

19. See *infra* notes 25-26 and accompanying text.

those who do not offer early cooperation to federal antitrust authorities.²⁰ Second, faithless agents who expose illegal cartels should receive significant rewards, including leniency from criminal prosecution, immunity from private liability, and substantial monetary incentives in the form of antitrust bounties. Third, because agents who distrust their principals are more likely to be faithless, cartel principals should be given incentives to turn on their own employees during plea bargaining. Fourth, and finally, Part III examines mechanisms to more efficiently educate price-fixing employees about how their interests are not aligned with their employers' interests.

Part IV considers the possible effects on a cartel of antitrust policies designed to encourage faithless agents. It first notes that price-fixing firms will probably reduce the number of cartel agents and guard information more carefully. This increases the expected costs of cartelization, a favorable result. Second, every cartel member must evaluate the risk that an employee at another firm will expose the conspiracy. This distrust should increase the pressure to

20. Antitrust differs from many other areas of business law, in that antitrust has historically targeted the firm, rather than the individual, in criminal cases. A debate ensues in academic circles over the appropriate role and form of corporate criminal liability as a general matter. See, e.g., Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Han Hyewon & Nelson Wagner, *Corporate Criminal Liability*, 44 AM. CRIM. L. REV. 337 (2007). However, antitrust is not really part of this discussion because it has long held corporations criminally liable for certain antitrust violations committed by their employees. See, e.g., *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983) (noting "cases hold[ing] that a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if ... such acts were against corporate policy or express instructions"). Corporate law scholars may find this Article's emphasis on individual criminal responsibility odd because in non-antitrust areas of white-collar crime—such as securities fraud—federal and state authorities have focused on prosecuting individuals. Why criminal enforcement of antitrust law has evolved differently and has historically focused on firms rather than individuals is beyond the scope of this Article and warrants its own study. But what may seem obvious or commonplace in corporate criminal law generally—namely, emphasizing the punishment of individuals who have committed white-collar crime—is at odds with antitrust law's traditional focus on holding firms criminally responsible for antitrust violations. Recently, federal authorities have started to move beyond this traditional focus and have increased prosecutions of individuals who commit antitrust crimes. This is a welcome trend, which this Article argues should be built upon.

expose the cartel as a preemptive move since only the first confessor receives amnesty from government prosecution. The enhanced fear of faithless agents creates both a persuasive incentive to confess and a strong disincentive to join a cartel in the first place, both positive outcomes.

Finally, Part V examines the potential downsides of efforts to decouple the interests of principals and agents in suspected price-fixing firms. These include the risk of undermining beneficial trust within firms and the possibility of false accusations. Part V explains why neither concern is particularly worrisome given how cartels operate and how federal officials approach antitrust prosecutions.

I. CARTEL STABILITY

Price-fixing cartels visit a litany of inefficiencies and related harms upon market economies. In lieu of competing against each other in order to increase their own market shares and profits by engaging in price competition, cartel members agree to increase the market price and divide the spoils. Successful cartels have been able to impose markups of 400 percent above competitive prices.²¹ Recent cartels have overcharged consumers billions of dollars.²² Because cartels reduce market output, they generally create significant allocative inefficiencies.²³ In some markets, cartel pricing may also protect high-cost firms, which would be driven from the market if lower, competitive prices prevailed. By insulating less efficient firms from competitive pressures, cartels sometimes facilitate productive inefficiency as well.²⁴

Fortunately, cartels are often unstable. Although cartel members collectively increase their profits by charging the inflated fixed price set by the cartel, each individual firm could maximize its short-term

21. Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 80 (2006).

22. See John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 559-60 (2005).

23. See Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 VAND. L. REV. 1125, 1135 (1985) (describing the effects of cartelization as, among others, the concentration of economic power, reduction of output, increased price, and "reduc[ed] allocative efficiency").

24. See Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 518 (2004) [hereinafter Leslie, *Trust, Distrust, and Antitrust*].

profits by cheating on the cartel, charging less than the cartel price, and selling more than its cartel allotment.²⁵ Even firms that entered into the cartel agreement sincerely may feel compelled to compete if they perceive that others are cheating. Some commentators have suggested that this incentive to cheat diminishes the need to focus significant attention or resources on anti-cartel efforts, since the conspiracies will inevitably unravel of their own accord.²⁶

Unfortunately, these optimistic predictions are belied by the historical record, which shows how many real-world cartels have overcome the problems of instability.²⁷ Successful cartels have devised mechanisms that enable members to trust one another not to cheat, such as developing personal relationships among competitors, undertaking goodwill gestures among cartel members, having frequent and open communications, making price more transparent, and creating a group identity and attendant social norms of cooperation among cartel members.²⁸ Once trust among the cartel members has been established, the temptation to cheat is significantly diminished. Moreover, even in the absence of trust, cartels can achieve stability by devising mechanisms to detect and punish cheaters, including employing auditors and accounting systems, requiring deposits and imposing fines on cheaters, and creating private dispute resolution systems.²⁹

In the face of significant cartel success in establishing stability, antitrust authorities have nevertheless achieved some major victories against both domestic and international cartels. For example, firms in the lysine, graphite electrodes, vitamin, and other cartels have pled guilty to price fixing and collectively paid nearly \$2 billion in criminal fines.³⁰ The credit for these successes lies with the government's Antitrust Amnesty Program. In order to encourage price-fixing firms to confess their crimes, the Antitrust Division of the Department of Justice has developed a program to grant amnesty from criminal prosecution to the first firm to

25. See George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 46 (1964).

26. See Levenstein & Suslow, *supra* note 21, at 44-46 (citing sources).

27. See *id.* at 44.

28. See Leslie, *Trust, Distrust, and Antitrust*, *supra* note 24, at 565-99.

29. See *id.* at 610-22.

30. ABA SECTION OF ANTITRUST LAW, ANTITRUST COMPLIANCE: PERSPECTIVES AND RESOURCES FOR CORPORATE COUNSELORS vii (2005) [hereinafter ANTITRUST COMPLIANCE].

expose a cartel and provide prosecutors with evidence against the other cartel members.³¹ Not only does the firm receive immunity from criminal prosecution, but that immunity also extends to its directors, executives, and employees who cooperate with the government's case against the other members of the cartel.³² Prior to 1993, amnesty for corporations that confessed to price fixing was discretionary.³³ Because the Antitrust Division could still prosecute a firm that exposed a cartel, firms faced a major disincentive against applying for amnesty; consequently, the government received only about one application per year.³⁴ In 1993, the revised Corporate Leniency Policy made amnesty automatic for the first eligible firm that confessed.³⁵ Applications for amnesty skyrocketed, and, in recent years, price-fixing conspiracies have been exposed at a rate of two per month.³⁶ While only the first firm to confess is guaranteed amnesty, subsequent confessors can receive substantial discounts

31. See ANTITRUST DIV., U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (Aug. 10, 1993), <http://www.usdoj.gov/atr/public/guidelines/0091.pdf> [hereinafter CORPORATE LENIENCY POLICY]. Although it does not receive complete immunity from private suits, the firm that secures amnesty from the government has its damages in private litigation limited to single damages instead of treble damages. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213, 118 Stat. 661, 666-67 (2004); see also R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the Fordham Corporate Law Institute's 31st Annual Conference on International Antitrust Law & Policy: Current Issues in International Antitrust Enforcement 2 (Oct. 7, 2004), available at <http://www.usdoj.gov/atr/public/speeches/206479.pdf>.

32. Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the U.S. Sentencing Commission's Symposium on Corporate Crime in America: The Experience and Views of the Antitrust Division (Sept. 8, 1995), available at <http://www.usdoj.gov/atr/public/speeches/speech1grs.htm> [hereinafter Spratling, The Experience and Views of the Antitrust Division].

33. *Id.* at pt. V.D.

34. See Bruce H. Kobayashi, *Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 716 (2001).

35. CORPORATE LENIENCY POLICY, *supra* note 31. To be eligible, the firm could not be the instigator or ringleader of the cartel; nor would amnesty be automatic if the government was already investigating the cartel and had collected sufficient evidence. *Id.*; see also Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 465-66 (2006) [hereinafter Leslie, *Antitrust Amnesty*] (criticizing these limitations and advocating true automatic amnesty for the first confessor).

36. See Scott D. Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Presentation at the New York State Bar Association Annual Meeting: A Summary Overview of the Antitrust Division's Criminal Enforcement Program 5 (Jan. 23, 2003), available at <http://www.usdoj.gov/atr/public/speeches/200686.pdf>.

off of their base criminal fines, with earlier confessors receiving greater discounts than later confessors.³⁷ The Amnesty Program is now the “most effective generator of cartel cases and is believed to be the most successful program in U.S. history for detecting large commercial crimes.”³⁸ Despite these important successes, however, probably hundreds of price-fixing cartels continue to impose higher prices on American consumers.

The problem remains that once a stable cartel survives its infancy and awkward adolescence, it can thrive for decades, despite the economic incentive to cheat and the potential criminal and civil penalties for the cartel members, if caught. For example, DeBeers has successfully managed the international diamond cartel for over a century.³⁹ OPEC continues to control the price of petroleum, disproving early predictions that the cartel would not sustain itself for any meaningful amount of time. And the duration of exposed cartels repeatedly demonstrates that price fixers can create robust conspiracies: The international alkali cartel and the railroad express cartel each lasted for over half a century.⁴⁰ Alfred Nobel’s dynamite trust controlled the market for almost thirty years, until the outbreak of World War I.⁴¹ Lesser known international cartels, such as those in niacin and other commodities, remained stable and secured cartel profits for over a decade,⁴² while more localized domestic cartels, such as those involving school milk, often have lifespans measured in decades.⁴³ Some studies find the median life of discovered cartels to have been approximately five to six years.⁴⁴ However, even these numbers may downplay the significance and

37. See Leslie, *Antitrust Amnesty*, *supra* note 35, at 467-68 (providing examples).

38. Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 799 (2001).

39. See *The Cartel Isn’t Forever—The Diamond Cartel*, ECONOMIST, July 17, 2004, at 60.

40. See GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS IN ACTION: CASE STUDIES IN INTERNATIONAL BUSINESS DIPLOMACY 430 (1946) (discussing the alkali cartel); Peter Z. Grossman, *The Dynamics of a Stable Cartel: The Railroad Express 1851-1913*, 34 ECON. INQUIRY 220, 220 (1996).

41. See STOCKING & WATKINS, *supra* note 40, at 438.

42. JOHN M. CONNOR, GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY 308-10, 315-16 (2001) (discussing the niacin cartel); Levenstein & Suslow, *supra* note 21, at 44 (noting that “many cartels measure their duration in decades, not months”).

43. See Robert F. Lanzillotti, *The Great School Milk Conspiracies of the 1980s*, 11 REV. INDUS. ORG. 413, 440 (1996).

44. Levenstein & Suslow, *supra* note 21, at 44.

stability of price-fixing conspiracies because many cartels that appear to fail—including those in Swedish beer, railroad oil, tea, potash, and sugar—often learn from their early failures and go on to create stable cartels in the long run.⁴⁵ Ultimately, a wide range of markets seem plagued by repeated price-fixing conspiracies, albeit of varying duration. Professors Levenstein and Suslow note that “the list of industries with frequent cartel activity is long and diverse: agriculture; stone, glass, and machinery; chemical and agricultural food products; textiles; steel; and highway construction, street construction, and electrical contracting.”⁴⁶

Cartels may continue to exist in part because price fixing remains profitable. Even though American antitrust law imposes high fines, international cartels necessarily make profits in other countries with fewer penalties for price fixing.⁴⁷ For example, although the members of the vitamins cartel paid almost \$1 billion in criminal fines in the United States and billions more in private damages and foreign fines, the cartel members still made approximately \$4 to \$7 billion in excess profits even after paying all fines and damages.⁴⁸ International antitrust authorities have come to realize that significant corporate fines alone cannot sufficiently deter price-fixing activity.⁴⁹

45. See *id.* at 74 (noting that the “early history of failure characterizes many successful cartels”).

46. *Id.* at 57 (citations omitted).

47. Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 833 (2004) (“U.S. fines may be sufficient to provide deterrence if one focuses on the U.S. market alone, but that may not be the case if the benefits to the cartel are global.”).

48. See Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329, 341 n.48 (2004) (citing Brief for Professor Darren Bush et al. as Amici Curiae Supporting Respondents at 4, *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724), 2004 WL 533933 (“This research demonstrates that the international vitamin cartel generated the largest total of antitrust fines and penalties in history, which are calculated to be between \$4.4 and \$5.6 billion. But the cartel’s monopoly profits in all areas of the world were \$9 to \$13 billion.”)).

49. See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., CARTEL SANCTIONS AGAINST INDIVIDUALS 7 (2003), <http://www.oecd.org/dataoecd/61/46/34306028.pdf> [hereinafter CARTEL SANCTIONS] (noting, on behalf of a joint international committee, that “corporate sanctions rarely are sufficiently high to be an optimal deterrent against cartels”).

A stable cartel can be exceedingly difficult to discover and, thus, dismantle.⁵⁰ Cartel members use code names and public phones; they meet in secret locations, such as the vitamins cartel's covert meetings in Germany's Black Forest,⁵¹ and create false travel records to cover their tracks.⁵² Every firm in a cartel knows that it is better off in the long run by fixing prices and concealing the conspiracy. This makes successful cartels difficult even to study because, by definition, they are clandestine.⁵³ Stable cartels also need less explicit and less frequent communication. Communication is necessary early on to form a cartel and to build trust, but members of an established cartel grow to trust each other such that the same level of communication is no longer necessary. In short, because they are the longest lived and often need less communication, stable cartels may cause the most harm and are also the hardest to uncover and punish.

Given the difficulty of detecting price-fixing conspiracies, anti-trust authorities should attempt to destabilize cartels by finding weak links within cartel structures. One approach is to destabilize individual cartel member firms from within. A cartel, after all, comprises a chain of firms that have conspired to replace competition with collusion. Prosecutors need to find the weak link in that chain. Most anti-cartel efforts have focused on getting one firm to confess and expose the cartel.⁵⁴ This Article argues that a weaker link is found not at the level of the member firms, but rather among the individuals within each cartel member firm. The individual employees who manage a firm's cartel operations have intimate knowledge of the conspiracy and represent a potential chink in the armor of a price-fixing conspiracy.⁵⁵ Because these employees are

50. See John Gibeaut, *Antitrust American Style*, A.B.A. J., Apr. 2004, at 55, 56.

51. Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711, 714 (2001).

52. See JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND 221 (2000) (discussing the lysine cartel).

53. See DEBORA L. SPAR, *THE COOPERATIVE EDGE* 35 (1994). Although some government-run cartels, like OPEC, operate openly, most cartels are private enterprises that must conceal their activities. See *id.*

54. See, e.g., MASON, *supra* note 1, at 248-51 (describing the Justice Department's decision to grant amnesty to Christie's Auction House in order to prosecute Sotheby's).

55. Gibeaut, *supra* note 50, at 56 ("Cartels are tough nuts to crack, and prosecutors say help from the inside is crucial in making strong cases.").

essentially agents of a cartel member firm, agency theory may offer insights on how to destabilize cartels through these employees.

II. CARTELS AND THE SOCIAL BENEFITS OF AGENCY COSTS

Broadly speaking, an agency relationship exists whenever one individual (the principal) employs another (the agent) to perform a task intended to create value for the principal.⁵⁶ In relying on another person, however, the principal faces the risk that the agent will pursue her own interests instead of the principal's.⁵⁷ Thus, the principal must be wary of his agent's motivations and faithfulness.⁵⁸

A. Agency Costs, Faithless Agents, and Unworthy Principals

The tension between a principal and his agents, and the danger that the agent will be faithless to the principal's interests, are often described in the language of agency costs. Agency costs have two major components. First, they include the costs that the principal incurs in keeping the agents faithful, including monitoring and bonding costs.⁵⁹ Second, agency costs include any losses the principal suffers because his agent pursues her own goals.⁶⁰

Agency relationships in which faithless agents may create agency costs abound.⁶¹ For example, agency costs are often discussed in the

56. ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 627 (6th ed. 2005).

57. *See id.*

58. *See* WALTER NICHOLSON, INTERMEDIATE MICROECONOMICS 233 (7th ed. 1997).

59. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 368 (3d ed. 1986) ("[A]gency costs [are] the costs to the principal of obtaining faithful and effective performance by his agents."); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259, 382 (2000) ("Agency costs are defined as the sum of the monitoring and bonding costs between principal and agent necessary to deter disloyal acts on the part of the agents, plus any residual loss incurred due to disloyalty that cannot be cost-justifiably deterred.").

60. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2761 n.1 (2006) ("Agency costs" refer to the losses suffered by a principal because her agent's interests—and hence incentives to act—diverge from those of the principal." (citing Jensen & Meckling, *supra*)).

61. *See, e.g.*, NICHOLSON, *supra* note 58, at 233 ("Examples of this [principal-agent] relationship occur not only in the management of firms, but also in such diverse applications as hiring investment advisors (do they really put their clients' interest first?); relying on an

context of publicly held corporations, in which shareholders' ownership is divorced from day-to-day corporate operations. Shareholders are principals who must rely on executives and hundreds or thousands of lower-level employees as their agents to run the corporation in a manner that maximizes shareholder value. If the agents were faithless, then they could pursue their own interests—for example, by increasing their own salaries and perks, not working efficiently, or even looting or embezzling—at the expense of the owners' welfare. Indeed, Professors Blair and Stout have argued that “the central economic problem addressed by corporation law is reducing ‘agency costs’ by keeping directors and managers faithful to shareholders’ interests.”⁶²

Agency costs also exist in litigation. In the traditional attorney-client relationship, the client is the principal and the attorney is her agent.⁶³ The client pays the attorney to be a zealous advocate—to maximize litigation payouts when the client is a plaintiff and to eliminate liability or minimize damages when the client is a defendant. The lawyer acts as a faithless agent when she pursues her own interests at the expense of her client's. This is a particular problem in class action litigation because there are so many putative principals, and none possess sufficient incentive to ensure that their agent is protecting their common interests. This sometimes results in, for example, class counsel negotiating low settlements in exchange for defendants' payment of relatively high attorneys' fees.⁶⁴

Agency costs are generally considered undesirable because they introduce inefficiency into business operations and professional relationships.⁶⁵ Principals must spend money screening and monitoring agents, and perhaps purchasing insurance in case an

automobile mechanic's assessment in ordering repairs; and buying clothes for a relative.”); PINDYCK & RUBINFELD, *supra* note 56, at 627 (discussing doctors as agents of principal-hospitals).

62. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248-49 (1999).

63. See MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 11 (2007) (noting that the law of principal and agent sometimes governs the attorney-client relationship).

64. See Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1042-44 (2002) [hereinafter Leslie, *Class Action Litigation*].

65. See Blair & Stout, *supra* note 62, at 258-59.

agent is faithless in the extreme. Such actions increase costs. Further, principals may avoid appropriate delegation out of fear of faithless agents; this could inhibit an organization from achieving its goals.

There are generally two basic approaches to minimizing the risk of faithless agents: aligning interests and monitoring. One traditional solution to agency cost problems is to better bind the interests of the principal and agent.⁶⁶ In the context of corporate management, the binding of interests is often achieved by tying the agent's compensation to the principal's profitability, such as through stock options.⁶⁷ In litigation, the specter of the faithless agent is often addressed by contingency fees that peg the attorney's remuneration to the client's recovery.⁶⁸ The other traditional response to agency costs requires the principal to monitor his agents to ensure that they execute their orders appropriately.⁶⁹ Agents are more likely to shirk their obligations to a principal and pursue their own interests if they are unobserved or otherwise unaccountable.

Agency cost analysis usually implicitly assumes that the principal's goals are laudable and, consequently, theorists seek ways to minimize the risks and costs of agents acting faithlessly. But what if the principal is a bad actor? Society does not want all organizations to achieve their goals. The general public obviously suffers when criminal enterprises—such as drug rings, counterfeiters, or those dumping hazardous waste—succeed in attaining their goals. In these instances, agency costs can be socially beneficial if they frustrate the principal's mission. When the principal is pursuing illegal, inefficient, or otherwise undesirable goals, the law should encourage agents to be unfaithful.

Price-fixing cartels warrant condemnation because they unnecessarily cost consumers billions of dollars and inflict both allocative

66. See, e.g., Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 650-57 (2004) (noting that many fiduciary duties attempt to align the interests of trustees and beneficiaries).

67. NICHOLSON, *supra* note 58, at 235 ("By offering such contract options as profit-sharing bonuses, stock option plans, and company-financed pensions, the owner may be able to give managers an incentive to be careful about the benefits they choose to take.").

68. See Leslie, *Class Action Litigation*, *supra* note 64, at 1048.

69. See *supra* note 59 and accompanying text.

and productive inefficiency on the economy.⁷⁰ As with other criminal conspiracies, agency costs in cartels benefit the public by making it more difficult for the principal to achieve goals that would harm society at large. If the principal's aim is to participate in a price-fixing conspiracy, then antitrust law should encourage any cartel agents to be faithless.

B. Agency Relationships Within Cartels

Cartels require many relationships among different actors. The most obvious relationships are those among the cartel's member firms. A cartel, by definition, involves competing firms joining together to fix prices, divide territory, allocate sales, or otherwise restrict competition. While the interactions among these firms are generally the most complicated part of any cartel, these are not necessarily agency relationships. The cartel members are partners and co-conspirators—in other words, equals. Although a particular firm may be the cartel ringleader, it is not the principal, as the other firms are not merely doing the ringleader's bidding. Each firm makes an independent decision as to whether joining or remaining in a cartel is in the firm's own best interest.

But cartels are not devoid of relevant agency relationships. In most major cartels, each participating firm has its own internal hierarchy of principals and agents, in which “the primary conspirators are usually high-ranking executives [while] less-senior corporate intermediaries frequently fine-tune the agreements.”⁷¹ In

70. See *supra* notes 21-24 and accompanying text.

71. Susan B. Garland, *Justice's Cartel Crackdown*, BUS. WK., July 27, 1998, at 50-51 (“In the ADM lysine case, for example, prosecutors charge that senior executives attended only those meetings necessary to solve big problems, such as volume allocation issues, while regional sales managers of competitor companies met to work out details on prices in local markets.”); Levenstein & Suslow, *supra* note 47, at 833 (“The cartel was organized into a ‘top-level’ group and a ‘working-level’ group. The top-level meetings included primarily company presidents and managing directors and were designed to set policies. Lower-level managers, who met more frequently, worked out the details of the agreement and its implementation.”). The primary exception would be cartel participants that are sole proprietorships, as in some of the school milk cartels.

The typical firm in a large cartel is a publicly traded company, in which the shareholders are the principals and the executives engaging in price fixing are the agents. Some conceive of the price fixers as the faithless agents. See, e.g., Paolo Buccirossi & Giancarlo Spagnolo, *Corporate Governance and Collusive Behavior* 13 (Lear Research Paper No. 06-01, Aug. 2006),

many cartels, senior executives—often with decades of seniority—decide to fix prices with their counterparts at competing firms.⁷² But these high-level decision makers do not necessarily fix the actual price or allocate market shares, perhaps in part because they know that price fixing is illegal.⁷³ Instead, the executives actually carry out the cartel operations through trusted lower-level employees, including managers and salespeople⁷⁴ who “possess the knowledge about prices, costs, sales history, etc., needed to reach an agreement as to who will bid for what job or what price will be set for what goods.”⁷⁵ This means that cartels often have dozens of individuals managing the cartel’s operations.⁷⁶ The two levels of responsibility within a price-fixing firm are well understood by the cartel participants and sometimes made even more distinct by the cartel’s internal nomenclature. For example, in the citric acid cartel of the early 1990s:

available at <http://www.learlab.it/Publications/Lear-RP-06-01.pdf>. This is not the agency relationship I am focusing on. It is certainly possible to think of the managers who fix price as agents of the law-abiding shareholders; thus, the agents are being faithless when they fix prices. However, this is not a traditional principal-agent problem because although the executives who engage in price-fixing are arguably being faithless agents with respect to their shareholder principals, these executives are not necessarily pursuing their own interests at the stake of principals; rather, they are pursuing the shareholders’ interests albeit through illegal means. Moreover, illegal price fixing is often ultimately profitable for the shareholders even when the cartel is caught and successfully prosecuted. CARTEL SANCTIONS, *supra* note 49, at 16-17 (describing the unlikely deterrent effect of corporate fines imposed on managers).

72. See ANTITRUST COMPLIANCE, *supra* note 30, at 50 (“Another perhaps surprising feature of cartels is that the most senior executives often play a key role in the conspiracy.”).

73. See Robert R. Faulkner, Eric R. Cheney, Gene A. Fisher & Wayne E. Baker, *Crime by Committee: Conspirators and Company Men in the Illegal Electrical Industry Cartel, 1954-1959*, 41 CRIMINOLOGY 511, 542-43 (2003) (noting that “upper level managers have an incentive to delegate cartel formation because price-fixing is illegal”).

74. Other cartel agents include the secretaries who keep track of the member firms’ reported monthly sales figures so that adjustments can be made to cartel allotments. See LIEBER, *supra* note 52, at 188.

75. Faulkner et al., *supra* note 73, at 522-23 (citation omitted) (“In most cases cartel agreements are negotiated by middle managers from the participating companies.”).

76. See CONNOR, *supra* note 42, at 11 (“Initially, only two or three officers were involved in the planning and execution of the [lysine, citric acid, vitamins, and other global price-fixing] conspiracies, but eventually each company would contribute at least ten men to a cartel’s maintenance.”). Before the criminal case was brought against ADM and its cartel partners in the food and feed industry, “price-fixing was a work a day endeavor around the globe, involving scores of corporations and executives.” EICHENWALD, *supra* note 7, at 559.

[t]he senior executives responsible for determining the broad outline of the cartel agreement were nicknamed: "the masters." The lower-level executives responsible for the day-to-day workings of the cartel were "the sherpas." They shared monthly sales figures and took stock at the end of the year of each company's total sales.⁷⁷

Such hierarchies within cartel firms "separating high-level policy decisions made by executives from the more frequent ongoing monitoring and negotiations undertaken by lower-level managers" are a hallmark of many successful cartels.⁷⁸

From the perspective of cartel operations, the high-level decision makers are the principals and the lower-level employees are the agents who implement the price-fixing scheme.⁷⁹ Each principal within a price-fixing firm needs its employees to be faithful agents who will carry out the cartel's operations and do nothing to destabilize or expose the cartel. Whenever one of these employees shirks his duties—or pursues goals contrary to those of his employer, he inflicts agency costs upon the principal. Of course, the lower-level employee may be serving multiple principals, so this may not be a pure principal-agent relationship, but it has enough of the salient characteristics so that agency theory can inform efforts to destabilize cartels.⁸⁰

77. Levenstein & Suslow, *supra* note 21, at 73 (citing Kurt Eichenwald, *U.S. Wins a Round Against Cartel*, N.Y. TIMES, Jan. 30, 1997, at D1). Some individuals straddled the line between master and sherpa. See LIEBER, *supra* note 52, at 192 ("The conspirators [in the citric acid cartel] called themselves masters and sherpas. Masters were the big-picture people who made decisions and set policy. Sherpas took orders and did the low-level detail work. Usually, Cox said, he was a sherpa, but sometimes he functioned as a master.").

78. Levenstein & Suslow, *supra* note 21, at 44; see also Wayne E. Baker & Robert R. Faulkner, *The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry*, 58 AM. SOC. REV. 837, 840 (1993) (discussing the transformer cartel, and noting that "[t]he high-level group, composed of top executives and general managers, met several times a year to establish price-fixing policies. The working-level group of assistant general managers, marketing managers, and sales managers executed the agreements struck by the high-level group, working out operational rules, routines, and details.").

79. Arguably, the cartel itself as an entity could be seen as the ultimate principal. That does not change our analysis; we still want individuals to be faithless agents. Moreover, an agent in a corporate hierarchy can serve multiple masters. This project focuses on the agent's relationship with the principal in the form of her boss who is instructing her to fix prices.

80. Similarly, the high-level decision makers who are the principals with respect to the lower-level employers are agents in some respects. To that extent, the theory this Article develops would apply to these senior executives in their agent capacities. For the sake of

C. Examples of Faithless Agents in Cartels

An examination of exposed cartels reveals many instances of an employee within a price-fixing firm acting as a faithless agent. Agents' acts of betrayal have taken several forms. For example, when government officials investigating suspicions of price fixing in the corrugated container industry in the 1970s approached George Connor, a former employee of a firm suspected of being a cartel member, he agreed to be interviewed in exchange for a grant of use immunity.⁸¹ Connor was faithless to his former principal, and transcripts of that interview, which were presented to the grand jury, laid the groundwork for successful prosecution of the cartel.⁸²

Similarly, the participants in the electrical equipment cartels of the 1950s and 60s seemed resolved to remain silent in the face of grand jury probes into the firms' identical bids on several Tennessee Valley Authority projects.⁸³ Overlapping price-fixing and bid-rigging conspiracies existed in over twenty separate product markets.⁸⁴ Although the cartel involved scores of individuals, the conspirators were well disciplined and believed their conspiracy to be invulnerable to government prosecutors. But an employee at one of the smaller firms—Lapp Insulator—announced that he would not perjure himself before the grand jury, which threw the management of General Electric (GE), one of the cartel leaders, “into a tizzy.”⁸⁵ Ultimately, four grand juries subpoenaed 196 people, at least some of whom owned up to the cartels and explained their operations.⁸⁶ Those that squealed were faithless, and their betrayal of their principals led to the successful prosecution of the cartels, with fines, private liability, and prison for several of the businessmen.⁸⁷

simplicity, however, this Article will focus on the principal-agent relationship between the high-level executive and the lower-level employees within a price-fixing firm.

81. *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411, 413 (5th Cir. 1985).

82. *See id.*

83. Gilbert Geis, *White Collar Crime: The Heavy Electrical Equipment Antitrust Case of 1961*, in *CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY* 141 (Marshall B. Clinard & Richard Quinney eds., 1967).

84. *See id.*

85. JOHN HERLING, *THE GREAT PRICE CONSPIRACY: THE STORY OF THE ANTITRUST VIOLATIONS IN THE ELECTRICAL INDUSTRY* 21-22 (1962).

86. Geis, *supra* note 83, at 141.

87. *See id.* at 223.

The highly publicized cartel between the world's two major auction houses, Sotheby's and Christie's, presents a more recent example of faithless actions by an individual within a price-fixing firm. Not long after becoming the chairman of Sotheby's, Alfred Taubman met with the chairman of Christie's, Sir Anthony Tennant.⁸⁸ The two agreed to fix commissions, with the particulars to be arranged by the CEOs of each firm—Dede Brooks of Sotheby's and Christopher Davidge, her counterpart at Christie's.⁸⁹ Brooks and Davidge had several clandestine meetings and successfully agreed to impose fixed, non-negotiable seller's commission rates.⁹⁰ Despite assuring Brooks that he was keeping no records of their meetings or agreements, Davidge kept copious notes.⁹¹ He generated handwritten accounts, detailing the substance of his meetings with Brooks so that he could report back to Tennant.⁹² Davidge's notes "recounted secret conversations and meetings in apartments, restaurants and limousines to discuss fixing the commissions paid by thousands of customers, dividing up superrich clients and a host of other steps to stifle competition and pump up profits."⁹³ Davidge retained other documents as well: when Brooks—as a show of good faith and to assure Davidge that their agreement was being implemented—faxed him a copy of an internal Sotheby's memo detailing the new minimum commissions, Davidge added it "to the burgeoning pile of potentially incriminating documents he was keeping under lock and key."⁹⁴ Davidge ultimately compiled a collection of almost 500 pages of material detailing every important aspect of the illegal collusion.⁹⁵

88. MASON, *supra* note 1, at 97-100.

89. *Id.* at 133.

90. *Id.* at 133-35.

91. *Id.* at 135.

92. *Id.* at 142 ("After meeting with Brooks, Davidge took out a legal pad and jotted down a couple of pages of notes summarizing their conversation. He wanted to give Tennant a detailed report of the topics and conclusions he and Brooks had reached, and thought it wise to keep a record of their discussions in case of any unforeseen repercussions."); *see also* Douglas Frantz, *Private Files Fuel an Art Auction Inquiry*, N.Y. TIMES, Oct. 8, 2000, at A1.

93. Frantz, *supra* note 92.

94. MASON, *supra* note 1, at 170.

95. Richard Gruner, *Avoiding Fines Through Offense Monitoring, Detection, and Disclosure: The Race for Amnesty*, in CORPORATE COMPLIANCE 2001, at 273, 281 (PLI Corp. Law & Practice, Course Handbook Series No. B-1248, 2001).

Davidge created and maintained this stockpile of evidence as his exit strategy, in case either the government ever prosecuted the cartel—in which case he might trade key evidence for immunity—or Christie's tried to do him wrong. When both prospects seemed possible in 1999 after Tennant had been replaced as chairman, Davidge dropped the bombshell on Christie's that the firm had committed a serious felony under Tennant and that Davidge would strike a deal for himself if Christie's failed to give him an acceptable severance package or attempted to exclude him from any deal that Christie's made with American antitrust prosecutors.⁹⁶ With Davidge's notes as its bargaining chip, Christie's ultimately negotiated an amnesty deal with federal prosecutors in exchange for its cooperation in the government case against Sotheby's.⁹⁷ In the end, Christie's was forced to expose its participation in the cartel only because of the threat from its faithless agent. The exposure created hundreds of millions of dollars in private liability for both firms, and led to the conviction of Taubman.⁹⁸

The most faithless cartel agent of all, however, has to be Mark Whitacre. Whitacre exposed the international lysine cartel involving ADM, two Japanese producers, and two Korean producers of lysine.⁹⁹ He did so not because he felt any remorse about his participation in the criminal conspiracy; rather, Whitacre feared that the FBI agents would discover his other crimes unless their attention was focused on bringing down the lysine cartel. Audio-tapes and videotapes that Whitacre either made or helped secure caused the downfall of the lysine cartel,¹⁰⁰ including guilty pleas by all of the firms involved and most of the Japanese and Korean executives involved.¹⁰¹ When ADM executives pleaded not guilty,¹⁰² the videotapes formed the foundation of the prosecution's successful

96. See MASON, *supra* note 1, at 246-49.

97. *Id.* at 248-51; Gruner, *supra* note 95, at 296-97.

98. MASON, *supra* note 1, at 296-98, 343-46.

99. Details for this paragraph are primarily from EICHENWALD, *supra* note 7.

100. See *id.* at 131-36, 146-47, 152-57, 168-69, 179-83, 190-92, 200-01, 204-06, 216-23.

101. See *id.* at 503-06.

102. This included Whitacre himself for some of the price fixing that he participated in before becoming a government informant. He would have received immunity from this but for his breach of the terms of his cooperation agreement with the government. *Id.* at 506, 539, 541-42.

case.¹⁰³ All of the defendants went to prison.¹⁰⁴ Whitacre brought down the lysine cartel and generated the evidence that led to the imprisonment of his boss. In short, Whitacre was a faithless agent.

These are all instances of faithless agents within price-fixing conspiracies. Each had promised to implement the cartel agreements as directed by their respective principals, the bosses at their firms. Each had implicitly or explicitly promised not to talk to investigators, not to confess before a grand jury, not to take notes, and certainly not to videotape cartel meetings. These examples illustrate how agents, by betraying their principals, can topple cartels.

D. The Wisdom of Targeting Agents

These examples demonstrate why antitrust authorities should focus more anti-cartel efforts on individuals. Individual employees within price-fixing firms represent attractive targets for anti-cartel efforts for several reasons. First, because more individuals than firms participate in any given cartel, individuals form a greater pool of potential defectors. Furthermore, some cartels require multiple levels of employees within each conspiring firm. For example, in the vitamin cartel, senior executives of each firm held top-level meetings to set price and production quotas, but midlevel executives oversaw the actual cartel operations and made any necessary adjustments.¹⁰⁵ Each individual is capable of exposing the cartel; each one is a potential weak link in the chain.

Second, individuals are subject to unique leverage: prison. Even when firms are caught price fixing, the illegal conduct may still prove net-profitable.¹⁰⁶ The individual makes an attractive target for

103. See *id.* at 551-52.

104. See *id.* at 557-58.

105. See Stephen Labaton, *U.S. Outlines How Makers of Vitamins Fixed Global Prices*, N.Y. TIMES, May 21, 1999, at A1.

106. See, e.g., LIEBER, *supra* note 52, at 33-34 (noting that criminal fines and civil settlements did not disgorge the ill-gotten gains of the lysine cartel); see also Buccrossi & Spagnolo, *supra* note 71, at 14 (noting that empirical research and "[b]lack of the envelope calculations show that, given current resources of law enforcement agencies ... the Beckerian optimal fine may be above most firms' ability to pay, so that in many jurisdictions actual fines are insufficient to discourage the formation of cartels" (citations omitted)); John M. Connor & Darren Bush, *Deterring International Cartels in the Face of Comity and Jurisdiction: A Legal, Economic, and Empirical Evaluation of the Extraterritorial Application of U.S.*

anti-cartel efforts because the individual's participation can more easily be rendered not cost-beneficial through the prospect of imprisonment.¹⁰⁷ Certainly, the fear of prison largely motivated Mark Whitacre to expose the lysine cartel.¹⁰⁸ Antitrust authorities have repeatedly reaffirmed that "individual accountability through the imposition of jail sentences is the single greatest deterrent."¹⁰⁹

Third, a faithless agent can often be motivated to document the cartel and expose it for personal, sometimes nefarious, reasons. Although he had risen to the top of Christie's, Christopher Davidge was a man with unresolved personal issues. Unlike other Christie's executives, Davidge came from the lower-middle class, having been raised in a government housing project in North London.¹¹⁰ His job immediately prior to his ascension had been running the catalog printing division at Christie's.¹¹¹ Coming from a significantly lower social class, Davidge resented his employer, even as he rose to lead the company.¹¹² After a French billionaire had acquired control over

Antitrust Law 32-36 (Apr. 2, 2007), available at <http://ssrn.com/abstract=978846>.

The expected profitability of price fixing also means that the traditional solution to solving traditional agency costs in the corporate context—giving managers a greater equity stock in the firm—actually increases the manager's incentives to engage in price fixing because she can expect a positive net value even if the cartel is punished.

107. See Scott D. Hammond, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?*, in CORPORATE COMPLIANCE 2001, at 325, 335 (PLI Corp. Law & Practice, Course Handbook Series No. B-1248, 2001).

108. See *supra* notes 11-14 and accompanying text.

109. Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the Paris Working Party No. 3 Prosecutors Program: Ten Strategies for Winning the Fight Against Hardcore Cartels 3 (Oct. 18, 2005), available at <http://www.usdoj.gov/atr/public/speeches/212270.pdf>.

110. See MASON, *supra* note 1, at 61-66.

111. *Id.* at 65-66.

112. See Frantz, *supra* note 92. Frantz detailed Davidge's family history at Christie's:

At the heart of the inquiry is Mr. Davidge, 55, the former chief executive who never really fit in at the stuffy pinnacle of the British upper class, where bloodlines and old-school ties are prized.

Mr. Davidge was the third generation of his family employed by Christie's and by far the most successful. But he never forgot the fate of the first family member to work there, his grandfather. He was a clerk at Christie's when he died at 44.

Not long ago, Mr. Davidge described to a friend what the family said had followed his grandfather's death. Two Christie's representatives paid a call on his grandmother and explained that she would get a pension of seven pounds a month, a miserly amount even at the time. As part of the deal, they suggested

Christie's, Davidge and the new owner clashed and Davidge's forced departure seemed imminent.¹¹³ When he felt that Christie's was casting him aside, Davidge revealed the evidence of price fixing to Christie's outside counsel;¹¹⁴ this essentially was a blackmail strategy in which Davidge traded his cooperation with American antitrust prosecutors in exchange for Christie's providing a multi-million dollar severance package and indemnifying him against all fines and private liability, as well as paying his legal fees.¹¹⁵

Similarly, in the plumbing fixtures cartel, the executive secretary of the Plumbing Fixtures Manufacturers Association secretly taped the cartel meetings so that he could embezzle funds from the association and blackmail the members if he was ever caught.¹¹⁶ His faithless act exposed the cartel when the government discovered the tapes during an unrelated investigation.¹¹⁷

Fourth, targeting individuals could be a cost-effective anti-cartel strategy because the government only needs to flip one key employee in order to unravel the conspiracy. Christopher Davidge kept copious notes, which forced Christie's to make a deal with the Antitrust Division.¹¹⁸ Mark Whitacre created or helped generate the videotape and audiotape evidence that brought down the lysine cartel.¹¹⁹ If prosecutors can get just one employee with credible evidence of cartel activity to betray his principal, then the entire

she send her young son, Roy, to work at the auction house.

Roy Davidge rose to company secretary, an administrative post, but he never earned enough to move his family out of public housing. Still, he persuaded his son Christopher, who was 20, to join the firm as an apprentice printer in 1965.

It is a wonder young Davidge took the job. In an interview several years ago with *The Sunday Telegraph* of London, he said he grew up disliking Christie's because of its treatment of his father, who died at 54. "The chap next door who worked as a butcher's assistant earned more than my father," he said.

Id.

113. See MASON, *supra* note 1, at 237 (discussing how Davidge and Hindlip had a huge falling out that led to the new owner promising Hindlip that Davidge would be fired); see also Frantz, *supra* note 92.

114. See MASON, *supra* note 1, at 242-44.

115. See Gruner, *supra* note 95, at 296-98; see also *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 445 (S.D.N.Y. 2000) (quoting Indemnification and Joint Defence Agreement between Christie's and Christopher Davidge).

116. See David E. Mills & Kenneth G. Elzinga, *Cartel Problems: Comment*, 68 AM. ECON. REV. 938, 940 n.5 (1978).

117. See *id.*

118. See Frantz, *supra* note 92.

119. See *supra* notes 100-03 and accompanying text.

cartel will be exposed. Once the first individual flips and provides evidence to prosecutors, other conspirators will often see the writing on the wall and rush to make deals with the government. In many cases, it can be much easier to flip one individual employee than to convince a corporation that it should confess because any corporate decision to confess may require agreement among multiple individuals at the firm.

Finally, faithless agents can play the key role in creating and supplying the evidence necessary to prosecute price fixing successfully. Solid evidence is the key to prosecuting and dismantling cartels.¹²⁰ It is not enough for prosecutors to “know” that a cartel exists. For example, in the case of Sotheby’s and Christie’s, although the Department of Justice had been investigating the auction houses for suspected antitrust violations, the lack of inside information significantly hampered the government’s investigation.¹²¹ Davidge’s notes saved the prosecution.¹²² Cartel members sometimes maintain written records because cartel “agreements may be very complex, due to the variety of products and prices involved, and to the number of possible contingencies; limited memory may then call for keeping notes about the agreement.”¹²³ When a government investigation appears underway, cartel operatives are often commanded to destroy all incriminating documents.¹²⁴ Although loyal employees follow such orders, faithless ones retain evidence as their own personal insurance policy.

120. See Gary R. Spratling, *Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders*, in ADVANCED CORPORATE COMPLIANCE WORKSHOP 2001, at 374 (PLI Corp. Law & Practice, Course Handbook Series No. B-1230, 2001). Also, American antitrust prosecutors need a sufficient quantum of evidence before even starting an investigation. See *id.*

121. See Frantz, *supra* note 92 (describing the government’s investigation as “nearly defunct” before the discovery of Davidge’s notes); see also Orley Ashenfelter & Kathryn Graddy, *Anatomy of the Rise and Fall of a Price-fixing Conspiracy: Auctions at Sotheby’s and Christie’s* 10 (Nat’l Bureau of Econ. Research, Working Paper No. 10795, 2004), available at <http://www.nber.org/papers/w10795>.

122. See DAVID BOIES, *COURTING JUSTICE* 327 (2004) (discussing the Davidge papers and noting that “[a]fter a two-year investigation that had made little progress, here was the mother lode”).

123. Cécile Aubert, Patrick Rey & William E. Kovacic, *The Impact of Leniency and Whistleblowing Programs on Cartels* 29 (June 21, 2005), available at <http://idei.fr/doc/by/reyl/leniency.pdf>.

124. See LIEBER, *supra* note 52, at 155-56; Aubert et al., *supra* note 123, at 28.

The faithless employee may be the most efficient mechanism for collecting the evidence necessary to expose and convict price fixers. Individual employees can take notes, keep diaries, and record actual price-fixing meetings.¹²⁵ Evidence handed over by such employees can be used to pressure other cartel members to confess and present any documents they possess, which can be used against the remaining cartel members who have not confessed. In the graphite electrodes cartel, prosecutors employed this tactic to secure guilty pleas and over \$100 million in criminal fines.¹²⁶ Using evidence provided by employees increases the efficiency of both investigations and court proceedings.¹²⁷ Also, in the case of evidence located abroad, which is common with international cartels, employees can provide information that subpoenas cannot reach.¹²⁸ And even without physical evidence, insiders can detail the participants, scope, and duration of the cartel,¹²⁹ which can help prosecutors obtain search warrants to secure incriminating evidence and can be critically persuasive at trial.¹³⁰ As with many conspiracies, successful antitrust prosecution requires individuals who will testify against the defendants.¹³¹ For example, antitrust “prosecutors

125. See *Investigation Profile: How We Build Our Cases*, STATUS REP. (Atlanta Field Office of the U.S. Dep't of Justice Antitrust Div., Atlanta, Ga.), Spring 1999, at 4, 5, available at <http://www.polk.edu/purchasing/WebSite/Forms/AntiTrust2NEWS99.pdf> [hereinafter *Investigation Profile*].

126. CONNOR, *supra* note 42, at 492.

127. Cf. CARTEL SANCTIONS, *supra* note 49, at 47 (discussing Australian approach to anti-cartel efforts and leniency).

128. See ABA SECTION OF ANTITRUST LAW, HANDBOOK ON GRAND JURY INVESTIGATIONS 279-80 (3d ed. 2002) [hereinafter GRAND JURY INVESTIGATIONS].

129. See ABA SECTION OF ANTITRUST LAW, CRIMINAL ANTITRUST LITIGATION HANDBOOK 80 (2d ed. 2006) [hereinafter CRIMINAL ANTITRUST LITIGATION].

130. See Hammond, *supra* note 107, at 329 n.4 (detailing how a cartel member “provided the Division with information that allowed us to obtain warrants to search the offices of several of the [graphite electrodes] cartel members. The execution of the warrants, together with the other cartel members’ knowledge of an insider’s cooperation, quickly led to the guilty pleas of other co-conspirators.”); *Investigation Profile*, *supra* note 125, at 5 (“The use of search warrants has proven to be a highly effective tool in obtaining powerful documentary evidence that may well have been destroyed had the conspirators known about the investigation before the search team arrived.”).

131. See *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950) (“Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly.”); Ann C. Rowland, *Effective Use of Informants and Accomplice Witnesses*, 50 S.C. L. REV. 679, 697 (1999) (“It is a rare federal criminal trial that does not require the use of criminal

must prove criminal intent, which can be tricky in the absence of trustworthy informants.”¹³² Witnesses can also explain ambiguous documents. Thus, in the lysine cartel, one Japanese executive who pled guilty to criminal price fixing testified against his American counterparts, explaining that the agendas for meetings of the so-called lysine trade association were fake—“simply paperwork to explain why the lysine competitors had gathered in the same hotel room.”¹³³

In sum, cartel employees are uniquely vulnerable, susceptible to persuasion, and able to secure critical evidence. That makes them the perfect targets for antitrust investigators.

E. Aligned Interests: Cartel Employees' Incentives To Be Faithful Agents

Agency cost analysis explains that agents are much more likely to be faithful if their interests align with their principals' interests. Although agents inside a cartel are potential weak links that can defeat a price-fixing conspiracy, it may nevertheless be hard to convince cartel employees to betray their bosses because employees may conclude that fixing prices and concealing cartel conduct is in their best interest. It is clear why firms join cartels: profits are maximized. It may be less clear why individual employees participate in illegal price fixing. Through a combination of carrots and sticks, firms attempt to make it in their employees' self-interest to break the law, thus essentially aligning the interests of a price-fixing firm and its employees in both fixing price and concealing the cartel.

Individual employees can gain from fixing price and managing cartel operations because price fixing often increases their total compensation, either through direct payments or increasing their stock value. Employees of firms belonging to the folding-carton cartel, for example, sometimes received over half of their compensation in the form of bonuses, which were essentially determined by

witnesses”).

132. Gibeaut, *supra* note 50, at 58.

133. EICHENWALD, *supra* note 7, at 217; *see also* CONNOR, *supra* note 42, at 420 (“Mimoto testified that documents were prepared to cover up the true purpose of the lysine meetings: ‘It was camouflage ... There was a fake agenda’”).

how well they could fix and stabilize prices.¹³⁴ Such payments are perfectly logical. Although the corporation “receives the direct benefit from the individual’s cartel conduct,”¹³⁵ employees may demand a premium for engaging in illegal activity and, flush with cartel profits, price-fixing firms are often willing to share the spoils.¹³⁶ Both parties gain financially from the conspiracy.

Related to the direct financial rewards, some employees feel that participating in price fixing is in their interest out of a sense of loyalty to their employer, who treats them well and provides job security.¹³⁷ Many price fixers are motivated by a sincere desire to help their company’s bottom line.¹³⁸ In sentencing defendants in the electrical equipment cartel cases, one judge chastised the executives as:

torn between conscience and an approved corporate policy, with the rewarding objective of promotion, comfortable security, and large salaries. They were the organization or company man, the conformist who goes along with his superiors and finds balm for his conscience in additional comforts and security of his place in the corporate set-up.¹³⁹

Finally, individual employees are also rewarded within the firm through social norms in which successful price fixers receive the respect and esteem of their superiors and work colleagues.¹⁴⁰

In addition to the potential personal payoff for individual employees who assist in running the cartel, the interests of the principal and agent are also aligned in price fixing to the extent that if an employee does not participate, he is punished. Executives who

134. See Jeffrey Sonnenfeld & Paul R. Lawrence, *Why Do Companies Succumb to Price Fixing?*, HARV. BUS. REV., July-Aug. 1978, at 145, 149.

135. CARTEL SANCTIONS, *supra* note 49, at 100.

136. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1341 (2003) (“As with any employment contract, a conspirator will expect compensation for her input and labor costs, and will also seek some premium for her legal risks.”).

137. See Baker & Faulkner, *supra* note 78, at 842.

138. See F. Joseph Warin, David P. Burns & John W.F. Chesley, *To Plead or Not To Plead?: Reviewing a Decade of Criminal Antitrust Trials*, ANTITRUST SOURCE, July 2006, at 4, available at <http://www.abanet.org/antitrust/at-source/06/07/Jul06-Warin7=20f.pdf>.

139. Geis, *supra* note 83, at 146; see also ANTITRUST COMPLIANCE, *supra* note 30, at 31 (“The history of antitrust prosecutions is rife with examples of ministerial employees who participated in the crime even though they personally would not profit.”).

140. See Warin et al., *supra* note 138.

do not cooperate with price fixing are transferred or dismissed.¹⁴¹ For example, GE “relieved” a manager who would not fix prices for electrical equipment,¹⁴² and ADM fired an employee who refused to cooperate with one of its cartels.¹⁴³ Raising the stakes for individuals even more, in the folding-carton cartel, “some executives threatened others with physical violence if they resisted raising prices.”¹⁴⁴ At the height of the electrical equipment cartel, GE may not have threatened physical violence, but it did rely on coercion and strong social norms to pressure its executives to fix prices.¹⁴⁵ One GE executive had been so “‘chewed out’ for his inability to get prices ‘stabilized’” in his segment of the electrical equipment industry that he was driven to suicide; the “suicide stunned General Electric executives and other high echelon managers in other companies. But life and meetings in the electrical industry went on.”¹⁴⁶ Testimony from the price fixers after the exposure of the electrical equipment cartels suggests that the threat of reprimand “if they failed to conform to price-fixing expectations” drove the individual cartel agents more than the promised rewards.¹⁴⁷

The interests of the firm and its employees are also aligned in *concealing* the price-fixing activity. From the firm’s perspective, exposure may subject it to hundreds of millions of dollars in criminal and civil liability. But each individual employee also has strong incentives to conceal cartel activity. First, exposure of the cartel could subject the individual to criminal fines and to civil liability from both consumer antitrust suits and shareholder derivative suits.¹⁴⁸ Second, exposure creates the possibility of jail time. Individual employees clearly do not want to be convicted and

141. Sonnenfeld & Lawrence, *supra* note 134, at 157 n.11 (“Executives who were uncooperative with price-fixing training were transferred by the company.”).

142. JOHN G. FULLER, *THE GENTLEMAN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY* 133-34 (1962).

143. CONNOR, *supra* note 42, at 145 n.7; LIEBER, *supra* note 52, at 199 (noting that “an ADM employee named Wayne Brasser had been fired for refusing to participate in citric acid price-fixing”).

144. Sonnenfeld & Lawrence, *supra* note 134, at 149.

145. *Id.* (“A GE vice president describing the type of coercion placed on an executive who resisted the norms of collusion stated, ‘We worked him over pretty hard, and I did too; I admit it.’”).

146. HERLING, *supra* note 85, at 250.

147. Geis, *supra* note 83, at 146.

148. See CONNOR, *supra* note 42, at 84-85, 382-83, 454; Gruner, *supra* note 95, at 312-13.

sentenced to prison.¹⁴⁹ Third, most employees need to conceal the cartel in order to keep their jobs. For example, the members of the vitamin cartel ordered executives "to destroy all records and notes of their meetings or face possible termination if anyone found out."¹⁵⁰ Just as the careless agent risks termination, the faithless agent who exposes the cartel is almost bound to be fired.¹⁵¹ Finally, individuals may desire to conceal the cartel out of a sense of loyalty to the firm. Employees have personal relationships among their work colleagues. Most individuals would not want to expose the cartel because they fear the social stigma of being a snitch; whistleblowers commonly face harassment and ostracization.¹⁵² Exposure of cartel activity could also harm the agent's colleagues by imperiling the firm's financial situation, forcing layoffs, and significantly reducing employee compensation and shareholder value, all of which happened to Sotheby's in the aftermath of the auction house price-fixing scandal.¹⁵³ In short, once the price fixing begins, the employees within each cartel member firm share their employers' incentives to conceal the criminal activity from the outside world.

III. DECOUPLING INTERESTS FROM THE AGENT'S PERSPECTIVE

Although a single employee can be the key to bringing down a cartel, most cartel agents who are aware of price-fixing activity have insufficient reason to expose it.¹⁵⁴ Agency cost theory teaches that agents are less likely to be faithless when their interests are in sync with the principal's goals. In an effort to create faithless agents within cartels, antitrust law should decouple the interests of the

149. See *infra* notes 169-71 and accompanying text. Firms also have an interest in their executives not going to jail. When firms have employees in prison for price fixing, they lose valuable workers and risk damaging relationships with their suppliers and customers. See Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917, 936-37 (1987).

150. Labaton, *supra* note 105.

151. See First, *supra* note 51, at 720 n.37 ("ADM had fired Whitacre shortly after learning of his role as an informant [who exposed the lysine cartel] and accused him of embezzling company funds." (citing Thomas M. Burton & Scott Kilman, *Three Ex-ADM Executives Are Indicted—Wilson, Michael Andreas and Informant Whitacre Cited in Antitrust Case*, WALL ST. J., Dec. 4, 1996, at A3)).

152. See BOIES, *supra* note 122, at 234.

153. Ashenfelter & Graddy, *supra* note 121, at 15-16.

154. See CARTEL SANCTIONS, *supra* note 49, at 8.

cartel principals and their employees.¹⁵⁵ The following Sections consider several avenues for doing so: punishing employees for faithfully fulfilling their cartel duties; rewarding employees who defect from the cartel; convincing employees to distrust their price-fixing bosses; altering the expected costs and benefits of faithful and faithless conduct; and educating employees as to why exposing cartels serves their interests.

A. Punishing the Faithful Agent

One obvious way to encourage employees to betray a price-fixing boss is to punish them for being faithful. In theory, levying significant sanctions against individual employees should deter them from participating in price fixing and encourage them to expose cartels, including by providing evidence sufficient to convict the conspirators. Antitrust authorities attempt to fashion the appropriate level of individual penalty that will cause cartel insiders to cooperate with antitrust enforcement officials.

Fines are the most common sanction against firms and individuals caught engaging in cartel activity. Although most headline-grabbing fines are against firms, individual employees have reached settlements to pay significant criminal fines, sometimes as high as \$10 million.¹⁵⁶ Upon his conviction in the auction house cartel case, Sotheby's chairman Alfred Taubman was ordered to pay a criminal fine of \$7.5 million, which represented one-fifth of his assets.¹⁵⁷ Despite the theoretical possibility of designing the optimal fine, financial penalties may not be enough to deter individuals from participating in price-fixing activity. In some cases, individuals have spent all of their ill-gotten gains from price fixing long before the imposition of criminal sanctions. Thus, a court cannot impose a substantial fine that the defendant can actually pay.¹⁵⁸ By making

155. *See id.*

156. Gruner, *supra* note 95, at 277 n.9; *see also* CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 466-67. As of 2004, more than forty corporations have paid criminal antitrust fines of \$10 million or more. Murray J. Laulicht, *Recent Developments in Criminal and Civil Price-Fixing Cases*, N.J. LAW. MAG., June 2004, at 26, 27, available at 228 NJLAW 26 (Westlaw).

157. Ashenfelter & Graddy, *supra* note 121, at 11, 16. Taubman was also sentenced to a year and a day in prison. *See infra* note 201 and accompanying text.

158. *See* CARTEL SANCTIONS, *supra* note 49, at 72 (discussing Israeli case involving PVC

themselves essentially judgment-proof, individual cartel operatives can effectively prevent antitrust enforcers from imposing the optimal fine that would deter price fixing in the first place.¹⁵⁹

Furthermore, individuals can be compensated by their employers—directly and indirectly—for financial penalties against price fixing. The law tries to prevent such reimbursement by prohibiting indemnification for criminal fines.¹⁶⁰ This is sound policy because indemnification arrangements align the interests of the principal and the agent in price fixing; specifically, they remove one of the agent's disincentives to breaking the law and, thus, encourage criminal behavior.¹⁶¹ In theory, eliminating indemnification should increase deterrence by forcing the agent to personally bear the brunt of any antitrust penalties.¹⁶² Unfortunately, forbidding indemnification or reimbursement alone does not necessarily render price fixing unprofitable for the individual because such prohibitions can be circumvented. For example, the "reimbursement" can be paid upfront in the executive's salary, as either a risk premium or the actual amount of expected fines, including legal costs.¹⁶³

The ease of evading individual fines counsels in favor of imprisoning employees who participate in criminal cartel activities. Imprisonment as a punishment for price fixing is less susceptible to evasion than monetary penalties.¹⁶⁴ A firm cannot easily compensate its employees for time spent in a federal prison.¹⁶⁵ Also, the threat

pipe cartel).

159. See *id.* at 17 (noting that the "[optimal] fine might exceed statutory ceilings and/or the individual's ability to pay").

160. See, e.g., DEL. CODE ANN. tit. 8, § 145(a) (2001); Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002-03: On Sideshow Prosecutions, Spitzer's Clash with Donaldson over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 462 n.76 (2004) ("Corporate indemnification for criminal fines is not allowed under state corporate statutes unless 'he had no reasonable cause to believe his conduct was unlawful.'" (quoting MODEL BUS. CORP. ACT § 8.51(a)(1)(iii) (2005))).

161. Katyal, *supra* note 136, at 1384-85.

162. See *id.*

163. See CARTEL SANCTIONS, *supra* note 49, at 17.

164. See *id.* at 100 ("If the individual is subject only to a fine, he could escape punishment altogether by having his employer pay the fine. In most cases, it is impracticable, if not impossible, to prevent a company from finding a way to reimburse an employee for any fine paid. Therefore, incarceration is the single greatest deterrent to the commission of antitrust offenses.").

165. See CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 90.

of imprisonment works against individuals regardless of their ability to pay the optimal fine.¹⁶⁶ Thus, prison has the advantage that it forces the convicted to pay their debt to society.

Imprisonment also has the additional benefit of imposing a significant social stigma, the threat of which can itself be a powerful disincentive to price fixing.¹⁶⁷ Some argue that business executives may find the stigma of imprisonment much more of a deterrent than non-white-collar criminals.¹⁶⁸ Certainly, some executives have shown that they do not want to be associated with the latter. In the electrical equipment cartel, the counsel for one GE senior manager decried that it would be "cold-blooded" to put this executive in prison with "common criminals."¹⁶⁹ And just as a cartel firm cannot easily reimburse its imprisoned employees for the loss of liberty they suffer, it cannot easily compensate them for the social stigma of serving hard time.¹⁷⁰

An individual's desire to avoid imprisonment operates on an emotional level, not just an economic one. A firm's decision either to participate in or expose a cartel is, by contrast, fundamentally an economic decision. The imprisonment penalty does not drive the firm's decision making in the way that it can motivate individuals to cooperate with antitrust authorities. Indeed, "executives' fear of getting tossed into the clink probably does more to fuel the race to

166. See CARTEL SANCTIONS, *supra* note 49, at 15 ("Whether or not it is legally possible to impose an optimal organisational fine and practically possible to calculate it in a given case, actually imposing it might present problems. The optimal fine could simply be too large for the entity to bear, causing bankruptcy and possible exit from the market, which itself could diminish competition. Thus, there is a place for sanctions against natural persons, placing them at risk individually for their conduct. Such sanctions can complement organisational fines and provide an enhancement to deterrence." (citation omitted)).

167. Werden & Simon, *supra* note 149, at 935 ("[A] major portion of the disutility businessmen experience as a result of imprisonment is the stigma and humiliation associated with incarceration"); see also ERIC A. POSNER, LAW AND SOCIAL NORMS 89 (2000) ("The average white collar criminal fears the shame of a prison term more than a fine, which is not so shameful.").

168. See CARTEL SANCTIONS, *supra* note 49, at 100. Also, serving time in person can reduce one's employability upon release. See Leslie, *Trust, Distrust, and Antitrust*, *supra* note 24, at 647 ("In addition to the criminal stigma, being out of the loop while in prison can reduce an executive's business connections, development of relevant skills, and maintenance of necessary personal relationships.").

169. Geis, *supra* note 83, at 140 (quoting Anthony Lewis, *7 Electrical Officials Get Jail Terms in Trust Case*, N.Y. TIMES, Feb. 7, 1961, at A1).

170. See CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 90.

the prosecutor than anything else.”¹⁷¹ In short, people may be willing to gamble more freely with the corporation’s money than with their own freedom.

Although the Sherman Act criminalized price fixing in 1890, a lengthy prison term for violators was not a serious threat until 1974. Until then, price fixing was a misdemeanor with a one-year maximum sentence; most convicted price fixers were sentenced to no jail time and those who were sentenced generally received suspended sentences of thirty days or less.¹⁷² In 1974, Congress made price fixing a felony and increased the maximum prison sentence to three years.¹⁷³ Since then, the government has more vigorously pursued imprisonment as a punishment.¹⁷⁴ Most significantly, in 2004, Congress considerably increased the maximum sentence to ten years.¹⁷⁵ While this presents an opportunity to increase deterrence of individuals agreeing to participate in cartel

171. Gibeaut, *supra* note 50, at 59 (citing Washington plaintiff’s lawyer Kenneth L. Adams).

172. CONNOR, *supra* note 42, at 434. Breit and Elzinga reviewed the early sentences for price fixing:

From 1940 to 1955 only eleven prison sentences were imposed, and in almost every case the sentences were suspended. It was not until 1959 that a prison sentence was imposed for price-fixing alone, in which no acts of violence or union misconduct were involved. In that case the court imposed a ninety-day prison term on four individuals and fined each \$5,000. The year 1960 saw the advent of the notorious electrical equipment cases. By 1966, at the termination of these cases, seven company officials had received thirty-day jail terms, a fact that led a number of observers to believe that a new era had been ushered in. But this belief proved premature. From 1966 to 1973 only eighteen cases resulted in the imposition of jail sentences. In only seven of these was time actually served, as compared to the 1955-1965 period when twenty-six cases resulted in jail sentences with only six actually served.

WILLIAM BREIT & KENNETH G. ELZINGA, *ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS* 52 (1986) (citation omitted).

173. CONNOR, *supra* note 42, at 434.

174. Whether following criminal convictions or plea agreements, executives from the lysine, vitamins, graphite electrodes, and auction house cartels all served prison sentences in the United States. This includes foreign executives from countries including Canada, Germany, France, Sweden, and Switzerland. J. Anthony Chavez, *Prosecution of International Cartels and Compliance Programs*, in 44TH ANNUAL ANTITRUST LAW INSTITUTE, at 820-21 (PLI Corp. Law & Practice, Course Handbook Series No. B-1371, 2003).

175. See CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 2 (citing Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, § 215(a), 118 Stat. 661, 668 (2004)).

schemes, much will depend on how prosecutors and courts put into practice the new possibility of longer sentences.

When the maximum sentence was one year, convicted price fixers served mere days in prison, if that. After Congress increased the maximum sentence to three years, although some sentences did increase, prosecutors and judges routinely resisted imposing the maximum.¹⁷⁶ For example, even after a jury convicted ADM's executives of price fixing in the billion dollar international lysine market—based largely on the videotapes of their actual cartel meetings¹⁷⁷—the district court judge declined to impose three-year sentences, opting instead for two-year sentences, despite the fact that the convictions represented the most significant criminal antitrust convictions in history.¹⁷⁸

Some commentators have suggested that prison sentences need not be long for price fixers because merely having to serve any time in prison has a sufficient deterrent effect on business executives that it would not have for other criminals.¹⁷⁹ While prison terms should deter price fixing, short sentences may not suffice.¹⁸⁰ First, longer sentences communicate the gravity of the crime, both to actual and would-be price fixers.¹⁸¹ Second, even as average prison terms have risen to approximately eighteen months for price fixing, businesspeople continue to form and participate in cartels.¹⁸² This

176. However, statistics show that the average prison sentence for price fixing increased in the first three years since 2000. See Gibeaut, *supra* note 50, at 59.

177. See *supra* notes 102-03 and accompanying text.

178. *United States v. Andreas*, No. 96-CR-762, 1999 WL 515484, at *13 (N.D. Ill. July 15, 1999). The government later successfully appealed in *United States v. Andreas*, 216 F.3d 645, 679-80 (7th Cir. 2000).

179. See CARTEL SANCTIONS, *supra* note 49, at 20 (discussing the assumption “that even short term prison sentences are viewed by business executives as extremely undesirable and costly, and that the stigma and reputational losses associated with a criminal conviction to serve time in jail would exist for any non-trivial time in jail”); Gibeaut, *supra* note 50, at 59 (“Six months in jail has a very different effect on the future and lifestyle of a corporate CEO than it does on a drug dealer.” (quoting Washington plaintiff's lawyer Kenneth L. Adams)).

180. See CARTEL SANCTIONS, *supra* note 49, at 8.

181. See *id.*

182. See *id.* at 101 (“The argument has been made that the marginal deterrent effect on price fixers and other white collar criminals may remain high only for rather short terms of imprisonment and then fall off rapidly. In our experience, however, over the last two years the average term of incarceration has been 18 months, a relatively long sentence, and yet cartel activity continues to be uncovered.”).

is evidence that current sentencing practices are too relaxed to sufficiently deter.

Undue leniency in sentencing offenders undermines the deterrent potential of criminal antitrust statutes.¹⁸³ Yet examples of undue leniency abound.¹⁸⁴ In the case of the folding-carton cartel in the mid-1970s, forty-eight executives from twenty-two companies were convicted of price fixing.¹⁸⁵ Among the convicted defendants, only one-third were sentenced to prison—with terms ranging from five to sixty days.¹⁸⁶ Another third were placed on probation and fined between \$500 and \$30,000.¹⁸⁷ The final third merely received fines ranging from \$100 to \$2,500.¹⁸⁸ Thus, some individuals were convicted of criminal price fixing in a multi-million dollar cartel and the punishment was a \$100 fine,¹⁸⁹ hardly a compelling deterrent.¹⁹⁰

Similarly, in the citric acid cartel, the ordinary sentencing calculation would have led to Hans Hartmann receiving a prison term of 24 to 30 months and a fine of \$350,000.¹⁹¹ Instead, the DOJ supported substantial leniency.¹⁹² Not only did Hartmann pay less than half of the standard fine, he received no prison time at all; indeed, he did not have to pay restitution, receive home detention,

183. See Leslie, *Trust, Distrust, and Antitrust*, *supra* note 24, at 653-54.

184. See CONNOR, *supra* note 42, at 561 ("The DOJ has been criticized for giving away too much when it negotiated guilty pleas for corporate and individual members of global cartels that were convicted in the late 1990s.").

185. Sonnenfeld & Lawrence, *supra* note 134, at 155.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. See also Baker & Faulkner, *supra* note 78, at 855-56 (detailing low punishments in the electrical equipment cartels).

Low sentences were also the hallmark for individuals who pled guilty in the international vitamin cartel. Although the vitamin cartel led to billions of dollars in illegal overcharges and every member firm pleaded guilty, the individuals who actually performed the price fixing over several years cut deals and received relatively short prison sentences, with none serving more than a year. First, *supra* note 51, at 717. While one former Vice President of Sales and Marketing agreed to serve one year and one day, *id.*, the move was purely strategic because that was the minimum sentence needed to make him eligible for time off for good behavior before serving his full sentence. Unlike the folding-carton and electrical equipment cartels, however, these relatively light sentences were probably a function of plea agreements and the fact that many of the individuals were foreigners who voluntarily submitted to American jurisdiction.

191. CONNOR, *supra* note 42, at 388. This case occurred prior to the increase of the maximum sentence to ten years.

192. *Id.*

or even face probation.¹⁹³ Although the government referred to his cooperation at the eleventh hour, Hartmann's employer, Bayer, was the last member of the cartel to settle with the government; thus, Hartmann provided no information necessary to convict other cartel members.¹⁹⁴

Indeed, individual employees have sometimes escaped punishment altogether without either cooperating or accepting responsibility. For example, the president of one company convicted of participating in the electrical equipment cartels denied fixing price at all, characterizing the company's conduct as an attempt to "recover costs."¹⁹⁵ Nonetheless, he was still spared any prison time upon conviction due largely to his age, sixty-eight years old.¹⁹⁶ While sympathy is natural, if the price fixer had wanted leniency, he should have cooperated with investigators. The sentencing of antitrust violators, however, shows that cooperation is not a prerequisite for leniency. Federal judges often grant leniency in sentencing to convicted price fixers based purely on the defendant's advanced age, which is generally in the mid-sixties.¹⁹⁷ But price fixing is not a crime of the young; cartel leaders are often senior executives, who have sometimes been engaging in price fixing for decades. If older executives automatically receive a discount upon conviction, deterrence is necessarily undermined.

A final example of unearned leniency comes from the auction house price-fixing case, which involved four major participants: Anthony Tennant and Christopher Davidge from Christie's and Alfred Taubman and Dede Brooks from Sotheby's. Attorneys representing Christie's provided significant evidence against their counterparts at Sotheby's in exchange for immunity from criminal prosecution.¹⁹⁸ Dede Brooks made a separate deal with prosecutors to testify against her boss, Alfred Taubman, in exchange for leniency.¹⁹⁹ As the sole conspirator who did not cooperate with officials and was convicted of felonious price fixing, one would have

193. *Id.*

194. *See id.*

195. Geis, *supra* note 83, at 147.

196. *Id.* His wife's illness played a role as well.

197. *See Leslie, Trust, Distrust, and Antitrust, supra* note 24, at 654.

198. MASON, *supra* note 1, at 245-47.

199. *See Ashenfelter & Graddy, supra* note 121, at 10-11.

expected Taubman to receive a relatively long prison sentence. Yet, the judge initially sentenced Taubman to only one year in prison and a \$7.5 million fine.²⁰⁰ Taubman's attorney asked for the sentence to be increased to a year and a day in order to make Taubman eligible for time off for good behavior, a request that the judge granted.²⁰¹ Thus, Taubman ultimately served less than one year in prison after being convicted of instigating a cartel that resulted in millions of dollars of consumer overcharges. If he had actually confessed to authorities, it is not clear that Taubman, as the last person in the cartel to confess, could have negotiated a better plea bargain before trial than the punishment he received upon conviction after trial. This is a disappointing result; punishment after conviction must be more harsh than cooperation at *any* stage. Otherwise, a guilty individual may perceive that she is better off continuing to deny and obfuscate instead of cooperating with antitrust officials.

In short, unearned leniency in sentencing price-fixing employees interferes with the goal of reducing antitrust conspiracies for two related reasons. First, it sends the wrong message to those considering cartelization about the seriousness of their crime. Second, reducing the sentence for reasons unrelated to cooperation with antitrust authorities decreases deterrence as price fixers discount the anticipated punishment for their crimes.²⁰² The result is that a cartel's agents may not feel sufficient pressure to be faithful.

One way to increase agents' perceived probability of imprisonment is through the judicious use of carve-outs. Under the Antitrust Division's Corporate Leniency Program, the first eligible firm to confess to participation in an illegal cartel obtains immunity from all criminal fines, and its cooperating employees all avoid imprisonment.²⁰³ The later-confessing firms do not necessarily receive such five-star treatment. Those firms get a reduction in their base fine depending on their order of confession, but they do not automati-

200. MASON, *supra* note 1, at 360.

201. *Id.*

202. Of course, reductions in sentence can be justified by other policy concerns. But judges should explicitly recognize that unearned leniency reduces deterrence, and that any rationale for granting leniency must be weighed against the effect it could have on deterring illegal price fixing.

203. CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 75.

cally obtain blanket immunity for their employees.²⁰⁴ Instead, while the firms can attempt to negotiate package deals that include protection for their price-fixing executives, antitrust prosecutors may require that the later-confessing firms “carve out” some of their employees from the plea bargain.²⁰⁵ After one cartel member has already secured amnesty, when the antitrust prosecutors discuss deals with the other firms,

in the early stages of corporate plea negotiations, the Division staff will identify a set of executives as potential ‘carve-outs’ from the employee nonprosecution and cooperation provisions of the potential corporate plea agreement. The carve-outs likely will include culpable individuals to whom the Division is ready to send a target letter, implicated individuals against whom the Division is still developing evidence, and individuals knowledgeable about the cartel who refuse to cooperate in the Division’s investigation. The Division typically insists that these individuals obtain separate counsel, and those individuals will be given the opportunity to proffer their cooperation to the government and asked if they can implicate higher-level corporate officials. Depending on their willingness to cooperate, their level of culpability, and their position in the company, some of the potential carve-outs may be able to negotiate immunity deals or favorable plea agreements.²⁰⁶

Carved-out employees must negotiate separately with prosecutors and often “the individuals should understand that any subsequent plea disposition with the Division would have to include a jail component. If no deal can be reached, then the individuals will be indicted.”²⁰⁷ Absent an acceptable plea bargain, they face being prosecuted with the evidence provided by their own employer as well as all of the other cartel members who confessed, as happened to individuals in the sorbates cartel.²⁰⁸ Carved-out employees often

204. *See id.* The second confessing firm receives a greater discount off its base fine than the third confessing firm; the third confessing firm receives a greater discount than the fourth confessing firm, and so on.

205. *Id.* at 87-88.

206. *Id.* at 88.

207. Hammond, *supra* note 107, at 337.

208. *See id.* at 335-36.

serve jail time.²⁰⁹ For example, in the case of the international vitamin cartel, because Rhône-Poulenc confessed first, it earned full amnesty from American criminal prosecution for both the corporation and all of its officers, directors, and employees in the United States and abroad.²¹⁰ Because Rhône-Poulenc's co-conspirators Hoffmann-La Roche and BASF failed to confess first, each had to carve out four employees, most of whom submitted to U.S. jurisdiction (despite being foreign nationals) and served prison time in America, as well as paid large criminal fines.²¹¹

Antitrust policy should maximize each cartel agent's fear that its employer will work out an amnesty deal that has a carve-out provision. Anxiety over being carved out may cause an otherwise faithful agent to expose a cartel quickly. Any employee who worries that his firm will not confess first and that he will be sacrificed is better off confessing immediately as an individual. The threat of being carved out has proven a powerful motivator for cartel agents in the past: Davidge's concern about being carved out led him to reveal his cache of notes documenting the auction house cartel.²¹² In addition to helping expose cartels, the carve-out threat could also provide a significant disincentive for workers to accept jobs at firms that have reputations for engaging in price fixing. This could put another burden on price-fixing firms by making them less efficient in the long run as more capable executives go to law-abiding firms.

A proper carve-out policy can align the principal and agent's interests in confessing participation in illegal price fixing.²¹³ Recognizing its agents' incentives to confess as individuals, each firm has greater reason to confess sooner as a corporate act in order to get the best deal possible and, if it confesses first, to avoid criminal liability altogether. Firms that fear that someone else will expose the cartel may also want to confess first and prevent any employee carve-outs because carving out individuals also hurts the firm, as its executives or other employees are indicted as criminals. In the case of foreign firms, their key employees may not be able to

209. See *id.* at 338 (discussing graphite electrode cartel).

210. *Id.* at 339.

211. *Id.*

212. See MASON, *supra* note 1, at 243.

213. See CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 88.

enter the United States or travel freely elsewhere.²¹⁴ After being carved out of their firm's cooperation agreements with the Antitrust Division, several executives of Japanese chemical companies, who engaged in fixing prices of food preservatives, were considered international fugitives by the U.S. government, meaning "they could be arrested, detained, extradited to the United States, and held for trial if they travel[ed] to or through any one of a host of countries with which the United States has an extradition treaty covering antitrust crimes."²¹⁵

In order to maximize the incentives for firms and employees to confess, the carve-out policy should be employed to insure that some participants in every exposed cartel serve time in prison. Unfortunately, evidence suggests that the Antitrust Division may be undermining its own program by not always aggressively prosecuting those executives who have been carved out.²¹⁶ Even after firms have pleaded guilty to price fixing—and successful conviction of the individual participants is virtually assured—the Division has entered into individual plea agreements, with prison sentences for carved-out individuals of just four to six months.²¹⁷ Indeed, in some past instances, in order to obtain insider testimony, every individual who participated in a cartel was given immunity from criminal prosecution.²¹⁸ That is a mistake: *Somebody* should be left holding the bag because the threat of being that person will motivate cartel agents to defect more quickly. The emphasis in current enforcement efforts appears to be on securing large criminal fines against price-fixing corporations instead of meaningful prison sentences against the individuals who actually engage in fixing price, which undermines deterrence of individual participation in price-fixing conspiracies.²¹⁹

Making lengthy prison terms the norm for carved-out executives would enhance deterrence of price fixing. Of course, there should be no mandatory carve outs for the first firm to confess; thus, once

214. See Hammond, *supra* note 107, at 336.

215. *Id.* at 335-36.

216. See Summary of Antitrust Modernization Commission Hearing on Criminal Remedies 2-3 (Nov. 3, 2005) (comments of Tefft W. Smith), available at <http://www.atanet.org/antitrust/at-links/pdf/at-mod/criminal-remedies.pdf> [hereinafter AMC Hearing].

217. See *id.* at 9-10.

218. See Werden & Simon, *supra* note 149, at 931-32.

219. See AMC Hearing, *supra* note 216.

exposure of the cartel seems likely, everyone within each member firm shares the same incentive to confess first. But mandatory carve-outs for some individuals at all other firms within the cartel would create a powerful incentive for agents to be faithless. Cartel managers would be less likely to risk that their firm will not confess first and that they will be carved out from any deals if the certainty of imprisonment for carved-out individuals were greater. Our antitrust enforcement regime needs to make prison a more meaningful threat—longer sentences and greater certainty of prison for those who do not confess first.²²⁰

In sum, the threat of a long prison sentence for employees who engage in price fixing can destabilize cartels because it decouples the interests of the price-fixing firms from those of their employees. While a cartel member firm can compensate its agents for financial penalties, the firm cannot generally make its employees whole if they are sent to prison. Price fixers value their freedom more than their money, as shown by the fact that antitrust defendants frequently request “to pay substantial fines in lieu of receiving a jail term” but “[n]ever has an antitrust target in the U.S. offered to go to jail in lieu of paying a fine.”²²¹ But for the prison threat to properly deter illegal price fixing, cartel agents must perceive a certainty of imprisonment upon detection.²²²

B. Rewarding the Faithless Agent

Cartel agents participate in price fixing in part because they believe that the costs of defection are high.²²³ In order to counterbalance this perception, antitrust law should provide offsetting benefits to negate these costs. Antitrust authorities must give sufficient incentive for employees with evidence of price fixing to step forward—confidentially if necessary—and provide information to prosecutors. This Section discusses three possible rewards: freedom

220. See *id.* at 11 (“There should be *certainty* that the *right* people will be *persistently* prosecuted and sent to jail.”).

221. CARTEL SANCTIONS, *supra* note 49, at 100.

222. See Donald I. Baker, *The Use of Criminal Law Remedies To Deter and Punish Cartels and Bid-rigging*, 69 GEO. WASH. L. REV. 693, 706 (2001).

223. See *supra* Part II.E.

from criminal prosecution; freedom from private civil liability; and antitrust bounties.

1. Individual Leniency Program

Fear of prison is a large motivating factor in how individuals transact cartel business. They seek to conceal cartel operations by using code names, having clandestine meetings, and destroying any paper trail.²²⁴ This same fear of imprisonment can be transformed into a carrot if early confessors are rewarded with a get-out-of-jail-free card. The Antitrust Division has sought to do this through its Individual Leniency Program.²²⁵

In addition to its Corporate Leniency Program, the Antitrust Division maintains a parallel program for individuals.²²⁶ Under the Leniency Policy for Individuals, an individual cartel participant can secure automatic amnesty so long as he is the first source to expose the cartel, cooperates fully with the government investigation, was not the cartel leader, and has not coerced others into fixing price.²²⁷ The Individual Leniency Policy has been seldom used, especially in comparison to the Corporate Leniency Program.²²⁸ That is surprising given that individual employees have more to lose by not cooperating than does a corporation. One reason why we see little use of the Individual Leniency Policy may be that an individual agent may simply convince her employer to confess on a firm-wide basis, which grants protection to all individuals within the first-confessing firm.²²⁹ That would explain the behavior of agents in

224. See *supra* notes 51-53 and accompanying text.

225. See CORPORATE LENIENCY POLICY, *supra* note 31.

226. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS (1994), available at <http://www.usdoj.gov/atr/public/guidelines/0092.pdf>.

227. See Leslie, *Antitrust Amnesty*, *supra* note 35, at 466 (criticizing these limitations as applied to the Corporate Leniency Program and advocating amnesty for the first confessor without restriction).

228. See AMC Hearing, *supra* note 216, at 3.

229. If a corporation qualifies for amnesty, individuals who come forward with the firm also will receive amnesty. If a corporation does not qualify for amnesty, individuals within the firm who come forward will be considered for immunity as if they had approached the Division individually. See CORPORATE LENIENCY POLICY, *supra* note 31; see also Buccrossi & Spagnolo, *supra* note 71, at 19 ("Individual applications are never observed, but this does not imply that individual leniency is ineffective. It is not directly used, but it is a credible threat in the hands of individual whistleblowers that pushes corporations to apply for corporate leniency before

those firms that do in fact seek amnesty under the Antitrust Division's corporate program. But for many cartels, no member firm seeks amnesty; cartels exist undetected and unexposed. Why do individuals in those cartels not confess? It must be because they do not believe that the benefits of confession outweigh the costs of detection.²³⁰ Antitrust policy should be structured to alter these perceptions.

Cartels collapse when insiders compete to confess first. The Corporate Leniency Guidelines already create a race to confess among firms, with the winner receiving amnesty.²³¹ In addition to the cartel-wide race, antitrust authorities should generate a race within each firm. Antitrust policymakers could consider exempting from imprisonment the first individual from each firm who confesses to participating in the cartel, if she presents evidence against other price fixers within her firm.²³² This would create an ex ante incentive for employees to keep clandestine files on cartel activity so that they can offer meaningful assistance to authorities when the hammer falls or when they fear that the cartel is about to be discovered. And this individual amnesty should be available even after other corporations in the cartel have cooperated with the government and have secured amnesty.²³³ This change would give individual conspirators within each firm a significant incentive to distrust each other, just as the corporate amnesty program gives each firm an incentive to distrust its cartel partners.²³⁴ Recent

its managers apply individually.”).

230. This refers to the costs of detection discounted by the probability of detection.

231. See Leslie, *Antitrust Amnesty*, *supra* note 35, at 457.

232. However, individuals should not be required to have evidence on hand when they actually confess; a requirement of immediately available evidence would decelerate the race to the prosecutor's office. Instead, individual confessors should be able to lay down a “marker.” For corporate confessors,

the [Antitrust] Division has adopted a policy that allows a company to secure its place at the front of the line by reporting the criminal conduct and putting down a “marker.” The company will then be given a certain period of time to complete its internal investigation, report its findings to the Division, and perfect its amnesty application.

Hammond, *supra* note 107, at 329.

233. Thus, even though an employee's firm is no longer eligible for amnesty, the employee could still receive amnesty as an individual.

234. Leslie, *Antitrust Amnesty*, *supra* note 35, at 478-79.

experience with corporate leniency shows that this form of distrust leads to confessions.²³⁵

The downside of this approach is that it may encourage an individual employee to wait and see if another cartel member—either a firm or an individual at another firm—confesses before he confesses. If the employee only has to beat his co-workers in the race to get amnesty, he can run more slowly than he would if he were racing to beat every individual participant from all of the cartel member firms. This could help stabilize the cartel by providing a brake on fast confessions. If so, this suggests a minor tweak: the first individual employee to expose the cartel to the government should receive complete amnesty while the first employee from each price-fixing firm who confesses would receive a substantial reduction in all penalties, including prison time. Thus, the individual employee would not only have a strong incentive to be the very first confessor in the whole cartel, but also—if he loses that race to be first—still retains a significant incentive to be the first confessor from his own firm.

2. Private Liability

Some individuals may cooperate in cartel efforts to conceal price-fixing activity because they fear being held personally liable in private treble-damage actions. Indeed, because antitrust provides joint and several liability with no right to contribution,²³⁶ an individual could theoretically be on the hook for all of the overcharges imposed by the entire cartel, trebled.²³⁷ To the extent that the threat of private civil liability represents a disincentive to cooperate with federal authorities, the first employee from each firm who confesses should receive immunity from private antitrust suits. Injured consumers could still receive full compensation, but all damages would be paid by those firms or individuals who confess too late or not at all.

235. *See id.* at 480.

236. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639-40 (1981).

237. This seems unlikely given that most plaintiffs would set their sights on deeper pockets—the firms.

3. *Antitrust Bounties*

Finally, if an economic incentive persuades employees to participate in price fixing, it makes sense that an economic lever could sway them to expose cartel activity. Perhaps the most direct way to reward faithless agents would be to pay them to expose price fixing. Paying antitrust bounties could encourage insiders to approach antitrust prosecutors with evidence.²³⁸ It might seem unfair that one participant in an illegal scheme could ultimately be rewarded for her insider knowledge, but in rejecting the *in pari delicto* defense in antitrust cases, the Supreme Court has reasoned that:

[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.²³⁹

Under this logic, it is no less unreasonable to reward the individual cartel participant who exposes the cartel.

Antitrust bounties can destabilize cartels in three related ways. First, individuals motivated by greed may be enticed to reveal the cartel. Second, even the less greedy have a compelling motive to defect: knowing that others have a financial incentive to confess gives each individual a strong reason not to trust her fellow cartel operatives. Thus, even loyal cartel workers might take the bait—albeit purely as a defensive move in anticipation of others being lured by the bounty. Third, antitrust bounties give employees a strong incentive to collect evidence documenting the cartel, which the employee can disclose in exchange for cash.²⁴⁰

238. See William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants To Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 792-97 (2001).

239. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 139 (1968).

240. In extreme cases, the bounty allows employees during salary or severance negotiations to threaten cartel exposure, in which case the bounty would provide the floor on the price of silence. Aubert et al., *supra* note 123, at 34 ("Individuals may also want to keep evidence of collusion because of agency problems within the firm, particularly between the owner(s), the manager and the involved employee(s). Antitrust reward programs can exacerbate, or even

Antitrust bounties should be generous. Without a sufficient incentive, few employees will be willing to sacrifice their jobs, professional friendships, and standing in the community²⁴¹ by cooperating with federal antitrust agencies in exposing and prosecuting cartel activity. When one brings down an industry-wide cartel, few firms in that industry (especially those who participated in the cartel) would be likely to embrace the confessor as a new employee. If so, the value of the confessor's industry-specific work experience could plummet. In short, the costs of confession are high, even when confession insulates the employee from criminal and civil liability. The rewards should be at least as great.

All of these measures—immunity from criminal prosecution and civil liability, and the payment of antitrust bounties—should help decouple the interests of a cartel's principals and its agents. These interests seem aligned because both want to conceal the cartel in order to avoid punishment. Additionally, both the principal and agent currently maximize their expected profits by engaging in price fixing. But with an appropriate mix of carrots and sticks, the individual can maximize her utility by being faithless—exposing the cartel to avert imprisonment and earn cash.²⁴²

C. Rewarding Disloyal Principals

Most discussions of agency relationships focus on the duties that the agent owes to the principal. But almost every principal also owes duties to its agents, generally including salary, benefits, and often procedural protections. In the context of cartel firm relationships, the principal's duties to its agents are more nuanced and rarely written down. Each firm's internal cartel leader promises,

create such agency problems. The employee that negotiates or implements the cartel agreement may want to keep evidence in order to increase his bargaining power vis-à-vis the manager or the shareholders, and obtain a pay raise").

241. Whitacre became a pariah after his role in exposing the lysine cartel became known. LIEBER, *supra* note 52, at 11.

242. Aubert et al., *supra* note 123, at 36 ("Bounties can also create or exacerbate agency problems between owners and employees. Individuals are indeed given incentives to keep hard information, making it more likely that the antitrust authority will find evidence of collusion, and increasing the cost of collusion by the amount that firms have to pay to prevent their employees from reporting evidence.").

either explicitly or implicitly, that it will reward that firm's price-fixing employees for their loyalty, competence, and discretion. These rewards are primarily financial but also include the promise not to betray the employees' loyalty.

An agent is more likely to be faithless if he fears that his principal does not have his back. For example, the distrust between Christie's and Davidge, especially after Davidge resigned his position at Christie's, played a major role in Davidge's decision making.²⁴³ Both Christie's and Davidge were worried about being the fall guy.²⁴⁴ The auction house price-fixing case also shows how the antitrust leniency guidelines worked to create a strong incentive to confess first. After Christie's received Davidge's handwritten notes that laid out the antitrust conspiracy, Christie's had a strong incentive to make a deal with the American prosecutors before Davidge did. Furthermore, since Davidge had just left Christie's, the executives at Christie's were worried that Sotheby's executives might fear that Davidge would expose the conspiracy and Sotheby's could attempt to secure amnesty from the antitrust prosecutors by turning in Christie's for its role in the price-fixing conspiracy.²⁴⁵ Davidge's distrust of Christie's started this cartel-exposing chain of events.

Antitrust authorities should implement policies that make individual employees who participate in cartel activity distrust their employers. For example, authorities should reward firms that confess to cartel participation if they turn in their employees who participated in the price fixing. Currently, under the Sentencing Guidelines for corporate defendants in criminal antitrust cases, "substantial assistance downward departure motions reward assistance in the investigation or prosecution of another organization or an individual 'not directly affiliated with the defendant.' Thus, a company cannot obtain a substantial assistance downward departure for evidence it provides against its own employees."²⁴⁶

243. See *supra* notes 95-97 and accompanying text.

244. See MASON, *supra* note 1, at 240-41.

245. See *id.* at 246.

246. CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 80 (citing U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 8C4.1(a) (2005)). But see Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys, Bringing Charges Against Corporations (June 16, 1999) ("In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify

That is shortsighted because it gives a corporate defendant insufficient incentive to turn on its own employees. And, thus, the individual agents have insufficient reason to distrust their bosses and to confess as a preemptive move. A firm should earn a downward departure for turning in—and cooperating in prosecutions of—its own employees because this would make the agent distrust the principal, a key component in converting a loyal lieutenant into a faithless agent. With such incentives for corporations in place, antitrust authorities could attempt to convince lower-level employees that any firm caught fixing price would try to reduce its own monetary exposure rather than protect its individual employees.²⁴⁷ This could create cartel-destabilizing agency costs: “If the company is more concerned about the financial consequences of a decision to self report than it is about the fate of its executives with culpability, then the interests of the company and those individuals are almost assuredly in conflict.”²⁴⁸

If cartel agents fear that their bosses may turn them in, prudent agents will take precautionary actions. At a minimum, distrust could encourage employees to make and maintain records in violation of cartel rules. Taking their cue from Christopher Davidge at Christie’s, they may realize that creating evidence of cartel activity is their best insurance policy against being hung out to dry. Once such records are created, an employee may be tempted to share them with the government in exchange for leniency on price-fixing charges or even another unrelated crime. Also, such notes may be inadvertently discovered and lead to the exposure and downfall of a cartel, as happened with the international uranium cartel²⁴⁹ and the plumbing fixtures cartel.²⁵⁰

Providing incentives for each price-fixing firm to sell out its own employees has two potential cartel-destabilizing effects. First, the firm may accept the offer and expose the cartel. Second, and most

the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.”).

247. See GRAND JURY INVESTIGATIONS, *supra* note 128, at 17 (“Unfortunately, the reduction in the corporate fine will not insulate executives and employees of the company from potential prosecution.”).

248. Hammond, *supra* note 107, at 339.

249. See SPAR, *supra* note 53, at 88-91.

250. See Mills & Elzinga, *supra* note 116, at 940 n.5.

relevant for our purposes, when agents realize that their interests are not necessarily aligned with those of their employers, they may reconsider whether it is in their long-term best interest to continue cartel business and concealment as usual, since the only guarantee of no prison time would come from confessing first as an individual.

D. Educating the Agents

Decoupling the interests of a principal and its agent is unlikely to create a faithless agent unless the agent appreciates the divergence of interests. Increasing the costs of participating in price fixing, while offering meaningful rewards for exposure, would be a hollow policy if the targets of these efforts were unaware of them and thus unable to determine their own best interests. Antitrust policy should seek to inform cartel participants about the advantages of defection. Unfortunately, any such education efforts would not take place on a blank slate because successful cartels have developed social norms that encourage price fixing and concealing the cartel activity. This Section explains the importance of anticompetitive social norms, why antitrust education is important, what it should include, and how to spread the message.

1. Antitrust Education and Overcoming Social Norms Within Cartels

One of the most effective ways to mold behavior is through the construction of social norms.²⁵¹ Richard McAdams has defined social norms as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.”²⁵² One of the great issues in any community is how to form social norms of cooperative behavior. Of course, not all such social norms are desirable. After

251. See JOHN ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 101 (1989) (“[S]ocial norms differ from legal norms. For one thing, obedience to the law is often rational on purely outcome-oriented grounds.”); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 967 (1996) (“Many of the most severe problems in current societies are a product of unfortunate norms, meanings, and roles.”).

252. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

all, there is honor among thieves. More importantly for antitrust concerns, social norms can prevent competition.²⁵³

Attempts to educate cartel agents about antitrust policy may be complicated by the fact that anticompetitive norms pervade many industries in the United States. Price-fixing cartels develop strong social norms against competition and in favor of creating and concealing cartels. A social norm of price fixing can also exist within a given corporation. For example, in the electrical equipment cartels, subordinates and middle managers at Westinghouse and General Electric learned price-fixing behavior by watching their immediate superiors fix prices.²⁵⁴ This taught the executives how to fix prices and fostered the belief that price fixing was encouraged, a way of life. Indeed, to refuse to participate in the conspiracy would result in expulsion from the group. Just as children sometimes take on the beliefs of their parents, executives raised in this price-fixing milieu operated as though price fixing were moral and natural when they themselves reached positions of power.²⁵⁵

More dangerously, social norms against competition can pervade entire industries. Social norms for collusion can be intrinsic in some markets that have never known true competition, as in the case of the early twentieth century electric lamp industry.²⁵⁶ In some commodity markets, such as that for magnesium, cartels "cultivat[ed] a philosophy of restrictionism."²⁵⁷ Similarly, the rayon industry had a "culture of collusion" among firms that eschewed competition.²⁵⁸ Such industry norms predate the Industrial Revolution: for example, in the 1840s Kanawha salt cartel, social

253. See FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 187 (1995) (showing examples of the fear of ostracization preventing companies from hiring the employees of other companies).

254. See Geis, *supra* note 83, at 146.

255. Faulkner et al., *supra* note 73, at 513 ("The internal organizational culture of the price-fixing firms plays an important role since the stance towards ethical conduct and compliance by top management of firms affects middle and lower management." (citation omitted)).

256. See STOCKING & WATKINS, *supra* note 40, at 304 ("Although the industry was nearly a half century old when the cartel was born, the business had developed from the outset on a monopolistic rather than a competitive pattern. The cartel was the culmination, not the inauguration, of a program to avoid competition in the manufacture and sale of electric lamps.").

257. *Id.* at 303.

258. Levenstein & Suslow, *supra* note 21, at 69 (citation omitted).

norms were created to ostracize any salt producer who would violate the cartel's rules.

If a member willfully and voluntarily contravened the articles, resolution, or pledge of the association, two-thirds of the members at a stated meeting could expel him after previously informing him of the causes. It "shall be duty of each member to withhold all offices of good neighborhood and kindness, and to decline all business intercourse with each expelled member, so far as those offices and such business intercourse may directly or indirectly aid him in making, vending or shipping salt." Members also agreed to shun persons who might aid the expelled member in the salt trade until the violator made restitution for his wrongdoing and agreed to abide by the regulations of the association.²⁵⁹

In addition to the moral obligation of shunning defectors, every cartel member had a duty to report all transgressors to the so-called "committee of vigilance," which enforced the cartel's dictates.²⁶⁰

While price fixing was not criminal during the life of the Kanawha salt cartel, even today strong social norms favoring price fixing can trump laws criminalizing such collusion. Even though price fixing is a felony, "a cartel constitutes a 'moral community' to the extent that 'trustworthy behavior can be expected, normative standards understood, and opportunism foregone.'"²⁶¹ In some industries, there has at times been an unquestioned expectation that all firms will violate the antitrust laws. For example, one particularly high-ranking defendant in the electrical equipment cartel criminal cases opined: "No one attending the gatherings was so stupid that he didn't know the meetings were in violation of the law. But it is the only way a business can be run. It is free enterprise."²⁶² A social norm that belittles antitrust principles can become so pervasive that executives may fail to give any weight to the fact

259. JOHN E. STEALEY III, *THE ANTEBELLUM KANAWHA SALT BUSINESS AND WESTERN MARKETS* 160-61 (1993).

260. *Id.* at 159.

261. Joel M. Podolny & Fiona M. Scott Morton, *Social Status, Entry and Predation: The Case of British Shipping Cartels 1879-1929*, 47 J. INDUS. ECON. 41, 44-45 (1999).

262. FULLER, *supra* note 142, at 91.

that antitrust violations are illegal.²⁶³ Secretly recorded conversations and testimony after cartel discovery—including in the lysine, citric acid, and vitamin cartels—all show that the executives and the lower-level employees carrying out cartel operations all know that they are breaking the law.²⁶⁴ ADM's internal corporate motto, which it shared with its cartel partners, was, "The competitor is our friend and the customer is our enemy."²⁶⁵

For decades, antitrust law did precious little to undermine these anticompetitive norms. Firms found engaging in price fixing were generally handled with kid gloves. Until 1959, criminal fines in antitrust cases "were modest and paid cheerfully by companies as a 'minor cost of doing business.' Corporate antitrust convictions were the equivalent of corporate parking tickets."²⁶⁶ After 1959, prison became a possibility, but the likelihood was still remote. Unearned leniency and generous plea agreements simply reinforced the perception among many cartel managers that price fixing was only nominally criminal.

Antitrust officials should seek to develop and nurture counter-norms, norms that encourage respect for competition and treat the exposure of criminal price fixing as a noble course of action. Of course, to create norms based on the nobility of confession, insiders who cooperate with the government should not be referred to as faithless agents. While this nomenclature is accurate for purposes of academic analysis, it is not necessarily a label that those unfamiliar with the literature would readily embrace. The better note to strike in educating employees about the illegality of price fixing and the benefits of confession would emphasize the pride of obeying the law. In their study of the folding-carton cartel, Professors Sonnenfeld and Lawrence noted that "[t]he most critical factor in preventing collusion is that managements unambiguously foster the kind of professional pride that is repulsed by any form of illegal profits."²⁶⁷ When there is a social norm of competition, it is harder to create and maintain a stable cartel. For example, the international uranium cartel suffered mightily from a social norm of

263. *Id.* at 170.

264. *See* CONNOR, *supra* note 42, at 11-12.

265. LIEBER, *supra* note 52, at 10.

266. CONNOR, *supra* note 42, at 43 (quoting HERLING, *supra* note 85).

267. Sonnenfeld & Lawrence, *supra* note 134, at 145.

competition among its Canadian members.²⁶⁸ The following Section discusses how antitrust officials might try to overcome the prevailing anticompetitive social norm in some industries.

2. Education as a Decoupling Device

If employees of price-fixing firms better understood the risks they are taking, their employers' incentives to abandon them, and their ability to exit the illegal cartel with minimal costs, more individuals might conclude that their best option is to decline to participate or to decide to expose the cartel. To maximize the probability of agent faithlessness, individuals should understand the following.

a. Penalties

The penalties for criminal price fixing are relatively high. The maximum prison term is now ten years.²⁶⁹ In addition, although the text of the Sherman Act appears to cap criminal fines at \$1 million for individuals,²⁷⁰ that appearance is deceptive. Because price fixing is a crime, those convicted are subject to pay either double-the-gain or double-the-loss associated with the violation.²⁷¹ While this method of calculating fines has been used primarily against corporations,²⁷² it can also be employed against individuals.²⁷³ Potential individual antitrust violators need to be made aware that the maximum fine in many cases is essentially defined by the individual's total wealth. In sum, individuals must understand both the scope and consequences of violating a criminal law in order to be deterred by it.²⁷⁴

268. See SPAR, *supra* note 53, at 134 ("[M]ost of the Canadian companies joined the government's program only under duress, and even during the operation of the cartel, they continued to distrust one another and even to sign secret, separate contracts with their preferred customers.").

269. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended in scattered sections of 15 U.S.C.).

270. See 15 U.S.C. § 1 (2006).

271. See 18 U.S.C. § 3571 (2006).

272. See LIEBER, *supra* note 52, at 115-16.

273. For example, Alfred Taubman was fined \$7.5 million. MASON, *supra* note 1, at 360.

274. See Katyal, *supra* note 136, at 1333-34 (explaining that in some circumstances, deterrence "will depend on the assumption that criminals know the contours of conspiracy law").

b. Firms' Incentives To Sell Out Employees

Cartel agents often harbor attitudes of “we’re all in this together.” The conspiracy as a happy family is a romantic notion of which individuals need to be disabused. Instead, individuals should be made aware of how some price-fixing firms treat their loyal employees once the cartel is exposed. In the electrical equipment cartels, for example, General Electric unceremoniously terminated its lower-level employees who had been indicted.²⁷⁵ Because high-level executives instigated the price fixing and pressured employees to participate or be fired, when GE publicly chastised its salesmen for violating both antitrust law and the company’s stated policy against price fixing, GE’s actions were “interpreted as an attempt to scapegoat particular individuals for what was essentially the responsibility of the corporate enterprise and its top executives.”²⁷⁶ At subsequent Senate hearings on the cartel, terminated GE employees concurred in the assessment that they had been “thrown to the wolves to ease the public relations situation.”²⁷⁷ More recently, an ADM executive warned one of its operatives in the citric acid cartel that “[i]f ever any of this goes wrong, you are on your own,” which the subordinate took “to mean that ADM would try to distance itself from him if the scam were exposed.”²⁷⁸

Additionally, individual employees should understand the possibility of being carved out from criminal immunity if another firm exposes the cartel first. The carve-out policy means that even if the firm wanted to protect its employees by negotiating an omnibus deal, it could not do so if the government insisted on carving out certain individuals.²⁷⁹ The destabilizing effect of this policy could be further magnified if employees knew that every price-fixing firm negotiating a settlement with the Antitrust Division would be offered payments for each cartel agent that it carved out. If employees understood that their interests diverge significantly from their employers’, they would be less willing to risk

275. See Geis, *supra* note 83, at 146.

276. *Id.*

277. *Id.* (quoting Senator John A. Carroll).

278. LIEBER, *supra* note 52, at 189.

279. See *supra* notes 204-12 and accompanying text.

being used as bargaining chips and more likely to strike their own deals earlier.

c. Individual Leniency Policy

Although many major corporations seem to be appropriately well versed on the Antitrust Division's Corporate Leniency Policy, those people actually managing cartel operations do not appear informed about the corresponding Individual Leniency Policy. In many cartels, individual participants apparently fail to appreciate the advantages of confessing immediately as an individual, especially when a government investigation appears on the horizon. For example, concerned that the government's longstanding suspicions of antitrust violations in the auction industry were about to be confirmed, the CEO of Sotheby's, Dede Brooks, asked her firm for permission to negotiate a deal for herself.²⁸⁰ By the time she received permission and approached the antitrust prosecutors, the opportunity for automatic amnesty had expired. Davidge and Christie's had already made a deal.²⁸¹ Employees like Brooks need to be aware that in many cases confession is not a team sport; it is an individual event. Faithful employees who attempt to reconcile their positions with their employers' may find themselves regretting their loyalty after it is too late. Educating them beforehand can allow individuals to make decisions in their own interests, including either declining to participate in price fixing in the first place or exposing the cartel.

d. Probability of Detection

Criminal sanctions against individuals caught fixing prices, combined with leniency and monetary rewards for cooperating individuals, should decouple the interests of the firm and its employees.²⁸² However, even with high punishments for the convicted and rewards for the confessors, individuals may nevertheless conclude that price fixing is net beneficial so long as they

280. See MASON, *supra* note 1, at 283, 288-89, 298-99.

281. See *id.* at 283.

282. See CARTEL SANCTIONS, *supra* note 49, at 18.

believe that they will not be caught.²⁸³ This is an important caveat because most employees who participate in price fixing think that they will escape detection and never be held accountable.²⁸⁴

There are at least two responses to this problem. First, antitrust law should make the expected length of imprisonment upon conviction very high. This should compensate for the perceived low probability of detection and conviction. Second, the law should change the agents' perceptions about the near-term probability of cartel detection. When a cartel's exposure is perceived as imminent, confession by employees of cartel member firms is rational. If an individual thinks that the cartel is coming to an end, and that her employer is not going to confess first, the only way that she would be guaranteed no prison time would be to confess first as an individual.²⁸⁵ If the end of the cartel is perceived as near, the interests of the price-fixing firm and its cartel-participating employees can become antagonistic.

Antitrust authorities should try to convince employees that that day is fast approaching. Prosecutors can do this by openly investigating alleged price fixing, empanelling grand juries, and issuing subpoenas. This creates many opportunities to destabilize a cartel. First, some cartel agents may be unwilling to perjure themselves; they would expose the cartel under questioning. Second, knowing this, other individuals—who would otherwise be loyal agents—will not want to risk being the sucker and will expose the cartel as a defensive move.²⁸⁶ Third, if an employee does lie to investigators or the grand juries and that lie is discovered, then investigators can nullify any deals made with that witness²⁸⁷ and charge the

283. See Dean Harvey, *Anticompetitive Social Norms as Antitrust Violations*, 94 CAL. L. REV. 769, 778 (2006) (“[M]embers of a cartel must place a sufficiently low probability on being caught and assign a sufficiently low cost to being caught.” (citing DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 131 (4th ed. 2005))).

284. See Geis, *supra* note 83, at 143 (“Like most reasonably adept and optimistic criminals, the antitrust violators had hoped to escape apprehension. ‘I didn’t expect to get caught,’ ... one of them said.” (citing *Administered Prices: Hearing Before the Subcomm. on Antitrust and Monopoly, S. Comm. on the Judiciary*, 87th Cong. 27-28 (1961))).

285. See *supra* Part III.B.1.

286. That is why it is important to grant amnesty to the first confessor even if the government has begun its investigation. See Leslie, *Antitrust Amnesty*, *supra* note 35, at 481-85.

287. Howard E. O’Leary, Jr., *Criminal Antitrust and the Corporate Executive: The Man in the Middle*, 63 A.B.A. J. 1389, 1391 (1977) (“Witnesses also have been prosecuted successfully

individual with obstruction; that provides independent leverage over the suspect that can be harnessed to secure a full confession of cartel activities. From Richard Nixon to Martha Stewart, we see repeatedly that often it is not the crime but the attempts to cover it up that lead to the downfall.

The ultimate effect of convincing individuals that the game is not worth the candle is two-fold. First, more individuals will be faithless to the cartel and expose it in exchange for immunity from criminal charges, freedom from private liability, and an appropriate bounty. Second, deterrence is enhanced. Perceiving a negative expected value from price fixing, rational workers will refuse to become the agents of price-fixing principals. Of course, this assumes that the individuals appreciate the relative costs and benefits. An effective antitrust program should insure that individuals have a healthy fear of detection.

3. How To Educate Agents

The Antitrust Division has done an excellent job of explaining its Amnesty Program to lawyers, through means such as continuing legal education programs.²⁸⁸ Unfortunately, most executives and employees engaging in cartel conduct do not confess their price fixing to their attorneys; indeed, they often assiduously avoid their own lawyers.²⁸⁹ This means the agents are often unaware of the legal landscape with respect to amnesty and the risks of not confessing first. This Section discusses four possible venues for educating price-fixing employees.

a. Antitrust Compliance Programs

Most major corporations have antitrust compliance programs.²⁹⁰ Antitrust compliance programs typically provide a basic overview of

for perjury after a grant of immunity.”).

288. See Gary R. Spratling, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy—An Update*, in CORPORATE COMPLIANCE 2001, at 343, 345 (PLI Corp. Law & Practice, Course Handbook Series No. B-1248, 2001) [hereinafter Spratling, *Making Companies an Offer They Shouldn't Refuse*].

289. See, e.g., MASON, *supra* note 1, at 222 (discussing Dede Brooks lying to Sotheby's outside counsel).

290. See Chavez, *supra* note 174, at 811.

antitrust law, advice on how to avoid violations, and a statement of the company's policy to abide by the law.²⁹¹ Such programs generally include the dissemination of compliance manuals, presentations to employees, and sometimes technology-based programs, as well as mechanisms for an employee to report antitrust violations to corporate counsel or to discuss concerns.²⁹²

Firms have several reasons to implement antitrust compliance programs. Ideally, such a program can prevent violations and limit the company's exposure to criminal and civil liability. But even if antitrust violations occur within the firm, the corporate defendant obtains significant benefits from maintaining an antitrust compliance program. First, because criminal price fixing requires a showing of intent, defendant firms sometimes argue that their antitrust compliance program demonstrates either a lack of scienter or lack of proof that their employees engaged in unauthorized conduct.²⁹³ Although far from universal, a few "district courts have instructed juries that they could consider [antitrust] compliance programs in determining a corporation's intent."²⁹⁴ Second, firms charged with price fixing may invoke their compliance programs in an attempt to persuade antitrust officials not to prosecute or to exercise leniency.²⁹⁵ Third, corporate antitrust defendants can receive reductions in sentencing for having an effective compliance program in place.²⁹⁶

291. CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 305 n.189.

292. See Andre R. Jaglom, *Managing Distribution: How To Develop a Corporate Legal Compliance Program*, in ALI-ABA PRODUCT DISTRIBUTION AND MARKETING 1079, 1087 (2006).

293. See CRIMINAL ANTITRUST LITIGATION, *supra* note 129, at 305 ("When a corporation is charged with a criminal violation of Section 1 of the Sherman Act, proof of the violation will typically involve imputing the conduct of corporate agents and employees to the corporation itself.").

294. *Id.* at 306 n.190.

295. See ANTITRUST COMPLIANCE, *supra* note 30, at 129 ("Even if litigation is not entirely avoided by a compliance program, the existence of a real, substantial compliance program, administered without 'winks,' can constitute exculpatory evidence. Such a program might persuade government investigators not to prosecute or a judge or jury not to convict or find liability."); Jaglom, *supra* note 292, at 1083 (citing *Garrett's, Inc. v. Farah Mfg. Co.*, 412 F. Supp. 656 (D.S.C. 1976)); Jesse W. Markham, Jr., *Corporate Compliance Ethics and Malpractice Prevention*, in 45TH ANNUAL ADVANCED ANTITRUST SEMINAR: DISTRIBUTING AND MARKETING 1387, 1389 (PLI Corp. Law & Practice, Course Handbook Series No. 8497, 2006).

296. ANTITRUST COMPLIANCE, *supra* note 30, at 129; Spratling, *The Experience and Views of the Antitrust Division*, *supra* note 32 ("An effective compliance program can reduce an organization's culpability score by 3 points and, hence, correspondingly reduce its criminal

While antitrust compliance programs sometimes do help firms detect price fixing within their organization and apply for amnesty,²⁹⁷ many recent international cartel cases speak to how such programs routinely fail.²⁹⁸ The auction house cartel illustrates the dubious value of many antitrust compliance programs. After its board meeting in 1996, Christie's circulated its antitrust policy, which required employees "to strictly avoid any communications with a competitor regarding prices and pricing policies, terms or conditions of sale, profits, margins or costs and bidding for particular consignments," and to report suspected violations.²⁹⁹ The company's American employees who strongly believed that Davidge and Brooks were violating antitrust laws all signed the compliance document to show that they had read and understood Christie's antitrust policy—as did Davidge himself—even as he continued to meet with his Sotheby's counterpart in violation of both American antitrust law and Christie's own stated policy.³⁰⁰ Similarly, throughout its participation and often leadership of the electrical equipment cartels, General Electric had expressly articulated a policy against price fixing, but its own executives made clear that "the directive was only for 'public consumption,' and not to be taken seriously."³⁰¹

fine."); see also ANTITRUST COMPLIANCE, *supra* note 30, at 22 ("The existence of an effective compliance program can once again be significant, since the Guidelines provide for a downward departure in cases of 'exceptionally low culpability.'"); Spratling, *The Experience and Views of the Antitrust Division*, *supra* note 32 ("Although a compliance program will rarely prevent an organization from being prosecuted if it commits an antitrust violation, a sound compliance program may serve to reduce an organization's criminal fine range once it is convicted."). But see ANTITRUST COMPLIANCE, *supra* note 30, at 21 (noting that the Sentencing Guidelines "create a rebuttable presumption in some cases that an organization did not have an effective program in place if high-level personnel, or those with substantial authority, were involved"); *id.* at 54 ("[A] well-designed compliance program may, in some circumstances, help a company qualify for sentence mitigation under the sentencing guidelines, so long as the employees who committed the violation were not 'high-level personnel' of the organization. In the Antitrust Division's experience, however, most antitrust crimes involve senior executives, which would disqualify the company from receiving any sentence mitigation under the Sentencing Guidelines, no matter how good its corporate compliance program.").

297. See Spratling, *Making Companies an Offer They Shouldn't Refuse*, *supra* note 288, at 346.

298. See Chavez, *supra* note 174, at 811.

299. MASON, *supra* note 1, at 206.

300. See *id.*

301. Geis, *supra* note 83, at 145.

It is hardly surprising that antitrust compliance programs may fail to stop ongoing price fixing. Although the Sentencing Commission criteria for compliance programs includes asking whether the defendant organization had training programs for its employees, the criteria do not address the most important issue—the *content* of the training programs.³⁰² Most such programs focus on explaining the contours of antitrust law, but that is not the primary area on which compliance programs should focus in connection with price-fixing cartels. While some areas of antitrust law are complicated and nuanced, such as when tying arrangements are illegal, the legendary complexity of antitrust law is not an issue in the criminal price-fixing context. Criminal antitrust law is clear: executives and mid-level managers engaged in cartel activity know that they are breaking the law.³⁰³

Most importantly, antitrust compliance programs generally do not include the information that would enlighten employees about the benefits of betraying a price-fixing employer.³⁰⁴ For example, it is not clear that cartel participants attending such programs receive a full understanding of the personal penalties that price fixing entails. Although prison may be mentioned as a possibility, the risk is generally viewed as remote or merely theoretical; many actual price fixers would likely be surprised to learn how many people have served time in federal prison for price fixing. In many (probably most) instances, employees are not likely to be informed that they could be held personally liable for the harm caused by a cartel if they participate in it. Moreover, even when employees are told

302. See ANTITRUST COMPLIANCE, *supra* note 30, at 29 (“Only ‘effective’ compliance programs qualify for amnesty or leniency, however. Law enforcement agencies provide some minimum requirements for a compliance program to be considered ‘effective.’”); see also Spratling, *The Experience and Views of the Antitrust Division*, *supra* note 32 (discussing the Sentencing Commission requirements).

303. See, e.g., *supra* notes 265-66 and accompanying text; see also ANTITRUST COMPLIANCE, *supra* note 30, at 50 (“[Cartel conspirators] were fully aware they were violating the law in the United States and elsewhere, and their only concern was to avoid detection. Many of the conspirators openly discussed—and even joked among themselves about—the criminal nature of their agreements.”); Baker & Faulkner, *supra* note 78, at 844 (describing conspirators’ knowledge of the illegality of their actions).

304. A review of the antitrust compliance policies and materials of several companies reveals no mention of the government’s antitrust leniency programs. See ANTITRUST COMPLIANCE, *supra* note 30, at pt. II (reprinting compliance manuals from several corporations).

about the penalties for price fixing, they are often not informed about the benefits of confession, including individual amnesty.³⁰⁵ Firms rationally exclude such material because, in order to receive credit for having an effective compliance program, the Sentencing Guidelines do not require the firm to inform its employees of the benefits of selling out a cartel.³⁰⁶ Given that the high-level executives who run cartels often have some input into what messages are communicated about antitrust compliance, it is hardly surprising that a pro-confession theme is not conveyed.³⁰⁷ In short, most antitrust compliance programs do not allow employees to accurately perform a cost-benefit analysis with respect to confession. This undermines the ability of any such program to expose or deter price fixing.³⁰⁸

Finally, some antitrust compliance programs seem specifically designed to prevent individual employees from being faithless agents. For example, some advise employees that if government investigators ever approach them with inquiries about price fixing, employees should report the inquiry to the firm and inform the government official that "cooperation has to be coordinated through counsel."³⁰⁹ For example, DaimlerChrysler's written antitrust compliance materials instruct its employees that:

[t]o insure that proper procedures are followed by government investigators, any written or oral inquiry made by any agency, including the Justice Department, FTC, FBI or state antitrust enforcement authorities, or any inquiry from an attorney not representing DaimlerChrysler, should be referred to OGC. You should politely advise the person making the inquiry that the matter is being referred to OGC. No information should be

305. *See id.*

306. *See Jaglom, supra* note 292, at 1086 (discussing criteria for an "effective compliance program" (citations omitted)).

307. *See* ANTITRUST COMPLIANCE, *supra* note 30, at 50-51 ("Many of the multinational cartels prosecuted by the Antitrust Division involved executives who had received extensive antitrust compliance counseling, and who often had significant responsibilities in the firm's antitrust compliance programs.").

308. *See id.* at 45-46 ("Only when company employees fully appreciate the risk of detection, the potential penalties for violations, and the destabilizing effect of the Leniency Program, will they fully recognize the potential costs of breaking the law.").

309. *Jaglom, supra* note 292, at 1088.

disclosed and no documents should be provided without approval of OGC. Advise OGC of all inquiries immediately.³¹⁰

This is typical of the antitrust strategy of firms with written policies.³¹¹

To remedy the flaws in many antitrust compliance programs, federal prosecutors and judges should impose additional requirements on such programs as a condition to granting any preferential treatment to firms for conducting such programs. First, employees should receive all of the accurate facts that would encourage them to be faithful and report violations. As some programs already do to some extent, this would include providing information about the consequences for violating antitrust laws—including ten years imprisonment, multi-million dollar fines, and personal liability.³¹² But employees should also be clearly informed of the government's carve-out policy. Employees should receive data and real-world examples of the number of price fixers in prison and how many of them were carved out, sometimes sold up the river by their employers. The risk of being carved out will not be as effective a deterrent to price fixing unless individuals are aware of the threat.

In addition, the program should explicitly inform all relevant employees of the benefits of confessing. This should include an accurate account of the Individual Leniency Policy.³¹³ The audience should be told that the people with the best records of the cartel's activities are the ones who get the best deals from prosecutors, again providing real-world examples. In conjunction with the explanation of why individual employees may be better off making their own early deals with federal prosecutors, employees should be made aware of the firm's motives to betray its price-fixing employees, and how firms have done so in the past.

310. ANTITRUST COMPLIANCE, *supra* note 30, Manual 2, at 3.

311. *See id.* Manual 7 (Tenneco's Antitrust Compliance Policy); *id.* Manual 8 (Coca-Cola's Antitrust Policy).

312. *See id.* at 47.

313. *See id.* at 48 ("An effective compliance program should also educate company executives about the key features of the Antitrust Division's Leniency Program. A basic familiarity with the program can help prevent antitrust violations in the first place by making sure that company personnel understand the destabilizing effect that the Leniency Program has on cartels.").

The purpose of these changes is to convince employees that when it comes to price fixing, their interests diverge from their employers' interests. Properly educated about the incentives of other cartel participants to reveal the conspiracy, individual employees should develop a healthy distrust for people with knowledge of the price-fixing conspiracy.³¹⁴ Painting a more accurate picture of the costs and benefits of price fixing for employees should deter them from participating in a cartel in the first place, which is the ultimate purpose of antitrust compliance programs.³¹⁵ Thus, in order to receive any credit for maintaining antitrust compliance programs, firms must truly inform individuals of the punishments for participating in price fixing and the rewards for exposing cartel activity.

Of course, reliance on companies' own internal antitrust compliance programs is by no means a total solution. First, the price fixer controls the message and can spin it, as General Electric did with its price-fixing employees.³¹⁶ Antitrust compliance programs presented with a knowing wink from senior management are unlikely to discourage a firm's sales team from participating in cartel activity.³¹⁷ This can be remedied to some extent by having employees watch approved videos or read approved literature.³¹⁸ Employees should have to sign a statement, under penalty of perjury, that they have watched the appropriate video. Although that may seem extreme, we are trying to deter and expose cartels that impose billions of dollars of damages on consumers worldwide. If requiring people to watch a video and swear that they watched it can help in the effort, this seems like a small price to pay.³¹⁹

Second, internal antitrust compliance programs cannot reach all individuals currently engaged in price fixing. Smaller firms do not generally have antitrust compliance programs, yet they are just as

314. See Katyal, *supra* note 136, at 1391 ("If conspirators learned that the government has persistently made use of information provided by co-conspirators, it could alter the impression that criminals are bonded to each other.").

315. See Chavez, *supra* note 174, at 857.

316. See Geis, *supra* note 83, at 144-45; see also *supra* notes 276-77 and accompanying text.

317. See Jaglom, *supra* note 292, at 1081-82.

318. See ANTITRUST COMPLIANCE, *supra* note 30, at 79-100 (discussing technology-based antitrust education tools); Jaglom, *supra* note 292, at 1087 (same).

319. This Section does not suggest making firms do this as a matter of course; rather, those firms that want to develop a qualifying antitrust compliance program—in order to ease the penalties for illegal activity—must satisfy these requirements.

susceptible to the lure of price fixing. Local industries that are often plagued by price fixing—such as school milk,³²⁰ local plumbing,³²¹ and the cement trade³²²—do not generally utilize antitrust compliance programs. To communicate with price fixers in such industries, alternative fora must be exploited.

b. Presentations at Trade Association Meetings

Trade associations have played a critical role in the propagation of price fixing. Studies have repeatedly confirmed that trade associations are involved in over one-third of reported cartel cases.³²³ This is not surprising for several reasons. First, trade associations provide opportunities for rivals to coordinate instead of compete.³²⁴ Trade associations can facilitate essential coordination for the cartelization of unconcentrated industries.³²⁵ Sometimes the head office of a trade association will suggest prices and production quotas, as happened with the industrial alcohol cartel.³²⁶

Second, trade associations often serve as social networks among potential cartelists. Trade associations can create social norms favorable to price fixing by “foster[ing] a social climate conducive to

320. See *supra* note 43 and accompanying text.

321. See *supra* notes 116-17 and accompanying text.

322. See Press Release, Antitrust Div., U.S. Dep’t of Justice, Indianapolis Ready Mixed Concrete Producer and Three Executives Indicted on Price-Fixing Charge (Apr. 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/215589.pdf.

323. Levenstein & Suslow, *supra* note 21, at 61 (“Posner (1970), for example, reports that 44 percent of the cartels in his sample used an industry association to facilitate the price-fixing agreement. Hay and Kelley (1974) and Arthur G. Fraas and Douglas F. Greer (1977) both find that trade associations were involved in about a third of the U.S. price-fixing conspiracies in their samples. Similarly, the vast majority of cartels in Symeonidis’s sample were organized and maintained by trade associations.” (citations omitted)); see also Arthur G. Fraas & Douglas F. Greer, *Market Structure and Price Collusion: An Empirical Analysis*, 26 J. INDUS. ECON. 21, 34 (1977); George A. Hay & Daniel Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J.L. & ECON. 13, 21 (1974) (“In seven out of eight cases with more than fifteen firms in the conspiracy, a formal industry trade association was involved.”).

324. See Fraas & Greer, *supra* note 323, at 39 (noting that “a trade association can serve as a vehicle for the coordination of a price fixing agreement”).

325. See Levenstein & Suslow, *supra* note 21, at 44 (“There are in fact many successful cartels in quite unconcentrated industries, but they almost always rely on industry associations.”).

326. SIMON N. WHITNEY, *TRADE ASSOCIATIONS AND INDUSTRIAL CONTROL* 132 (1934) (“In addition, suggestions as to price and production policy were occasionally made from the office of the Institute.”).

collusion."³²⁷ For example, when wool manufacturers engaged in price fixing during the inter-war period, their trade association hosted speakers who gave rousing oratories about the evils of price cutting and the virtues of cooperation.³²⁸

Finally, some trade associations are formed explicitly for the purpose of providing cover for price-fixing schemes.³²⁹ For example, the recent lysine cartel created a Potemkin trade association, including fake agendas, so that its illegal meetings could be represented to the outside world as innocuous trade association gatherings.³³⁰ Other trade associations combine both legal and illegal components in their conferences, using the legal aspects of the gatherings to conceal the criminal collusion.³³¹ Many illegal cartels—including those in citric acid,³³² electrical equipment,³³³ and dairy products³³⁴—held legitimate trade association meetings during the day and illegal meetings after hours.

In sum, while some trade associations came to facilitate illegal price fixing, some cartelists created trade associations for the purpose of concealing an illegal conspiracy. Importantly, when trade associations are employed as cover for cartels, it is harder for member firms' own internal antitrust compliance programs to spot price fixing.³³⁵ In any case, the relationship between trade associations

327. Fraas & Greer, *supra* note 323, at 39.

328. WHITNEY, *supra* note 326, at 121.

329. CONNOR, *supra* note 42, at 12 ("Cartels frequently utilized industry trade associations as covers for their illegal meetings, prepared false agendas and false minutes, and took many other steps to hide their conspiracies."); *see also* EICHENWALD, *supra* note 7, at 3.

330. *See* EICHENWALD, *supra* note 7, at 208. Many historic trade associations, such as the Rubber Institute, were also founded specifically to reduce competition and price cutting. WHITNEY, *supra* note 326, at 139 ("To meet the problems of competition and price cutting, the Rubber Institute was founded on June 1, 1928.").

331. *See* CONNOR, *supra* note 42, at 28.

332. *Id.* at 135-37; EICHENWALD, *supra* note 7, at 68.

333. FULLER, *supra* note 142, at 136 n.44; HERLING, *supra* note 85, at 315.

334. Lanzillotti, *supra* note 43, at 429 n.44 ("In the Western Kentucky case, according to testimony by industry witnesses, the bid-rigging arrangements were hatched at meetings of the Western Kentucky Dairy Products Association, which were usually held in conjunction with or following meetings of the Kentucky Milk Marketing and Anti-Monopoly Commission.").

335. CONNOR, *supra* note 42, at 545 ("However, none of these internal checks and balances will catch collusive behavior by employees if a cartel uses a legitimate trade association as a cover for illegal price fixing.").

and price fixing suggests that any efforts to thwart cartelization must pay special attention to trade associations.

If trade association meetings are where cartels are born and nurtured, then the Antitrust Division should develop an educational program to make presentations at these trade association meetings. Although most of the content would mimic that provided to most large firms, people in trade associations "often erroneously believe that subjects which could not otherwise be discussed by competitors are somehow permissible if undertaken within a trade association. They should be disabused of this notion."³³⁶ In addition to clarifying the legality of agreements made through trade associations, antitrust presentations at trade association events should explain the benefits of defection from a cartel, as well as one's co-conspirators' temptations to confess.

Given the high number of trade associations, it would be impossible to provide such educational efforts to all trade associations. Accordingly, antitrust authorities should focus on those trade associations that raise the greatest concern: for example, because of prior price fixing in the industry, a concentrated market, or simply rumors or other suspicions of collusion. Also, while it would be practically impossible for antitrust officials to explain the rationality of confession to every worker who might be an agent within a cartel, an effort focused on trade associations is likely to reach many individuals who may either be asked to violate antitrust laws or are actually participating in price fixing.

Although trade associations are sometimes large entities, the antitrust message only needs to convince one person to bring down an entire cartel. Again, deterrents and incentives only work if the target is fully aware of the punishments and rewards for particular actions. If antitrust enforcers can spread the word about the benefits of confessing, then there is a greater likelihood that agents will be faithless, cartels exposed, and deterrence enhanced.

336. ANTITRUST COMPLIANCE, *supra* note 30, at 138.

IV. DECOUPLING INTERESTS FROM THE PRINCIPAL'S PERSPECTIVE: GETTING EMPLOYERS TO DISTRUST EMPLOYEES

Agency cost theory suggests that decoupling the interests of price-fixing firms and their employees may encourage individuals to expose antitrust conspiracies. This Part argues that once the interests are decoupled, price-fixing firms themselves may take actions in their own self-interest that destabilize the cartel. In particular, the risk of faithless agents may lead cartel member firms to delegate less, thereby reducing the efficiency of the cartel operation, or even to confess as a preemptive move. Either action decreases the expected value of cartelization and makes price fixing a less attractive opportunity for firms considering whether to initiate or join a price-fixing conspiracy.

A. The Risk of Faithless Agents Increases Cartel Costs

An antitrust regime that significantly punishes faithful agents and rewards faithless agents should drive cartel firms to significantly reduce the number of individuals actively involved in the price fixing. Each employee who knows about the cartel is a potential weak link that the government might persuade to expose the conspiracy.³³⁷ Higher-level executives will worry that an employee has taken and kept accurate, incriminating notes or other evidence. To diminish the risk of a faithless agent betraying the cartel, each firm must further minimize its number of agents.³³⁸ This, however, can weaken the price-fixing conspiracy as cartel managers have to focus on concealing the conspiracy instead of maximizing its efficiency.³³⁹

337. See Katyal, *supra* note 136, at 1312 (“The more conspirators, the more witnesses there are to flip and the more ominous the prisoners’ dilemma for a conspirator.”).

338. In fact, many cartel firms conceal their price-fixing activity from their own employees. See, e.g., LIEBER, *supra* note 52, at 251 (“[The prosecutor] focused on taped statements that the ADM sales force was to be kept in the dark about lysine pricing. ‘The salesman could go off to another company and turn in the top people at ADM and report that there’s price-fixing. So, the salesmen couldn’t be trusted.’”); Garland, *supra* note 71, at 50 (discussing the graphite electrodes cartel).

339. See Baker & Faulkner, *supra* note 78, at 838 (“Using archival data, we reconstruct the communication networks involved in three major [price-fixing] conspiracies (switchgear,

Cartels are more stable when the employees of the participating firms are aware of the price-fixing conspiracy. Additionally, cartels operate most efficiently when all the member firms' employees are in on the deal. For example, the electrical equipment cartel was stable in large part because so many people in the industry knew the score. Over time, as the cartel's operations grew and expanded—geographically and across product lines—more employees needed to be brought into the conspiracy in order for the cartel to function. If too many salespeople were out of the loop, the bid rigging simply could not occur. More importantly, the unhindered free flow of information between principals and agents in price-fixing firms provides the flexibility necessary for cartels to function efficiently.³⁴⁰

Uninformed employees can also undermine cartels by creating the risk of misunderstandings. For example, salespeople unaware of a price-fixing agreement may actually engage in competition. The other members of the cartel may interpret this as cheating on the cartel agreement, which generally leads to price wars and competition.³⁴¹ Furthermore, in order to conceal the collusion, price-fixing firms may "have to adopt a seemingly competitive behavior so as not to arouse the suspicions of their employees."³⁴² Any increased secrecy within firms can therefore make cartel operations more costly and confusing. For example, cartel members must take steps to avoid detection, such as using unsigned communications and referring to cartel members by code names or numbers.³⁴³

Ultimately, the higher cartel costs that result from the need to involve fewer employees and keep secrets from those who are not involved increase the likelihood that cartelization will not be cost-beneficial. Rational firms will not enter a cartel unless they believe

transformers, and turbines). We find that the structure of illegal networks is driven primarily by the need to maximize concealment, rather than the need to maximize efficiency.").

340. See Levenstein & Suslow, *supra* note 21, at 67 ("Hierarchy and communication are important to cartel success because the world is dynamic and contracts are inherently incomplete.").

341. See Faulkner et al., *supra* note 73, at 532-34 (discussing the destabilizing effect of a single episode of cheating in the electrical equipment cartel).

342. Aubert et al., *supra* note 123, at 36.

343. See FULLER, *supra* note 142, at 72 (noting use of coded numbers and unsigned communications in electrical equipment cartel); Garland, *supra* note 71, at 50 (discussing use of code names by graphite electrodes cartel).

that the cartel will be stable. Because greater secrecy increases the risks of “accidental competition” and misunderstandings giving rise to price wars, the specter of faithless agents may lead executives to conclude that price fixing is not worth the risk.

B. Preemptive Confession by Cartel Firms

Providing incentives to individual employees to expose price fixing will also affect the firms’ incentives to engage in—and conceal—cartel activity. A confession of price fixing by an individual employee is not a corporate act and thus does not confer amnesty upon the employee’s firm. Under the Leniency Guidelines, the company’s “confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.”³⁴⁴ Thus, if a lone employee exposes the cartel, the employee’s firm is not entitled to amnesty—only the individual is guaranteed relief from criminal prosecution. However, if the firm reaches the government before any individual employee confesses, then the entire firm is eligible for amnesty.³⁴⁵ That means that the firm has a powerful motivation to beat any individual employee to the punch. By providing sufficient incentives for employees to expose price-fixing conspiracies, antitrust law can get cartel leaders to distrust their own agents and to consider confessing themselves.

The risk of faithless agents also increases distrust across firms in a price-fixing conspiracy. Most cartels require trust in order to survive. Price fixing represents a prisoner’s dilemma: Although the firms are better off as a group if they cooperate (i.e., fix a higher price), each individual firm is better off if it cheats (i.e., charges a price below that fixed by the cartel in order to sell more than its cartel-allotted output). The solution to the prisoner’s dilemma is mutual trust. The players—in the case of cartels, the firms—need to be able to trust their cartel partners not to cheat on the cartel agreement.

The criminalization of price fixing adds another dimension to the trust quandary; each member of the cartel must trust its co-conspirators not to expose the criminal conspiracy in exchange for

344. CORPORATE LENIENCY POLICY, *supra* note 31, at 2.

345. *See id.* at 1.

amnesty. The stakes are greater when trusting a cartel partner not to confess. A betrayal of trust with respect to cheating simply means a reversion to competition. In contrast, a betrayal of trust in the form of confessing means criminal liability for the betrayed cartel members, including the possibility of prison time for executives. All of the Asian lysine cartel members suffered serious financial penalties because ADM's employee, Mark Whitacre, exposed their cartel.³⁴⁶ Davidge's notes clearly showed that Tennant and Taubman had orchestrated the cartel, and Taubman went to prison based on the actions of Davidge, a man he never met.³⁴⁷

Price-fixing firms may face greater difficulty in addressing the second species of distrust—concern about exposing the cartel—than traditional distrust concerns about cheating on the cartel price. Personal relationships can help create trust with respect to cheating. An executive at one cartel member firm need not know and trust every employee at the other firms. So long as she trusts her counterpart—who has authority to properly implement the cartel agreement—she does not have to worry about whether someone else at the other firm wants to cheat.

Providing the proper mix of rewards to faithless agents and punishments to faithful cartel employees, though, necessarily changes the cartel's internal trust dynamics. Each individual participant in the cartel would need to trust not just the other executives who attend cartel meetings, but all of the knowledgeable employees of each cartel firm. In order to be fully confident that one's cartel is stable with respect to confession, one must believe that the other firms can effectively police their own employees. Any insecurity could make confession the rational strategy. For example, if Firm A and Firm B are in a cartel, providing incentives for employees of Firm A to expose the crime could lead executives in Firm B to conclude that seeking antitrust amnesty is in Firm B's best interest, lest one of Firm A's employees confesses first and renders Firm B ineligible for amnesty.

In short, creating distrust within firms should increase distrust across firms. Indeed, both of these types of distrust—distrust within a price-fixing firm and across price-fixing firms—led to the downfall

346. See LIEBER, *supra* note 52, at 35-36.

347. See MASON, *supra* note 1, at 322.

of the auction house conspiracy. The executives within one firm may fear that a single employee of any cartel firm may inform the government about the conspiracy in order to secure individual amnesty. The Christie's case brings this scenario to life. Armed with his devastating collection of incriminating documents, Christopher Davidge threatened to make a deal for himself, leaving Christie's and its executives to face criminal charges on their own.³⁴⁸ Christie's needed to be concerned not only with Davidge striking a deal to protect himself at Christie's expense, but also with the possibility that the executives at Sotheby's could be en route to the prosecutor's office. Davidge's public departure from Christie's might spur Sotheby's to confess, lest Davidge expose the price-fixing conspiracy in exchange for individual leniency.³⁴⁹ Because Christie's would lose hundreds of millions if either Davidge or Sotheby's confessed first, Christie's "clearly had only one choice: to hand the documents over *immediately*."³⁵⁰ Thus, policies that create distrust within price-fixing firms have the potential to destabilize entire cartels, as each conspirator must worry about whether any individual with knowledge of the conspiracy will succumb to the pressure to confess.

V. THE POTENTIAL DOWNSIDES OF CREATING DISTRUST WITHIN FIRMS

Of course, antitrust policies designed to create cartel-destabilizing distrust within price-fixing firms could produce other problems. These include corporate inefficiency caused by distrusting workers and the risk of false accusations of price fixing. This Part explains why neither of these potential problems is particularly vexing.

348. See BOIES, *supra* note 122, at 326.

349. See MASON, *supra* note 1, at 246.

350. *Id.*

A. Distrust and Inefficiency

Trust within firms can facilitate efficient business operations.³⁵¹ People within a single firm need to trust each other on a daily basis to ensure that operations run efficiently. In contrast, distrust within firms can lead to inefficiency. Antitrust authorities would not want to create a level of distrust that would prevent employees from working with each other, that would prevent executives from appropriately delegating work, or that would cause lower-level employees to behave inefficiently. Parts III and IV advocate increasing agency costs in part because the distrust between cartel principals and agents could destabilize a price-fixing conspiracy. This raises the problem that injecting distrust into business relationships could undermine the firm from achieving its legitimate goals.

While this Article advocates creating and harnessing distrust within price-fixing firms as a means of exposing cartels, this is not the type of distrust that would improperly interfere with a firm's legal business conduct. First, it would be overly simplistic to characterize the modern business entity as either blessed by trust or plagued by distrust. Trust is not binary, where firms either have it or do not. Within any given firm, there are different forms and levels of trust. An employee may trust a co-worker to help with one particular project but not another task. An employee may confide a personal secret to a co-worker, but not confess that she is embezzling; the employee may trust her co-worker to conceal the secret but not the embezzlement. People constantly make judgment calls about what information to trust with friends, family, and business associates.

Second, any inefficient distrust would be limited to price-fixing firms. If a firm is not engaging in price fixing, then the executives have no reason to distrust their employees about exposing an illegal conspiracy. Moreover, there is no need to inefficiently hide information from employees if the firm is doing nothing wrong. In short, any distrust about exposing a cartel—and the inefficiency associated

351. See Katyal, *supra* note 136, at 1346 ("Perhaps the most important asset of a firm is its trust between members. Trust is the glue that allows diverse individuals to work together easily."); Leslie, *Trust, Distrust, and Antitrust*, *supra* note 24, at 532-35 (discussing the importance of trust and cooperation in the business setting).

with such distrust—would be visited upon firms committing felonies, not honest businesses.

Third, if the distrust associated with increased agency costs creates inefficiency within cartel member firms, this would represent an additional deterrent to price fixing. Firms in cartels may need to conceal their conduct from their own employees in order to minimize the risk that one of those employees will expose the antitrust crimes to federal prosecutors.³⁵² This could reduce the free flow of information within a price-fixing firm in a way that diminishes efficiency. However, this inefficiency would simply constitute an additional cost of belonging to a cartel.³⁵³

A related efficiency problem is that rewarding confessions through antitrust bounties may improperly empower individuals who are aware of cartel activity. For example, it would be difficult for a price-fixing firm to terminate an employee who could threaten to expose the cartel in retaliation.³⁵⁴ Again, Davidge's departure strategy is instructive. Price-fixing firms may be compelled to retain inefficient, lazy, or even corrupt employees who have inside information about the cartel.³⁵⁵ For example, evidence suggests that some within ADM knew that Mark Whitacre was embezzling millions of dollars, yet ADM could ill afford to fire him, lest he expose ADM's antitrust crimes.³⁵⁶ It is clearly inefficient for a firm to retain an employee whose skill set is outmoded or who is looting the company, but in the cartel context this form of inefficiency is beneficial; it is essentially a tax on cartel conduct, which should make price fixing marginally less attractive.³⁵⁷ This could enhance deterrence of price fixing in the long run.³⁵⁸

352. See *supra* Part IV.A.

353. Also, a firm that engages in price fixing may find it more difficult to attract the best employees since job candidates may be wary of joining a firm where there is a risk of its employees getting sent to prison for price-fixing violations. Again, this effect would represent a tax on cartelization, which is an efficient effect of the proposed changes in antitrust policy.

354. See Buccirosi & Spagnolo, *supra* note 71, at 19.

355. See Aubert et al., *supra* note 123, at 22 ("Collusive firms thus have an incentive to lengthen the tenure of their 'informed' employees and may have a less flexible employment structure, with employees remaining in office for longer periods than in competitive companies.").

356. LIEBER, *supra* note 52, at 50-51.

357. See Aubert et al., *supra* note 123, at 15-16.

358. See *id.* at 24.

B. False Accusations of Price Fixing

Rewarding employees for exposing cartel arrangements creates a risk that a vengeful employee might make a false accusation or even attempt to frame his boss, especially if the employee has been fired. The risk of false accusations nonetheless seems exaggerated. First, in order for a prosecution to go forward, the employee would have to commit perjury, subjecting himself to criminal prosecution.³⁵⁹ Second, false accusations of price fixing could be easily deterred by imposing meaningful sanctions for lying to antitrust investigators.³⁶⁰ Third, no prosecution would ever proceed based solely on the uncorroborated accusations of an individual. When insiders report price fixing, federal authorities generally arm the informant with recording equipment in order to secure proof positive of the conspiracy.³⁶¹ Finally, although other government programs provide significant bounties for informants, there is no indication of any serious problem from false accusations or the fabrication of evidence.³⁶²

The severe punishment of firms in cartels, coupled with rewards for exposing price fixing, could theoretically encourage a firm in a competitive market to falsely "admit" participation in a cartel, whereby the accusing firm would simultaneously attack its competitors while securing (unneeded) amnesty from criminal prosecution. Certainly such a move would create a hassle for the falsely charged competitor. But this strategy seems unlikely because the accusing firm would open itself up to private liability. Additionally, the same factors that diminish the risk of false accusations by employees apply here as well. For example, fraudulent accusations could be

359. See *Investigation Profile*, *supra* note 125, at 5 ("Witnesses before the grand jury are questioned under oath, and witnesses who testify falsely are subject to prosecution for perjury.").

360. See Buccirrossi & Spagnolo, *supra* note 71, at 20.

361. *Investigation Profile*, *supra* note 125, at 5 ("If we have a cooperating insider, we likely will ask them to use a hidden recorder to tape conversations with cartel members. In appropriate situations, we may also ask the FBI or other investigating agency to videotape meetings of the members."); see also *supra* notes 100-04 and accompanying text (describing use of recording equipment in the lysine cartel).

362. See Buccirrossi & Spagnolo, *supra* note 71, at 20.

punished severely.³⁶³ Again, there is no evidence of firms making such false accusations under the current amnesty program.³⁶⁴

CONCLUSION

Whenever a principal asks an agent to engage in socially undesirable conduct, the law should encourage the agent's disloyalty. Antitrust law should attempt to fashion faithless agents by decoupling the interests of price-fixing principals and their employees. This requires punishing the faithful, rewarding the faithless, and making sure that all price-fixing agents understand the relevant costs of cartel participation and the benefits of making an early deal with prosecutors.

By punishing the faithful and rewarding the faithless, antitrust enforcers should work to make confession cost-beneficial for the cartel's agents. Individual employees are much more likely than firms to find that price fixing is not cost-beneficial. Price fixing may be rational at the firm level so long as the anticipated cartel profits exceed the damages from exposure discounted by the probability of getting caught, convicted, and held liable.³⁶⁵ At the employee level, however, it is not a simple matter of dollars and cents. Individual employees bear a risk that corporations do not: individuals can be imprisoned. Each employee must consider the risk of imprisonment and its consequences, including the attendant risks of being rendered permanently unemployable. Once those individual employees consider the probability of their own imprisonment, engaging in price fixing may become too risky for the employee even if such cartelization is cost-beneficial from the firm's perspective.

363. See Aubert et al., *supra* note 123, at 35.

364. See Buccirossi & Spagnolo, *supra* note 71, at 20. Firms prosecuted for price fixing following accusations by amnesty applicants consistently plead guilty to criminal price fixing. This is not surprising given the amount of evidence that the Antitrust Division secures before initiating prosecutions.

365. At the firm level, price fixing remains cost-beneficial even when firms are caught and punished. Financial penalties are not enough with respect to firms. Although members of the vitamin cartel paid larger fines than any cartel in history, much scholarship demonstrates that the member firms still profited from their illegal activity. See Lande, *supra* note 48, at 341 n.48. If firms believe that price fixing is profitable even when caught, they are much more likely to join cartels despite antitrust laws.

In short, antitrust policy should better recognize that cartels are composed of agency relationships and, thus, agency theory should inform antitrust enforcement efforts. Most importantly, decoupling the interests of principals and agents provides a cost-effective mechanism to destabilize price-fixing conspiracies.