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Treble, Treble Toil and Trouble: The New Per Se Rule as a Protection Against the Curse of the "Supreme Evil"

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TREBLE, TREBLE TOIL AND TROUBLE: THE NEW PER SE RULE AS A PROTECTION AGAINST THE CURSE OF THE "SUPREME EVIL"

SETH KONOPASEK*

ABSTRACT

The Supreme Court has called collusion between firms the "supreme evil" of antitrust. Despite public and private enforcement efforts, collusive firms and the cartels they form cost American consumers billions of dollars a year and undermine the virtues of our free market economy. The Chicago School theory of antitrust enforcement, which has dominated antitrust scholarship, vehemently disapproves of private antitrust actions that enable plaintiffs to recover treble damages. Recent scholarship, however, has rejected the Chicago School's concerns of overdeterrence and embraced the treble damages remedy. This Note follows the recent scholarship and proposes the New Per Se Rule, which would impose per se civil liability—including treble damages—on firms that are criminally convicted of collusion and those firms' executives, regardless of whether or not the executives are individually prosecuted or convicted. The New Per Se Rule will radically alter the decision-making formulas of firms and their agents, likely transforming collusion from a rational and profitable business strategy into an irrational and unprofitable one. More importantly, the New Per Se Rule will strike at the root cause of collusion: firm executives. The New Per Se Rule will make it irrational for firm executives to engage in or allow the firm they command to engage in collusive activity. Once collusion is irrational, the "supreme evil" will cease to plague our economy.

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INTRODUCTION

As thunder cracks and a cauldron boils, the three Weird Sisters chant in unison, "Double, double toil and trouble; Fire burn, and cauldron bubble."[1] Given the animosity to antitrust class action lawsuits that enable plaintiffs to recover treble damages, it seems that many would not be surprised if plaintiff's attorneys followed a similar ritual, chanting "Treble, treble toil and trouble; Fire burn, and profits bubble" before pulling yet another frivolous complaint out from their diabolical cauldron.[2] While the wisdom of antitrust class actions is a subject of debate, their purpose is clear: "the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."[3]

Chief among the antitrust laws is the Sherman Act, which forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[4] Through this language, the Sherman Act is designed to "prevent firms from stealing from consumers by charging them supracompetitive prices."[5] The Supreme Court has also recognized two other evils that arise from antitrust violations:

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[1] WILLIAM SHAKESPEARE, MACBETH act 2 sc. 1, l. 10–11.

[2] One critic likened private antitrust suits to the "Salem Witch trials." Abbott B. Lipsky Jr., Before the Antitrust Modernization Commission: *Private Damages Remedies: Treble Damages, Fee Shifting, Prejudgment Interest* 4–5 (2005), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Lipsky.pdf [https://perma.cc/X633-7LJA]. For criticisms of private antitrust actions, *see infra* Section II.B.

[3] Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 130–31 (1969).

[4] Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

[5] Robert H. Lande, *A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 FORDHAM L. REV. 2349, 2351 (2013); *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724 (1988) (holding that interbrand competition is the "'primary concern of antitrust law'") (quoting Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977)); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 54–59 (1911) (determining that the policy purpose of the Sherman Act was to ban restraints of trade that created higher prices and reduced output); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (holding that the Sherman Act was passed because "ultimately competition will produce not only lower prices, but also better goods and services.").

lower quality and lower quantities of products.[6] By colluding with each other, firms can bypass market competition and use the aggregate power of a cartel to fix prices, allocate markets, and rig bids—acts that bring about these three evils so consistently that they are illegal per se.[7] Because of the power of cartels to impose these evils, the Supreme Court has labeled collusion between firms the "supreme evil" of antitrust.[8]

Although collusive firms, the "supreme evil,"[9] are prosecuted by the Department of Justice and sued in private actions, they continue to form and operate.[10] Recent empirical reviews of cartel incentives have found that the current level of punishment for collusive behavior is vastly insufficient to deter corporations from colluding and committing anticompetitive crimes.[11] Thus, firms collude because it "pays. In fact, it pays very well."[12] And it pays at the cost of the consumer: cartels cost the economy billions of dollars a year.[13] Given the enormous cost imposed by collusive behavior, it is nearly universally agreed that cartels should be policed and punished.[14] And to be sure, they are.[15] But if we want to be free from the evils cartels impose, we need to police and punish corporate collusion more effectively.[16] This Note proposes

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[6] *See, e.g., Standard Oil*, 221 U.S. at 52; *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695.

[7] U.S. DEP'T OF JUST., ANTITRUST DIV., AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 2 (2018) [hereinafter DOJ PRIMER], https://www.justice.gov/atr/page/file/1091651/download [https://perma.cc/HTQ7-NTRL].

[8] Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

[9] *Id.*

[10] *See, e.g.,* D. Daniel Sokol, *Policing the Firm*, 89 NOTRE DAME L. REV. 785, 785–88, 790–93 (2013); *see also infra* Part I.

[11] *See, e.g.,* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 476–77 (2012) [hereinafter *Crime Pays*]; *see also infra* Section III.B.

[12] *Crime Pays*, *supra* note 11, at 430.

[13] *See infra* notes 38–44 and accompanying text.

[14] Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 120–21 (1993) [hereinafter *Antitrust "Treble" Damages*].

[15] *See infra* Part III; *see also* Scott D. Hammond, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program*, U.S. DEP'T OF JUST. (Mar. 26, 2008), https://www.justice.gov/atr/file/519651/download [https://perma.cc/P63T-79L5].

[16] *See, e.g., Crime Pays*, *supra* note 11, at 476–77; John M. Connor & Robert H. Lande, *Does Crime Pay? Cartel Penalties and Profits*, ANTITRUST, Spring 2019, at 29 [hereinafter *Does Crime Pay?*]; Sokol, *supra* note 10.

a single, simple rule that will radically shift the cost-benefit analysis of both firms and the individual actors who compose them, drastically boosting the effectiveness of the cartel policing and punishment structure already in effect.

Part I of this Note reviews the current incentives of firms and individuals to collude and the harm that collusion imposes on society. Part II reviews the economic efficiency theory of cartel enforcement, known as the Chicago School, which has largely dominated antitrust theory.[17] It also adapts Robert Becker's model of criminal decision making into a "decision-making formula" applicable to antitrust collusion.[18] Part III reviews the burgeoning new outlooks on cartel enforcement, or the Post-Chicago School, including that private enforcement is more effective than previously thought,[19] the growing scholarship that advocates for increased individual accountability,[20] and the Department of Justice's increased focus of individual prosecution.[21] Part IV proposes a new "per se" rule for policing cartel activity. Under this New Per Se Rule, firms and firm executives would have per se liability in civil actions when they or any of their employees are convicted of a criminal antitrust violation. It then outlines how the New Per Se Rule would effectively deter and police cartel activity by drastically altering the decision-making formula of both firms and firm executives. Part V outlines the theoretical underpinnings of the New Per Se Rule and its alignment with contemporary scholarship on cartel enforcement and the Department of Justice practice.

I. THE REALITY OF COLLUSION AND ITS EFFECTS

Collusion is the "supreme evil" of antitrust because it enables what appears to be competitive markets to function as a monopoly or near monopoly.[22] Collusive companies combine into a cartel and, through their aggregate market power, impose the three evils: costs are artificially inflated, quality goes down, and

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[17] *See infra* note 50 and accompanying text.
[18] *Infra* Section II.A.
[19] *Infra* Part III.
[20] *Id.*
[21] *Id.*
[22] Verizon Commc'ns Inc. v. Law Offs of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004).

production is limited.[23] The three evils are evils not only because they force consumers to overpay, but because they destroy the efficiency of the free market.[24] In addition to creating allocative inefficiencies, cartels decrease competition, which "insulat[es] inefficient manufacturers from the pressures of competition," increasing production costs and preventing innovation.[25] Cartel activity is illegal, and violators can face prison time and fines.[26]

Despite the risks that come with cartelization, cartels continue to form and operate.[27] As eminent cartel scholars John M. Connor and Robert H. Lande wrote, "[c]artels are a crime that ... pays."[28] Christopher R. Leslie argues that price fixing in the American market can be especially lucrative because the high standards of proof required to prove collusion enable price fixers to begin their cartel in a friendly market, build trust with each other, and then expand into the American market with little chance of prosecution.[29] Moreover, the continuation of both public and private actions brought against cartels proves that, for whatever reason, cartels are still forming and operating.[30]

Regardless of the exact laws or circumstances that incentivize firms to collude, it is clear that the penalties and costs of

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[23] *See supra* notes 4–7 and accompanying text.

[24] This inefficiency is known by economists as dead-weight loss. *See generally* Christopher R. Leslie, *Antitrust Damages and Deadweight Loss*, 51 ANTITRUST BULL. 521 (2006) (explaining deadweight loss and how antitrust law should address the problem).

[25] Christopher R. Leslie, *Foreign Price-Fixing Conspiracies*, 67 DUKE L. J. 557, 564 (2017) [hereinafter *Foreign Conspiracies*].

[26] Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)); U.S. SENT'G GUIDELINES MANUAL ch. 8 (U.S. SENT'G COMM'N 2018).

[27] *See, e.g.,* Brent Snyder, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., *Compliance is a Culture, Not Just a Policy* (Sept. 9, 2014), https://www.justice.gov/atr/file/517796/download [https://perma.cc/SL2D-C2U4] (Cartels continue to form and operate despite "high fines for the company; significant jail time for executives; expensive attorneys' fees; substantial civil damages owed to customers; and exposure to further criminal investigations—not to mention the associated bad publicity and internal distraction from the actual business of the company."); Christopher R. Leslie, *Antitrust Law as Public Interest Law*, 28 U.C. IRVINE L. REV. 885, 886 (2012) (reviewing a variety of modern cartels).

[28] *Crime Pays*, *supra* note 11, at 430.

[29] *Foreign Conspiracies*, *supra* note 25, at 614.

[30] *Crime Pays*, *supra* note 11, at 433 n.25.

being caught colluding are simply not high enough to outweigh the millions of dollars in profits firms gain by their collusion.[31] On the one hand, the probability of a firm's collusion being discovered is less than one.[32] On the other, even when cartels are identified, a large number go without criminal prosecution due to a lack of evidence.[33] And when they are prosecuted, the costs the guilty parties incur are often vastly too low to deter future collusion.[34] Moreover, private actions against cartels are also woefully underpowered.[35] Despite being authorized to recover treble damages against price fixers, victims' actual recoveries are often less than their actual damages.[36] As evidenced by the continuing formation of cartels, these two factors—the possibility of never being caught and low penalties if caught—combine to incur lower costs upon collusive firms than gained through their collusion.[37]

The consequences of these cartels are significant.[38] Although hard to calculate exactly, one empirical study found that domestic cartels overcharge by a median of 23.3% and international cartels overcharge by a median of 30%, with an aggregate overcharge

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[31] *See, e.g.*, *Crime Pays*, *supra* note 11, at 430 ("[T]he combined level of U.S. cartel sanctions has been only 9% to 21% as large as it should be to protect potential victims .... [D]espite all the existing sanctions, collusion remains a rational business strategy."); Sokol, *supra* note 10, at 790–92 (discussing the high overcharge and low detection rates of cartels).

[32] *See infra* Section II.A; *see also* Leslie, *supra* note 24, at 609–14 (discussing how American courts have enabled cartels to form and build trust in a cartel-friendly jurisdiction, then expand into the American market and operate based on trust, not enforcement mechanisms, and thus evade prosecution).

[33] Direct evidence of price fixing is generally unavailable, forcing plaintiffs and prosecutors to rely on circumstantial evidence. *See In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010) ("Direct evidence of conspiracy is not a sine qua non, however. Circumstantial evidence can establish an antitrust conspiracy."); Christopher R. Leslie, *Balancing The Conspiracy's Books: Inter-Competitor Sales and Price-Fixing Cartels*, 96 WASH. U. L. REV. 1, 7 (2018) ("Because price-fixing firms take great efforts to conceal their illegal activity, direct evidence of price-fixing agreements is generally not available.").

[34] *Crime Pays*, *supra* note 11, at 476–77; John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 559–64 (2005) [hereinafter *How High?*].

[35] *See generally Antitrust "Treble" Damages*, *supra* note 14.

[36] *Id.*

[37] *See Foreign Conspiracies*, *supra* note 25, at 609–14; *Crime Pays*, *supra* note 11, at 476–77.

[38] *See, e.g.*, *Foreign Conspiracies*, *supra* note 25, at 561 nn.16–18; *How High?*, *supra* note 34, at 559–64.

mean of 49%.[39] These overcharges result in consumers paying billions of dollars in artificially inflated prices per year.[40] The costs of the allocative inefficiencies caused by cartels are less obvious but also significant.[41] Judge Easterbrook posited that the costs of allocative inefficiency can be estimated at 50% of direct costs.[42] Regardless of the exact costs imposed by the allocative inefficiency of price-fixing cartels, however, it suffices to say that these costs are likely also in the billions of dollars per year.[43] Likewise, umbrella costs are similarly difficult to quantify. It is nonetheless sure, however, that umbrella costs exact at least some price upon society by protecting inefficient actors and allowing firms not part of the cartel to also raise prices.[44]

We are only able to estimate these figures because only some cartels have been caught.[45] It is impossible to quantify the effects of yet undiscovered collusion.[46] Whatever the precise dollar value of cartel harm may be, it is clear that our economy is plagued with a nasty case of "the supreme evil."[47]

II. THE ECONOMIC EFFICIENCY THEORY OF CARTEL ENFORCEMENT

The theoretical underpinnings of antitrust law have been described as a battle between the Chicago School and the Post-Chicago School.[48] Although this division might not be as clean-cut

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[39] *Crime Pays*, *supra* note 11, at 456–57.

[40] *Crime Pays*, *supra* note 11, at 455–62; *Foreign Conspiracies*, *supra* note 25, at 564; Hammond, *supra* note 15, at 1.

[41] *See Crime Pays*, *supra* note 11, at 433 n.22.

[42] Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445, 455 (1985).

[43] *See id.*

[44] *Crime Pays*, *supra* note 11, at 461–62; *Foreign Conspiracies*, *supra* note 25, at 565.

[45] *See How High?*, *supra* note 34, at 518–19.

[46] "Such cartels are common," Gideon Mark, *The Yates Memorandum and Cartel Enforcement*, 51 U.C. DAVIS L. REV. ONLINE 95, 96 (2018), and have "potentially devastating effects on the U.S. economy"; DOJ PRIMER*, supra* note 7, at 1.

[47] Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). "The bulk of scholarly opinion is consistent with the view that despite ever-increasing levels of corporate fines and longer jail sentences, cartel activity is currently under-deterred." Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, 9 (2010) [hereinafter *Antitrust Sanctions*].

[48] *See, e.g.,* William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*,

as it first appears,[49] it is certain that the Chicago School's method of economic analysis has had an "unmistakably profound" influence on U.S. antitrust law.[50] This Part outlines the economic view of cartel enforcement, including its rejection of private antitrust actions. Part III will then outline contemporary, or Post-Chicago School, views on cartel enforcement.

A. Economic Theory of Enforcement

In 1978, Chicago School scholar Robert Bork wrote that total welfare, or surplus, is consumer welfare.[51] This summation of antitrust law, that its purpose is to enhance economic efficiency, dominated the Chicago School's antitrust enforcement theory.[52] In the 1980s, William Landes put this understanding into a theoretical model of optimal deterrence.[53] Landes's model is built on Robert Becker's model of crime and punishment, which posits

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2007 COLUM. BUS. L. REV. 1, 5, n.14 (2007) (describing both the author's own use of the Chicago/Post-Chicago dialectic and its use by other "academics, practitioners, and enforcement officials"); D. Daniel Sokol, *Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. 201, 201–02 (2012) [hereinafter *Cartels, Corporate Compliance*] (noting that while the Chicago School has been "quite contentious," its assumptions and policy prescriptions have been generally accepted).

[49] *See* Kovacic, *supra* note 48, at 5–6.

[50] *Id.* at 6. *See also* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 349 (1995) ("[T]here exists very little in the way of contemporary antitrust theory which has not been inspired to some extent by Chicago economic analysis.").

[51] ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66, 97 (1978); *see also* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 691 (2010) (noting that Bork equated consumer welfare with the total welfare of society); Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 148 (2011) ("Bork explicitly equated the term 'consumer welfare' with 'the wealth of the nation,' a term that economists would understand as 'social welfare.'" (internal citations omitted)). See generally William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413 (1990) [hereinafter *Antitrust Paradox Revisited*] for a discussion of Bork's impact on antitrust law.

[52] *Antitrust Paradox Revisited*, *supra* note 51, at 1415–16.

[53] *See generally* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983) [hereinafter *Optimal Sanctions*].

that the purpose of criminal punishment is to deter inefficient offenses, but not efficient ones.[54] By the 1990s, Landes's "Beckerian formulation" of antitrust theory had been universally adopted by scholars.[55] The bottom line of Becker's model is that an enforcement system so robust that it deters *all* crime is actually suboptimal.[56] Optimally, crime that brings more benefits than harm should be allowed to happen.[57] Becker's model can be simplified and applied particularly to the decision to collude: the probability of being caught (*Pr*) multiplied by the punishment (*Pn*), balanced against the benefit (*B*) the criminal receives from the crime (all expressed in constant dollars).[58] Thus, when $Pr * Pn = B$, the criminal's net gain from their criminal activity is $0.[59] If the *Pr* is a perfect one, the *Pn* only needs to be equal to the benefits received to deter the crime; the formula is reduced to $Pn = B$.[60] As *Pr* goes down, however, *Pn* needs to be increased to achieve actual deterrence.[61] This Note will refer to this simplification of Becker's model as a firm or individual's "decision-making formula."

As applied by Landes to antitrust, the benefits (*B*) of some antitrust crimes are more than just the increased profits to the individual cartel members, but the social benefits realized by society as a whole through greater economic efficiency.[62] Some cartel activities are beneficial because they bring more social benefits (in the form of economic efficiencies) than they cost consumers in overcharges and other ills.[63] For example, a cartel may choose to restrict output and thereby obtain cost savings of *C*.[64] If *C* is greater than the deadweight loss incurred by the output restriction,

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[54] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207–08 (1968).

[55] *Crime Pays*, *supra* note 11, at 431 n.15 (citing Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980)).

[56] *See Optimal Sanctions*, *supra* note 53, at 652–53.

[57] *Id.*

[58] *See* Becker, *supra* note 54, at 172–85 (formulating the model described in this Note).

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *Optimal Sanctions*, *supra* note 53, at 655–56.

[63] *See id.*

[64] *Id.* at 654–56.

the output reduction is efficient—the cartel saves more money than consumers overpay, and surplus is created.[65] Punishment, in the form of a fine on the cartel, greater than the sum of C and the generated deadweight loss would negate the generated surplus and deter the behavior.[66] This punishment, however, would not be optimal because negating the surplus would also negate the social benefits generated by the surplus.[67]

Thus, according to Landes, the optimal way to deter cartel activity is to punish cartels with fines equal to the net harm imposed—the deadweight loss they generate.[68] If cartel activity generates cost savings, C, greater than the harm imposed, a fine at the level of net harm imposed will not deter the activity; if cartel activity does not create such a surplus, it will be deterred.[69] Importantly, Landes also notes that his economic theory of cartel deterrence applies even when a cartel does not have a 100% market share.[70]

Landes's model relies on three defining principles.[71] First, Landes's model seeks to deter and punish the firm involved in the collusion, not any human individual.[72] It thus focuses on firms as rational actors in and of themselves, rather than as a collection of agents that could be individually punished.[73]

Second, the means of punishment whereby deterrence is achieved is—and can only be—monetary fines.[74] Imprisonment or other individual punishments are not possible to impose on a firm. In agreement, Richard Posner posits that optimal punishment consists almost exclusively through fines.[75] Another scholar encapsulated the theory by saying that "very little now supports

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[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 666–68.
[71] *See id.* at 654–56.
[72] *See id.*
[73] *See id.*
[74] *See id.*
[75] Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980).

the continued imposition" of punishments outside corporate fines to achieve deterrence.[76]

Third, Landes's model only seeks to deter and punish inefficient collusion.[77] In other words, it avoids overdeterrence or the deterrence of efficient collusion. This goal relies on firms to examine the costs and benefits of colluding via their decision-making formula (including the chance of being caught and receiving punishment) and to make the rational decision, whether that be to collude or not collude.[78] Summarizing this principle of Landes's theory, Robert H. Lande wrote, "Optimal deterrence models are founded upon the assumption that the sole goal of antitrust is to enhance economic efficiency."[79]

B. Criticisms of Private Actions

Given the goal of optimal deterrence, it comes as no surprise that private class action suits for treble damages are disfavored by those who subscribe to Landes's economic theory of cartel enforcement.[80] However, it is not that private lawsuits are necessarily disliked on principle. Landes himself endorsed private antitrust actions, believing that the incentive they give victims promotes efficiency.[81] Generally, optimal deterrence scholars would prefer private suits to recover the net harm of inefficient cartels over government enforcement.[82] Rather, private suits are disliked because the combination of government prosecution and private treble damages suits combine to create overdeterrence.[83] Expressing

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[76] V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1534 (1996).

[77] *See Optimal Sanctions*, *supra* note 53, at 654–56.

[78] *See id.*

[79] *Antitrust "Treble" Damages*, *supra* note 14, at 127; *see also* WILLIAM BREIT & KENNETH G. ELZINGA, ANTITRUST PENALTY REFORM, 4, 32–42 (1986) (suggesting that all optimal deterrence models assume that efficiency is the only legitimate goal of antitrust).

[80] *See, e.g.,* 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, 732–33 (2001).

[81] *See Optimal Sanctions*, *supra* note 53, at 674–77.

[82] *See, e.g.,* Khanna, *supra* note 76 ("[F]rom a deterrence perspective, very little now supports the continued imposition of criminal rather than civil liability on corporations.").

[83] *See* Kobayashi, *supra* note 80, at 732–33.

this view, Richard Posner wrote that the "burgeoning of the private antitrust action has induced enormous, and I think justified, concern about the overexpansion of the antitrust laws and their increasing use to retard rather than promote competition."[84] Michael Spence lamented that "[t]hings can get carried away, and antitrust law can be used in ways that are not desirable ...."[85] William Breit and Kenneth Elzinga posit that the misallocation of antitrust penalties leads to three economic inefficiencies: perverse incentives, misinformation, and reparations costs.[86] "The most important and influential"[87] critique of private antitrust actions in the Chicago School era was by Phillip Areeda, who proposed that treble damages should not be available unless plaintiffs proved that competition was actually reduced.[88] These criticisms even caught the ear of the chairmen of the House and Senate Judiciary committees, who both questioned the efficacy of private action treble damages.[89]

Contemporary criticisms of private antitrust actions are also legion.[90] One common refrain is that it is the attorneys, not the plaintiffs, who really win because "administrative costs [often] swallow the entire recovery."[91] A former commissioner of the FTC called private antitrust actions "almost as scandalous as the price-fixing cartels that are generally at issue" and said that "the plaintiffs' lawyers ... stand to win almost regardless of the merits of the case."[92] Another critic identified antitrust class

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[84] BREIT & ELZINGA, *supra* note 79, at 3 (quoting RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 35 (1976)).

[85] Karen W. Arenson, *From Economic Theory to Harvard Don*, N.Y. TIMES, April 1, 1984 (§ III), at 4; *see also* BREIT & ELZINGA, *supra* note 79, at 4, 69 nn.5–6.

[86] BREIT & ELZINGA, *supra* note 79, at 36–42 (discussing each of the inefficiencies successively).

[87] Kovacic, *supra* note 48, at 54.

[88] Phillip Areeda, Comment, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1129–30 (1976).

[89] *See* BREIT & ELZINGA, *supra* note 79, at 4.

[90] For a thorough discussion of the criticisms leveled at private antitrust actions, see Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 38–78 (2013) [hereinafter *Defying Conventional Wisdom*].

[91] Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 683 (2010).

[92] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks to the Antitrust Modernization Commission 9–10 (June 8, 2006), https://www.ftc.gov/sites

actions as an area needing reform because "they are increasingly beneficial only to plaintiffs' law firms and not to consumers."[93] A similar line of criticism claims that many private antitrust actions are unfounded.[94] One such critic said, "many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip to strengthen the hands of plaintiffs who really have other complaints."[95] Prominent antitrust attorney Abbot Lipsky pulled no punches when he analogized private antitrust actions to the Salem Witch Trials.[96]

To be sure, the contemporary critics of private antitrust actions also maintain concerns of overdeterrence.[97] They fear that private antitrust actions will discourage lawful and beneficial competitive behavior.[98] David Rosenberg and James P. Sullivan argue that fines and prison terms imposed by public enforcement reduce the need for treble damages.[99] Other critics have called for an end to treble damages as presently constituted.[100] Even the ABA Antitrust Section is wary of overdeterrence.[101] Other authors

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/default/files/documents/public_statements/antitrust-modernization-commission -remarks/rosch-amc20remarks.june8.final.pdf [https://perma.cc/Z3PK-BSHT].

[93] *Q&A with Weil Gotshal's Steven A. Newborn*, LAW360 (May 26, 2009, 12:00 AM), https://www.law360.com/articles/103359/q-a-with-weil-gotshal-s-steven -a-newborn [https://perma.cc/WN4X-9DUP].

[94] *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 59 (2005).

[95] *Id.*

[96] *See* Lipsky, Jr., *supra* note 2, at 4–5.

[97] *See* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 884–85 (2008) [hereinafter *Benefits From Private Antitrust*].

[98] *See, e.g., id.* at 885–86, 885 n.29; Donald F. Turner*, The Durability, Relevance, and Future of American Antitrust Policy,* 75 CAL. L. REV. 797, 811–12 (1987).

[99] David Rosenberg & James P. Sullivan, *Coordinating Private Class Action and Public Agency Enforcement of Antitrust Law*, 2 J. COMPETITION L. & ECON. 159, 162 (2006).

[100] *See, e.g.,* John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 ANTITRUST BULL. 531, 567–68 (2003) ("In light of a more expansive corporate amnesty policy that increases the probability of uncovering concealable antitrust violations, and hence reduces the magnitude of the appropriate fine, the ceilings today may well be high enough that the optimal penalty can be imposed through criminal sanctions alone."); Kobayashi, *supra* note 80, at 732–33.

[101] "Whether increased criminal penalties will provide an appropriate level of deterrence ... should be the subject of hearings and public briefings to

claimed that "allowing cases to proceed toward trial or settlement under the threat of redundant or excessive damages [ ] is untenable" and that action is needed to bring "sanity and stability back to antitrust law."[102] Another said that the private action system is so flawed that it cannot be reformed, but must be wholly replaced because it is existentially unsound.[103]

III. EMERGING VIEWS ON CARTEL ENFORCEMENT

A. The Implicit Rejection of Landes's Economic Efficiency Theory

Each of the three defining principles of Landes's model has been rejected by contemporary views on cartel enforcement.[104] Contrary to Landes's assumption that all punishment should be focused on the business entity, modern scholars have begun to examine the efficacy of punishing the individual agents of the corporation.[105] Judge Douglas Ginsburg and Joshua D. Wright argue that individual executives, even negligent ones, must be punished to achieve optimal deterrence.[106] They also argue that debarment of individual corporate criminals would be an effective solution,[107] while others say that incarceration is the greater deterrent to individuals.[108] Christopher Leslie argues that the agents

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reach the proper deterrence balance." AM. BAR ASS'N, COMMENTS OF THE ABA SECTION OF ANTITRUST LAW ON H.R.1086: INCREASED CRIMINAL PENALTIES, LENIENCY DETREBLING AND THE TUNNEY ACT AMENDMENT 12 (2004), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_increasedcriminalpenalties.pdf [https://perma.cc/SQ5P-3NWP].

[102] Kyle W. Mach & Bradley E. Markano, *The Problem of Duplicative Recovery Under Federal and State Antitrust Law*, 23 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 105, 119 (2014).

[103] Crane, *supra* note 91, at 676–77.

[104] *See supra* Section II.A.

[105] *See, e.g.,* Gregory J. Werden et al., *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, 56 ANTITRUST BULL., 207, 234 (2011) [hereinafter *Deterrence and Detection*] (arguing that the various forms of cartel punishment, including the prosecution of individuals, made the United States' cartel enforcement program the most effective).

[106] *See Antitrust Sanctions*, *supra* note 47, at 3.

[107] *Id.* at 22.

[108] *Deterrence and Detection*, *supra* note 105, at 234; *see* Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1652–64 (2008) [hereinafter *Faithless Agents*] (arguing that imprisonment has multiple advantages over fines and disbarment).

of collusive firms should be punished for the purpose of increasing agency costs and destabilizing cartels.[109]

Other scholarship argues that compliance with antitrust law can only be achieved though incentivizing firm executives to implement effective, internal compliance programs.[110] An analysis of behavioral economics as applied to cartel enforcement posited that firms will comply with antitrust laws only when the culture of the firm changes and executives take antitrust violations seriously.[111] Another scholar concluded that "[n]eo-Chicago antitrust must embrace a more nuanced view of the firm" and "create appropriate incentives for individuals ... within the firm."[112]

Also, contrary to the Landes model, the Department of Justice prioritizes the deterrence of cartels through prosecution of individuals.[113] The Department does this because "individual accountability through the imposition of jail sentences is the single greatest deterrent" to cartel activity.[114] The Department's commitment to this strategy was reaffirmed in 2015 when Deputy Attorney General Sally Yates issued what has come to be known as the Yates Memorandum.[115] The Yates Memorandum explained, "[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability ... deters future illegal activity [and] incentivizes changes in corporate behavior ...."[116] As part of

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[109] *See generally Faithless Agents*, *supra* note 108.

[110] *See* Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 825–27 (2014) [hereinafter *Effective Ethics*] (explaining how an internal compliance program differs from an extrinsic, incentive-based approach).

[111] *See* Maurice E. Stucke, *Am I A Price Fixer? A Behavioral Economics Analysis of Cartels*, *in* CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 263, 282–84 (Caron Beaton-Wells & Ariel Ezrachi, eds. 2011).

[112] *Cartels, Corporate Compliance*, *supra* note 48, at 236–37.

[113] This practice began in the 1990s. *See* Mark, *supra* note 46, at 97.

[114] Scott D. Hammond, *Ten Strategies for Winning the Fight Against Hardcore Cartels*, U.S. DEP'T OF JUST. (Oct. 18, 2005), https://www.justice.gov/atr/file/517851/download [https://perma.cc/8LXR-P2GZ].

[115] Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Just., on Individual Accountability for Corporate Wrongdoing, 1 (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/8FG4-XDJ3].

[116] *Id.*; *see also* U.S. Dep't of Just., Just. Manual § 9.28-210 (2018), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700 [https://perma.cc/4L9R-4GTF] ("Because a corporation can

this turn towards individual accountability, the Antitrust Division now insists on jail sentences for all defendants—no longer do they make "no-jail" deals.[117] The Division also now prosecutes multiple individuals from each corporate defendant, rather than adhering to the prior practice of prosecuting only the single most culpable individual.[118]

Recent scholarship has also rejected the punishment via only monetary fines that Landes's model requires.[119] Werden, Hammond, and Barnett explicitly reject reliance on monetary punishment, arguing that it "follows from unsupportable assumptions."[120] Proposals that call for debarment and longer incarceration times also reject the exclusivity of monetary fines.[121] Speaking of corporate punishment generally, one scholar argues that corporations should be punished through incapacitation, not merely fines.[122] Longstanding Department of Justice practice of prosecuting and incarcerating individuals also rejects the Landes model's view of exclusive reliance on fines.[123]

Finally, the recent scholarship on cartel enforcement has implicitly rejected the Landes model's concerns of overdeterrence.[124] Rather than outright arguing that all collusion should be prevented regardless of economic efficiency, however, modern scholarship focuses on the purported need for greater deterrence simply to achieve optimal deterrence for economically inefficient

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act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Provable individual criminal culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or non-prosecution agreement, or a civil resolution.").

[117] Scott D. Hammond, Deputy Assistant Att'y Gen. for Crim. Enf't, U.S. Dep't of Just., Antitrust Div., Remarks at the Nat'l Inst. on White Collar Crime: The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, 7 (Feb. 25, 2010), https://www.justice.gov/atr/file/518241/download [https://perma.cc/MG5M-2R27].

[118] *Id.* at 9–10.

[119] *See Deterrence and Detection*, *supra* note 105, at 211.

[120] *Id.*

[121] *See supra* notes 104–09 and accompanying text.

[122] W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 963 (2019).

[123] *See* Yates, *supra* note 115, at 4–5.

[124] *Deterrence and Detection*, *supra* note 105, at 209.

cartels.[125] One empirical study found the U.S. Sentencing Guideline's presumption that cartels overcharge by 10%[126] far too low, indicating that even if we only wanted to achieve optimal deterrence, we must drastically increase punishment to get there.[127] John M. Connor and Robert H. Lande similarly found that cartels remain significantly under-deterred—sanctions are only 9.2 to 20.8% of their optimal level.[128] Joshua D. Wright and Judge Douglas Ginsburg also do not outrightly reject the notion of overdeterrence, but rather believe that that one prong of the "optimal sanction for price-fixing" is "that the *individuals* responsible for the cartel activity ... should be given a sufficient disincentive."[129] Following this line of implicit criticism, the Department of Justice does not grant a defendant leniency in prosecution or sentencing if they can show economic efficiency.[130]

B. New Appreciation of Private Actions

In recent years, there has been a growing body of scholarship in support of private antitrust actions.[131] At the tip of the spear lies Robert H. Lande, who began his defense of private antitrust actions in the height of the economic efficiency model's acceptance.[132] In 1993, he asked if "treble" damages were actually single damages.[133] He concluded that rather than being treble, antitrust damages are "approximately equal to, or less than, the actual damages caused by antitrust violations."[134] Since this first analysis, Lande has written a litany of articles analyzing cartels and private actions against them.[135] Lande and his co-authors

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[125] *See, e.g.*, *Deterrence and Detection*, *supra* note 105, at 208–18; *Crime Pays*, *supra* note 11, at 476–77.

[126] U.S. SENT'G GUIDELINES MANUAL § 2R1.1 cmt. n.3 (U.S. SENT'G COMM'N 2018).

[127] *How High?*, *supra* note 34, at 559–64.

[128] *Crime Pays*, *supra* note 11, at 474.

[129] *Antitrust Sanctions*, *supra* note 47, at 5 (emphasis in original).

[130] *See supra* notes 113–18 and accompanying text.

[131] *See infra* notes 135–41 and accompanying text.

[132] *See Crime Pays*, *supra* note 11, at 431 n.15.

[133] *Antitrust "Treble" Damages*, *supra* note 14, at 115, 120–21.

[134] *Id.* at 118.

[135] *See, e.g.*, *Does Crime Pay?*, *supra* note 16, at 29; Robert H. Lande, *Class Warfare: Why Antitrust Class Actions Are Essential for Compensation and Deterrence*, ANTITRUST 81 (Spring 2016) [hereinafter *Class Warfare*]; John M.

are not alone in their support of private antitrust actions. Many scholars cite and build upon Lande's work, including Joshua D. Snyder,[136] Mark A. Lemley,[137] Christopher R. Leslie,[138] D. Daniel Sokol,[139] Jens-Uwe Franck and Martin Peitz,[140] and Steve Williams and Elizabeth Tran.[141] Lande's work is particularly helpful, and is focused on here, because he directly confronts the primary arguments against private antitrust actions[142] and tests them through empirical analysis.[143]

A common theme of Lande's work in support of private antitrust actions (and in the work of those that have followed him) is the lambasting of critics who make their arguments against private antitrust actions with no empirical evidence.[144] Along with co-author Joshua P. Davis, Lande points out that "[t]hose who point to the perceived flaws of private antitrust enforcement typically offer only anecdotes ... rather than provide

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Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 IOWA L. REV. 1997 (2015) [hereinafter *Not Treble*]; *Defying Conventional Wisdom*, *supra* note 90, at 5–6; Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 1269–70 (2013) [hereinafter *Toward Assessment*]; *Crime Pays*, *supra* note 11, at 476–77; *How High?*, *supra* note 34, at 513; *Antitrust "Treble" Damages*, *supra* note 14, at 117–18. *See generally Robert H. Lande*, U. BALT., http://law.ubalt.edu/faculty/profiles/lande.cfm [https://perma.cc/A5UM-MTLJ].

[136] Joshua D. Snyder, Tyson Foods *And "Uninjured Class Members" in Antitrust Class Actions*, 15 ANTITRUST SOURCE, Dec. 2015, at 1, 11–12.

[137] Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 48–49 (2015).

[138] *Id.*; Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 454 n.393 (2018); Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1035 n.124, 1036 n.133, 1039 nn.147 & 149, 1045 n.175 (2008).

[139] D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 691 n.11, 726 n.215 (2012).

[140] Jens-Uwe Franck & Martin Peitz, *Suppliers as Forgotten Cartel Victims*, 15 N.Y.U. J.L. & BUS. 17, 29 n.45, 38 n.64, 42 n.70, 43 n.77, 46 nn.84 & 87 (2018).

[141] Steve Williams & Elizabeth Tran, *Recoveries for Violations of Federal and California Antitrust Statutes Should Not Be Apportioned*, 23 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 95, 103 (2014).

[142] *See supra* Section II.B.

[143] *See Toward Assessment*, *supra* note 135, at 1271.

[144] *See, e.g., Benefits From Private Antitrust*, *supra* note 97, at 887–89; Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651, 651–52 (2006).

reliable and rigorous data to support their arguments."[145] In that same article, Lande and Davis analyze forty cases to conclude that "private antitrust actions complement government enforcement ... . [and] may be every bit as essential as public enforcement."[146] In another empirical study, this one covering seventy-one law review pages, Lande and Davis conclude that "the high success rate of government litigation suggests that in the absence of private litigation, many bad actors would get away with violating the antitrust laws."[147] In 2015, Lande revisited his 1993 question[148] and once again found through empirical analysis that "cartel recoveries are mostly less than single damages."[149]

These findings all undercut the argument that private antitrust actions lead to overdeterrence.[150] Moreover, Lande has tackled the question of optimal deterrence head on.[151] In 2005, he and John M. Connor found that the median overcharge by cartels is 25%: 17–19% by domestic cartels and 30–33% by international cartels.[152] Thus, the presumption of the U.S. Sentencing Guidelines that cartels overcharge by 10% is substantially too low—low enough that even if 100% of all cartels were caught, optimal deterrence would still not be met.[153] Seven years later, the same duo found that "the overall level of anti-cartel sanctions is far too low. To protect victims optimally, the collective level of existing sanctions should be multiplied by a factor of five."[154] Revisiting this study in 2019, Lande and Connor concluded that "the most recent data re-affirm this conclusion."[155]

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[145] *See Benefits From Private Antitrust*, *supra* note 97, at 887.

[146] *Id.* at 905–06.

[147] Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315, 349 (2011) [hereinafter *Comparative Deterrence*]. *But see Deterrence and Detection*, *supra* note 105, at 229 (calling Lande and Davis's study "more misleading than informative"). Lande and Davis rebut these critics in *The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden, Hammond, and Barnett*, 58 ANTITRUST BULL. 173 (2013).

[148] *See Crime Pays*, *supra* note 11, at 431 n.15; *Antitrust "Treble" Damages*, *supra* note 14, at 115, 120–21; *supra* text accompanying notes 132–33.

[149] *See generally Not Treble*, *supra* note 135.

[150] *See supra* Section II.B.

[151] *See How High?*, *supra* note 34, at 514.

[152] *Id.* at 559.

[153] *Id.* at 561.

[154] *Crime Pays*, *supra* note 11, at 476.

[155] *Does Crime Pay?*, *supra* note 16, at 29.

Not only do these findings refute the argument that private antitrust actions and the treble damages regime lead to overdeterrence, they also refute the other primary critique of private antitrust actions—that they are often frivolous.[156] For even if, arguendo, many private antitrust actions were frivolous, the reality of cartel enforcement is that the punishments collusive companies receive is far below the level of optimal deterrence.[157] These frivolous lawsuits would help to make up the difference between the actual levels of cartel enforcement and the optimal level of cartel enforcement.[158] Lande and Davis note at the conclusion of another study, however, that *none* of the cases they studied involved an unmeritorious claim against the defendants.[159] While they concede that their analysis is not wholly conclusive, they assert that "there is no reason to believe otherwise."[160] Thus, the data show that the fear of frivolous lawsuits is just that—a fear, not reality.[161]

IV. Introducing the New "Per Se" Rule

This Note posits that the best way to more effectively deter companies from colluding and to improve enforcement actions against operating cartels is for Congress to introduce a new "per se" rule of liability. This New Per Se Rule should make collusive firms and their executives liable per se in private actions when the firm or any of its agents are criminally convicted for violations of Section 1 of the Sherman Act.[162] In other words, all executives of collusive firms should gain per se liability if their firm becomes criminally liable for an antitrust violation, even if they are not individually prosecuted. For the purposes of the New Per Se Rule, criminal liability should be determined by both guilty verdicts and guilty pleas against a firm or any of its agents. The New Per Se Rule should also build upon the Department of

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[156] *See supra* Section II.B.

[157] *See supra* notes 126–28 and accompanying text.

[158] *See id.*; *supra* notes 145, 153 and accompanying text.

[159] *Comparative Deterrence*, *supra* note 147, at 344–45; *see also Class Warfare*, *supra* note 135, at 81–82.

[160] *Comparative Deterrence*, *supra* note 147, at 344–45.

[161] *See id.*

[162] Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

Justice's existing leniency policy and allow the first executive of a colluding firm who reports the firm's collusive activity to the Department of Justice to automatically receive immunity from all liability, both criminal and civil.[163] Collusive firms, however, should not be able to receive immunity from the New Per Se Rule for self-reporting.

A. Increased Pn *Value*

The New Per Se Rule will improve the effectiveness and deterrent power of public antitrust enforcement by radically altering the results of firms' and individuals' decision-making formulas.[164] The New Per Se Rule will alter firms' and individuals' decision-making formulas by drastically increasing the *Pn* variable of the formula, or the punishment a convicted firm or individual receives if prosecuted, by drastically increasing damages in private actions.[165] Private antitrust actions against collusive companies are successful, but they do not actually recover the treble damages they are entitled to.[166] In reality, private antitrust awards are often less than the actual damages.[167] This disparity between plaintiffs' theoretical recovery and actual recovery is mostly due to the costs and uncertainty of the litigation process, making underpowered settlements attractive.[168] The New Per Se Rule will drastically increase the *Pn* value of the decision-making formula by reducing the costs of private antitrust litigation and eliminating nearly all uncertainty from the process, thus bringing actual awards much closer to the treble damages plaintiffs are entitled to.[169]

Under New Per Se Rule actions, the defendant firms and individuals will already be convicted of violating the Sherman Act.[170] Accordingly, the factual record will already be developed. Moreover, the factual record will be proven beyond a reasonable

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[163] *See* U.S. Dep't of Just., Just. Manual § 9-28.400(B) (2018).

[164] An individual or firm's decision-making formula is the Beckerian formulation of how a rational actor would decide whether or not to engage in collusion. *See supra* Section II.A.

[165] *See supra* Section II.A.

[166] *See supra* Section III.B.

[167] *See supra* Section III.B.

[168] *See supra* Section III.B.

[169] *See supra* Sections II.A, III.B.

[170] *See* Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)); *supra* text accompanying note 162.

doubt—a higher standard than necessary to find liability in a civil case.[171] Because the facts are developed and the New Per Se Rule will make defendants automatically liable on those facts as a matter of law, the litigation process will be significantly shorter—there will be no need for discovery unless the plaintiffs choose to do so to seek additional damages. With a developed factual record and no additional discovery, New Per Se Rule suits will reach judgment significantly faster than private actions currently do.[172] Indeed, New Per Se Rule suits will usually be decided at summary judgement, if not earlier on the pleadings.[173] The treble damages that plaintiffs are entitled to receive from the litigation will thus cease to be discounted by the costs and uncertainty of long litigation,[174] and rational plaintiffs will see the litigation through and claim their treble damages, rather than taking an underpowered settlement. Thus, the New Per Se Rule will drastically increase the punitive and deterrent effects of private antitrust actions by turning what are currently merely theoretical treble damages into actual treble damages, thereby drastically increasing the *Pn* value of the decision-making formula.[175]

This analysis also shows why other sanctions, such as longer terms of debarment,[176] disgorgement,[177] and incarceration,[178] are insufficient methods to achieve a similar level of deterrence.[179] Disgorgement does not increase the *Pn* value at all—it merely lowers the *B* value, or the benefit a collusive firm receives.[180] Debarment does increase *Pn* for individual defendants, but only insofar as the defendant executive is actually injured by the debarment.[181]

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[171] *See Burden of Proof*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/burden_of_proof [https://perma.cc/8QUC-D4BA].

[172] Estimates of the average length of private antitrust suits range from 4.3 to 8.6 years. *Antitrust "Treble" Damages*, *supra* note 14, at 132–33.

[173] *See* FED. R. CIV. P. 12(c). A motion for judgment on the pleadings is analyzed under the same standard as a motion to dismiss. *See, e.g.,* Nat. Alts. Int'l, Inc. v. Creative Compounds, LLC, 918 F.3d 1338, 1343 (Fed. Cir. 2019).

[174] *See supra* Section III.B.

[175] *See supra* note 134 and accompanying text; Section II.A.

[176] *See Antitrust Sanctions*, *supra* note 47, at 22.

[177] *See, e.g.*, Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 79 (2009).

[178] *See, e.g.*, *Deterrence and Detection*, *supra* note 105, at 216.

[179] *See supra* notes 106–08 and accompanying text.

[180] *See supra* Section II.A.

[181] *See supra* Section II.A.

If a debarred individual gains employment with a salary similar to what they could earn in the industry they are barred from, they are not actually injured and their *Pn* value did not actually increase.[182] Moreover, if they are compensated by the firm they colluded on behalf of, then subsequent employment is irrelevant—they will not suffer an increased *Pn* by their debarment.[183] Even longer incarceration terms do not guarantee that an individual's *Pn* value actually increases, for the individual can be compensated for their troubles with a small portion of the profits they reaped through their collusion.[184] Even without the possibility of indemnification, incarceration can only be achieved through the criminal process.[185] The New Per Se Rule imposes civil liability on firms and firm executives who are not criminally convicted. This enables the New Per Se Rule to deter them from colluding—to impose a *Pn* value at all—even if a lack of evidence or government resources precludes their criminal prosecution.

One author argues that "no economic sanction by itself can effectively deter hard-core cartels"—that no *Pn* is big enough and cartels can only be deterred if they are transformed into moral issue.[186] The New Per Se Rule recognizes that firm-only sanctions are insufficient and thus imposes New Per Se liability on executives as well.[187] However, if collusion really is the "supreme evil,"[188] economic sanctions should be increased through the New Per Se Rule *and* cartels should be made a moral issue. Only then can we be sure that colluding firms and executives have a sufficiently high *Pn* value to deter collusion.

B. Firms

The New Per Se Rule will deter firms from colluding and forming cartels by radically altering each firm's decision-making

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[182] *See supra* Section II.A.

[183] *See* Keith N. Hylton, *Deterrence and Antitrust Punishment: Firms Versus Agents*, 100 IOWA L. REV. 2069, 2076–77 (2015) (discussing firms' ability to indemnify employees who collude on their behalf).

[184] *See id.*; *supra* Section II.A.

[185] *See Deterrence and Detection*, *supra* note 105, at 216.

[186] Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUM. BUS. L. REV. 443, 544–47 (2006).

[187] *See id.*

[188] Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

formula. For firms considering collusion, the per se liability of the New Per Se Rule will greatly increase the *Pn* value of their decision-making formulas.[189] If caught, not only will a convicted company face the penalties imposed by its criminal liability (something unchanged by the New Per Se Rule), it will also face a much larger civil penalty—treble damages.[190] Because the civil damages a convicted firm will face will be actually trebled, the New Per Se Rule guarantees that a convicted collusive company will not only lose all the profits it gained through its collusion, but it will also have to pay an enormous fine equal to double its illegal profits.[191] This civil penalty should be imposed in addition to the criminal penalties that the convicted firm will face. Thus, the New Per Se Rule will likely cause the *Pn* value of the decision-making formula for firms considering collusion to skyrocket and will likely make collusive activity irrational for firms.[192]

However, because we do not know the exact probability of a collusive company being caught and successfully prosecuted, we cannot say that the increased *Pn* value of the New Per Se Rule will definitively make collusion irrational in all circumstances. But because the New Per Se Rule ensures treble damages if caught, the decision-making formula essentially becomes *Pr* (the probability of being caught) * *3B*, balanced against *B* (the benefits of the collusion).[193] In other words, the New Per Se Rule makes collusion irrational when a firm's decision-making formula is:

$$Pr * 3B \geq B$$

Thus, when the *Pr* value is greater than 33%, or when a collusive company has more than a 33% chance becoming subject to the New Per Se Rule, the increased *Pn* value of the New Per Se Rule makes collusion unprofitable and irrational.[194] Moreover, this analysis assumes that the *Pn* value of the firm's criminal liability is zero.

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[189] *See supra* notes 58–61 and accompanying text.

[190] The New Per Se Rule assumes that a private actor will always sue a New Per Se Rule defendant.

[191] Exact triplication may not be achieved because a company may be convicted on facts that do not constitute 100% of their collusive activity.

[192] *See supra* notes 58–61 and accompanying text.

[193] *See supra* Section II.A.

[194] *See supra* Section II.A.

Given that there will surely be some sort of criminal punishment that gives rise to New Per Se liability, a firm's actual decision-making formula includes that variable:

$$Pr * 3B + Pn[criminal] \geq B$$

Therefore, collusion actually becomes irrational at a *Pr* value somewhere less than 33%.[195]

Of course, a firm considering cartel activity does not have a sure calculation of their *Pr* value.[196] A firm cannot perform a calculation of their decision-making formula and its *Pn* and *Pr* values with a high degree of certainty. Regardless of what a firm's *Pr* value actually is, or what it perceives it to be, the massive *Pn* value that the New Per Se Rule creates means that if the firm is actually prosecuted and subject to the Rule, it will suffer enormous consequences.[197] Thus, while the New Per Se Rule may not always make collusion irrational according to a given firm's decision-making formula, it drastically increases the risks of collusion. Firms considering collusion will have to reckon with the possibility of suffering treble damages under the New Per Se Rule and what that will mean for the firm. These high stakes are raised even more by the leniency policies of the New Per Se Rule: no leniency for firms, and immunity for the first executive who reveals a firm's participation in cartel activity.[198] This leniency regime will force firms to consider the human elements of their collusive partners and the likelihood of a defector. With so many variables to consider, each being impossible to calculate to a degree of certainty, the New Per Se Rule will turn collusion into a high-risk game where firms stand to lose all of their extra profits and more through actually realized treble damages.[199] Thus, even without a *Pr* value that guarantees collusive activity to be irrational, the New Per Se Rule creates uncertainty and high risk that will further deter firms from collusive activity.[200]

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[195] *See supra* Section II.A.
[196] *See supra* Section II.A.
[197] *See supra* Section IV.A.
[198] *See supra* Part IV.
[199] *See supra* Part IV.
[200] *See supra* Part IV.

C. Individuals

The New Per Se Rule will also deter individual executives who control firms and firm agents from colluding by radically altering their decision-making formulas. For individuals, the New Per Se Rule alters both the *Pn* (punishment received) and *Pr* (probability of being caught) values of the decision-making formula.[201] The *Pn* value of an individual's formula increases for the same reason a firm's does. If caught, an individual will face both criminal penalties and expensive, expedited civil liability. Rather than civil liability for the treble of total damages, however, an individual's civil liability under the New Per Se Rule should be set at a fixed percentage of the firm's civil liability.[202] This increased *Pn* value will in turn boost the *Pr* value of individual decision-making formulas.[203] It will do so because, under the New Per Se Rule, the increased *Pn* value will increase the risk for executives and other individuals.[204] When an individual is approached by law enforcement investigating the firm for collusive behavior, the increased risk they face will make the individual more likely to cooperate with law enforcement in order to avoid New Per Se liability. Because the risk individuals face is higher, the payoff they receive by mitigating that risk through cooperating with law enforcement is also higher.[205] In response to higher rates of cooperation, rational enforcement officials will pursue individual actors under the New Per Se Rule more often and with greater vigor than they currently do, and the *Pr* value of individuals' decision-making formulas will increase.[206]

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[201] *See supra* Part II.

[202] The purpose of fixing individual liability as a percentage of the firm's liability is to make the fine a realistic one—a single individual would almost never have the assets to pay a fine equal to the firm's entire liability. The guiding principle is that individual civil liability under the New Per Se Rule must be high enough that engaging in collusive behavior is unprofitable, even if the individual's company indemnifies them, compensates them, or rewards them. The fine should be predetermined to provide a sure deterrent effect. *See Crime Pays*, *supra* note 11. See also Hylton, *supra* note 183, for a discussion of firms' willingness to compensate or indemnify individuals who collude on their behalf.

[203] *See supra* Section II.A.

[204] *See supra* Section IV.A.

[205] *Supra* Section IV.A.

[206] *Supra* Section IV.A.

With radically increased *Pr* and *Pn* values, the decision-making formula for individuals under the New Per Se Rule will be significantly less favorable than it currently stands.[207] Although it is impossible to quantify an exact *Pr* or *Pn* value for an individual in a colluding firm and thus impossible to definitively say that the New Per Se Rule will make collusion irrational for any individual actor, it can be said with confidence that individuals engaged in or considering collusion face a much different calculation under the New Per Se Rule.[208] The chances of being prosecuted are greater and the added civil liability makes the consequences, if caught, much larger. Additionally, the benefits individuals receive from their collusive behavior, *B*, are not likely to outweigh the risks.[209] As an employee or executive of a collusive firm, there are rarely any direct benefits from the employer firm's collusion.[210] The benefits of collusion are increased profits, and those can only be passed to an individual indirectly by the firm.[211] In cases where the firm has promised payment to individuals for their participation in collusion, the *B* value will be significantly lower than the overall profits the firm will gain through the collusion.[212] Although each individual's decision-making formula will be different, each will face a large punishment in the *Pn* value, an increased risk of prosecution in the *Pr* value, and little to no benefit in *B*.[213] Even if an individual's *B* value is high enough to make collusion rational, the *Pn* value of the New Per Se Rule, a fixed amount of the firm's overall liability, is easily adjusted to make collusion irrational again.[214] Thus, the New Per Se Rule will make participating in collusive activity irrational for individuals.[215]

For executives of firms considering collusion, the *Pn* and *Pr* values will skyrocket even more under the New Per Se Rule.[216] The New Per Se Rule's requirement that executives of convicted companies gain per se civil liability most likely guarantees that the

[207] *Supra* Section IV.A.
[208] *Supra* Section IV.A.
[209] *Supra* Section IV.A.
[210] *See supra* Section IV.B.
[211] *Supra* Section IV.B.
[212] *Supra* Section IV.B.
[213] *See supra* Section II.A.
[214] *Supra* Section II.A.
[215] *Supra* Section II.A.
[216] *See supra* Part IV.

executives of collusive companies will face personal consequences, even if they are not individually prosecuted.[217] In essence, the New Per Se Rule adds a second *Pr* and *Pn* value to each executive's decision-making formula: the probability that the firm, but not them individually, is caught colluding and the punishment they will receive if so. It thus ceases to matter that the chances of individual prosecution is low—the executives will suffer per se liability if the company is caught at all.[218] The decision-making formula for an executive can thus be expanded to *Pr * (Pn[company] + Pn[personal])* balanced against *B[company] + B[personal]*.[219] If a company perfectly indemnified a colluding executive to shield them from Per Se liability, *Pn[personal]* would equal *B[personal]* and would cancel out, making the executive's decision-making formula identical to the firm's.[220] A *Pn[personal]* greater than *B[personal]*, however, requires the *Pr* value to decrease proportionally to make the collusive activity rational for the executive actor.[221] Of course, the *Pr* value, the chances of the firm's collusion being discovered and prosecuted, does not decrease proportionally to a firm executive's personal risk.[222] Thus, without perfect indemnification, the more a firm profits from its collusion, the more *Pn[personal]* grows (because it is tied to the total award of treble damages) and the more irrational collusion becomes for an executive actor.[223] Moreover, the *Pn[personal]* value is determined by the percentage of the firm's total liability that is imposed upon each executive and, therefore, can be adjusted to ensure that it is greater than *B[personal]* to the extent necessary to defeat indemnification and make entering the collusive activity irrational for executive actors.[224]

In addition to deterring individuals and executives from beginning collusive activity, the New Per Se Rule will aid the detection and prosecution of operating cartels by changing individual and executive decision-making formulas.[225] It is clear that

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[217] *Supra* Part IV.
[218] *Supra* Part IV.
[219] *See supra* Section II.A.
[220] *Supra* Section II.A.
[221] *Supra* Section II.A.
[222] *Supra* Section II.A.
[223] *Supra* Section II.A.
[224] *Supra* Section II.A.
[225] *Supra* Section II.A.

the Department of Justice's leniency policy has aided in the detection and prosecution of cartels by incentivizing cartel members to step forward and report the crime.[226] The New Per Se Rule will build upon this successful program by increasing the punishment an individual faces if caught, thus increasing the payoff they receive by reporting the cartel under the New Per Se Rule's leniency program and thereby mitigating their personal risk.[227] Simply put, the increased personal risk disincentivizes engagement in collusion since at-risk individuals and executives would want to protect themselves.[228] After the passage of the New Per Se Rule, it is likely that a race to immunity would ensue as individuals and executives realize that their participation in or complacency with a cartel has now become irrational, as they realize that collusion no longer pays.

V. THEORETICAL UNDERPINNINGS OF THE NEW PER SE RULE

A. Rejecting Landes's Economic Efficiency Theory

The New Per Se Rule rejects the three defining principles of the Landes model, just as contemporary scholarship does.[229] First, New Per Se liability applies to both firms and individuals. Although the New Per Se Rule would impose a new punishment—New Per Se liability—it is hardly new in its focus on the executives who direct collusive firms.[230] Proposals advocating for debarment and more incarceration, as well as the Department of Justice policy of prosecuting individual executives, have a similar focus on non-firm actors.[231] The New Per Se Rule is also in

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[226] *See* Hammond, *supra* note 15, at 3; *see also* Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AM. ECON. REV. 750 (2009) (finding 60% less cartel formation and 62% higher cartel detection because of leniency policies); Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453 (2006) (inquiring why the leniency policy is so successful and suggesting changes to make it even more effective).

[227] *Cf. Faithless Agents*, *supra* note 108, at 1698–99 (arguing that increased prison sentences should be used to incentivize individual employees to report collusive employers).

[228] *See supra* Part IV.

[229] *See supra* Section III.A.

[230] *See supra* Part IV.

[231] *See supra* Section III.A.

harmony with the Yates Memo and its emphasis on the prosecution of individual actors.[232]

Second, the New Per Se Rule does not rely on fines alone to achieve deterrence. Although New Per Se liability does not include punishment outside of fines, it is designed to function as an add-on to the current cartel enforcement regime, which relies on criminal prosecution and prison sentences.[233] Indeed, New Per Se liability is triggered by criminal conviction and therefore is inextricably linked to the threat of prison time.[234]

Finally, the New Per Se Rule rejects concerns of overdeterrence, just as contemporary scholarship rejects concerns of overdeterrence, not because of a disbelief in an efficiency exception but rather because current deterrents are insufficient to achieve even optimal deterrence.[235]

B. Focusing on the Root

The New Per Se Rule would be an effective deterrent of collusion because it focuses on the root actors of collusion, rather than the amorphous firm.[236] The New Per Se Rule alters the decision-making formula of firm executives more drastically than it alters the decision-making formulas of non-executive individuals and of the firm itself.[237] Contrary to Landes's theory of cartel enforcement, this focus on individual actors is a feature, not a bug, of the New Per Se Rule.[238] It follows the scholarly and Department of Justice trend towards prosecuting individuals and changing incentives.[239] More importantly, however, the New Per Se Rule will deter collusive behavior because it targets the root of the problem: executives with perverse incentives.[240] The increased focus by the scholarship and Department of Justice on individual incentives recognizes that firms cannot act independently of their executives.[241]

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[232] *Supra* Section III.A.
[233] *See infra* Section V.D.
[234] *See supra* Part IV.
[235] *See supra* Section III.A.
[236] *See supra* Part IV.
[237] *Supra* Part IV.
[238] *Supra* Part IV.
[239] *Supra* Part IV.
[240] *See supra* Part IV.
[241] *See supra* Section III.A.

However rational collusion might be for a firm, the firm, as a collection of assets, cannot act upon the opportunity to cartelize—only those in control of firm assets can perform the required acts to collude.[242] And when the executives of a firm do collude, they do not collude with merely a collection of assets. They collude with the executives in control of those assets.[243]

The Sherman Act itself implicitly acknowledges that firms cannot act for themselves, but only through their controlling executives.[244] Else, rational firms could not make the economically irrational choice to obey the law.[245] Thus, law anticipates it as a violation by individual actors, and therein lies the real criminal: the executive who leads the firm into collusion. This logic has been called an "accountability gap" and one scholar stated that "[t]he urgency of the accountability gap is real," and "[f]ailure to address [it] will further undermine public trust."[246] The same scholar argued that criminal remedies will fail and only civil remedies can fix the accountability gap.[247] Another scholar conceptualizes the accountability gap as agency costs and argues that agency costs should be exacerbated to incentivize agents of collusive firms to report and destabilize cartels.[248] Regardless of vocabulary, the New Per Se Rule's focus on individual actors follows the Sherman Act and contemporary scholarship in its focus on individual executives.[249]

The New Per Se Rule's particular impact on executives is thus a strike at the heart of the "supreme evil" of collusion.[250] Even if the decision-making formulas for firms and non-executive individuals indicate that collusion is rational under the New Per Se Rule (a plausible scenario, though unlikely, under the New Per Se Rule),[251] if the decision-making formula for firm executives

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[242] *See supra* Part IV.

[243] *Supra* Part IV.

[244] *Supra* Part IV.

[245] *Supra* Part IV.

[246] Gregory M. Gilchrist, *Individual Accountability for Corporate Crime*, 34 GA. ST. U. L. REV. 335, 338–40 (2018).

[247] *Id.* at 380–87.

[248] *Faithless Agents*, *supra* note 108, at 1652–64.

[249] *See supra* Part III.

[250] Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).

[251] *See supra* Part IV.

determines that collusion is irrational for them as individuals, then they—and, accordingly, the firm—will not collude.[252] The New Per Se Rule also makes it easy to ensure that executives' decision-making formulas always dictate that collusion is irrational: the dollar value of an executive's per se liability can be raised and lowered through adjusting the percentage of firm liability that an executive becomes liable for.[253] This direct impact on individual executives' decision-making formulas also insulates New Per Se liability from being nullified by indemnification or reimbursement, ensuring that the New Per Se Rule actually operates on and deters the root actors of collusion.[254] Finally, this focus on executive action and incentives, rather than the firm, carries another benefit: it incentivizes firm executives to implement antitrust compliance programs within their firms.[255]

C. Making Corporate Compliance Rational

Perhaps the most powerful effect of the New Per Se Rule on collusive behavior lies not in its power to punish, but its power to prevent. By imposing liability on the executives of collusive firms, the New Per Se Rule will not only deter executives from beginning collusive activity, but will incentivize them to actively police their firm to ensure that collusion does not happen at any level.[256] Scholarship on corporate compliance has recognized that this kind of incentive is necessary for internal compliance schemes to work.[257] And when compliance programs are enacted, they are effective at policing behavior within firms.[258] Speaking of compliance programs

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[252] *Supra* Section IV.B.

[253] *See Crime Pays*, *supra* note 11, at 431 n.15; *Antitrust "Treble" Damages*, *supra* note 14, at 115, 120–21; *supra* text accompanying notes 132–33, 148.

[254] *See* Douglas H. Ginsburg et al., Opinion, *DOJ Has the Power to Crush Price-Fixers*, USA TODAY (May 27, 2015, 12:39 PM), https://www.usatoday.com/story/opinion/2015/05/27/currency-manipulation-cartels-doj-antitrust-column/27920795/ [https://perma.cc/A4F5-2NGW] (recommending that the Department of Justice insist that convicted employs are not compensated by their employer).

[255] *See supra* notes 110–12 and accompanying text.

[256] *Supra* Section IV.C.

[257] *See supra* notes 90–92 and accompanying text.

[258] See Max Huffman, *Incentives to Comply with Competition Law*, 30 LOY. CONSUMER L. REV. 108, 117 (2018), for a discussion of which actor can most effectively enact compliance programs, concluding that firms are "best able to adopt systems to prevent law-breaking."

that reward internal whistleblowers, one piece of literature studied empirical evidence and concluded that "the available data do suggest that an ethics program ... can effectively prevent and deter criminal conduct."[259] Another theory suggests that compliance officers within firms are "far from powerless" and can "drastically alter directors' and officers' liability calculus."[260]

Under the current Sentencing Guidelines, firms can receive credit for having a compliance program and what constitutes a compliance program is defined.[261] However, firms do not have the proper incentives to actually maintain these kinds of programs and ensure that no one within the firm is colluding. And accordingly, they do not implement and use them.[262] One—if not the most—direct way of changing the views and incentives of executives, as these proposals suggest should be done, is to punish the executives directly rather than letting them hide behind the firm they command.[263] The New Per Se Rule does this by holding firm executives—who have the power to implement and maintain such a compliance system—accountable for any collusion that happens within their firm.[264] The New Per Se Rule will thus incentivize firm executives to build robust compliance programs and prevent collusion from happening in the first place.[265]

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[259] *Effective Ethics*, *supra* note 110, at 794.

[260] Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2156–57 (2019).

[261] U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (U.S. SENT'G COMM'N 2018); *see In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 969 (Del. Ch. 1996) (observing the Guidelines' "powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts"); Sokol, *supra* note 10, at 819 n.177.

[262] *Effective Ethics*, *supra* note 110, at 782–91; Sokol, *supra* note 10, at 800–03.

[263] *Supra* Section III.A.

[264] *See supra* Part IV.

[265] An additional benefit of incentivizing firms to promote internal compliance is that it leaves the legwork of developing an effective compliance system to the private sector. The New Per Se Rule should be implemented in a way that allows judicial review of sufficiency, while allowing the creative power to remain with the firms. Such a framework could be adopted from the current U.S. Sentencing Guidelines, specifically at chapter 8B2.1. It should also be noted that sentencing data does not indicate judicial error in applying Guidelines and reviewing the sufficiency of compliance programs. *Effective Ethics*, *supra* note 110, at 799.

This compliance-promoting effect of the New Per Se Rule aligns with what the Department of Justice has identified as a best practice, saying "compliance programs make good sense—both good common sense and good business sense. Compliance programs help prevent companies from committing crimes in the first place."[266] It also aligns with the purpose of treble damages remedies in general, which is "not merely to provide private relief, but[,] to serve as well the high purpose of enforcing the antitrust laws."[267]

Thus, the powerful punishment of the New Per Se Rule's automatic liability will most likely change executives' incentives and induce them to refrain from collusion in the first place and implement robust compliance programs within their firms.[268] In addition to the threat of increased punishments, however, the New Per Se Rule should provide another incentive to firm executives to police themselves through robust compliance programs: limited immunity from New Per Se liability when non-executive employees engage in collusion despite a sufficiently robust compliance program. This exception will protect executives who implement adequate compliance programs in good faith. It also will provide further incentive to implement a robust compliance program. Moreover, this exception follows current Department of Justice policy of considering compliance programs as a basis for leniency.[269] If concerns of overbroad New Per Se liability persist, the New Per Se Rule could also grant immunity to executives or employees who report collusive activity through an internal whistleblower reporting system that is part of a firm's internal compliance program. Such immunity, if given, should be monitored to ensure it is not abused.

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[266] Snyder, *supra* note 27, at 3; *see also Effective Ethics*, *supra* note 110, at 792 ("One empirical issue is whether ethics programs can effectively prevent and detect crimes, and if so, the extent of their effectiveness. One positive trend is the increase over the past 30 years in empirical work on business ethics. The empirical studies suggest that the Guidelines are on the right track: firms can prevent and deter unethical and illegal behavior by promoting an ethical organizational culture." (internal citations omitted)).

[267] Zenith Radio Corp. v. Hazeltine Resch., Inc., 395 U.S. 100, 130–31 (1969).

[268] *See supra* Section IV.C.

[269] *See* Snyder, *supra* note 27 ("Even if they fail to do so, partially successful compliance programs may help companies qualify for leniency.").

D. Addressing Counterarguments

A critic of the New Per Se Rule may object on the grounds that it deviates from the optimal punishment model and will deter efficient breaches—that it will over-deter.[270] As discussed in Part III, contemporary scholarly literature has rejected overdeterrence concerns, at least insofar as the evidence shows that current cartel sanctions are insufficient to deter all economically inefficient offenses.[271] The New Per Se Rule follows this literature and is premised on the evidence that current cartel sanctions are insufficient to deter economically inefficient collusive behavior among firms.[272] Moreover, current Department of Justice policy has already rejected overdeterrence as a guiding principle of antitrust enforcement.[273] So long as that is the paradigm within which we are operating, continuing to disregard optimal deterrence concerns does not create a net negative.[274] Even more, the New Per Se Rule is not totally incompatible with efficient breach. An exception that allows immunity from New Per Se liability if the collusion was economically efficient would resolve overdeterrence concerns while preserving the deterrent power of the New Per Se Rule in relation to inefficient collusion.[275]

Critics may also point out that the New Per Se Rule does not actually change anything about antitrust enforcement because it only comes into play after a criminal conviction or plea agreement; existing Department of Justice enforcement policies and their well-founded reasons lay unchanged.[276] Just because Department of Justice policy is not changed directly by the New Per Se Rule, however, does not mean that antitrust enforcement will stay the same. The New Per Se Rule fundamentally changes the game by increasing the risks of collusion for firms, their executives, and other individuals.[277] The drastically increased punishments

[270] *See supra* Section III.A.

[271] *See supra* Section III.A.

[272] *See supra* notes 124–30 and accompanying text.

[273] *See supra* notes 91–96 and accompanying text.

[274] *See supra* notes 91–96 and accompanying text.

[275] Such an exception could easily be added to the New Per Se Rule's leniency policy. For a discussion of that policy, see *supra* Part IV.

[276] *See supra* Part III.

[277] *See supra* Part IV.

all these parties will receive under the New Per Se Rule, as expressed in the *Pn* value of their decision-making formulas, will likely change how they act in any given situation. In response, Department of Justice enforcement actions will likely also change. For example, the New Per Se Rule increases the risk for individuals and executives engaged in collusive behavior.[278] The increased risk will incentivize individuals to cooperate with investigating law enforcement officials, and in turn will incentivize law enforcement officials to dedicate more resources to pressuring and prosecuting individuals.[279] Thus, even though it makes no formal changes to Department of Justice antitrust enforcement policies, the New Per Se Rule will change the enforcement landscape, deterring collusive activity and increasing the effectiveness of enforcement actions.[280]

Another concern with the New Per Se Rule may be punishing firm executives for collusive actions that they did not take part in, whether committed by executives or other individuals within the firm.[281] With regards to liability for actions committed by non-executives within the firm, holding executives accountable prevents them from turning a blind eye to collusive behavior and is an essential element of the New Per Se Rule.[282] Such accountability incentivizes those executives to implement robust compliance programs to police the behavior of individuals within their firm.[283] If firm executives do implement such a compliance program, the New Per Se Rule allows them to be immune from liability for the actions of non-executive individuals.[284] With respect to collusion performed by other executives, New Per Se liability once again incentivizes firm executives to police the behavior of their firm with some sort of compliance system—this is intentional.[285] Executives are in the best position to police the behavior

[278] *See supra* Section IV.C.
[279] See *supra* Section IV.C for a more robust discussion of how the New Per Se Rule will change the incentives for individuals and law enforcement officials during investigation.
[280] *See supra* Part IV.
[281] *See supra* Section IV.C.
[282] *See supra* Section IV.C.
[283] *See supra* Section V.C.
[284] *Supra* Section V.C.
[285] *See supra* Section IV.C.

of other executives.[286] Imposing per se liability on all executives if the firm colludes at all prevents the firm from designating a sacrificial lamb of sorts and incentivizes firm executives to meaningfully police each other's actions.[287] Moreover, if an executive is worried about being personally liable for another executive's behavior under the New Per Se Rule, they can gain immunity through the Rule's leniency program.[288]

Finally, the New Per Se Rule may cause cartels to clamp down on their members, improve the cartel's internal enforcement mechanisms, and ultimately make collusive activity harder to police.[289] The high risks created by the New Per Se Rule, however, heavily incentivize executives (and other individuals) to defect on the cartel when it comes under legal scrutiny.[290] And with a cooperative insider, law enforcement will be much more likely to effectively investigate and prosecute the cartel, despite the cartel's best effort to clamp down on its members.[291] Relatedly, since a guilty plea triggers New Per Se liability, individuals and firms may be less willing to plead guilty when indicted.[292] Indeed, pleading guilty may be out of the question for most firms. If they choose to proceed to trial, however, they will also be surrendering the reduced criminal punishment that comes from pleading guilty.[293] Because so few antitrust cases proceed to trial, it is impossible to discuss the success rate of trials if New Per Se liability caused a spike in trials.[294] Considering, however, that there will most likely be at least one cooperating insider, the government likely will not have trouble assembling strong cases against discovered cartels.[295] Moreover, with pleading off the table there will be much more uncertainty for both firms and individual defendants,

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[286] *See supra* notes 110–12 and accompanying text.

[287] Hylton, *supra* note 183, at 2082 (citing *Crime Pays*, *supra* note 11, at 440–41 n.54).

[288] *See* U.S. Dep't. of Just., *supra* note 163.

[289] *See supra* Section IV.C.

[290] *See supra* Section IV.C.

[291] *See supra* Section IV.C.

[292] *See supra* Part IV.

[293] Donald J. Newman, *Pleading Guilty For Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 780, 783–84 (1956).

[294] Fred A. Freund, *The Pleading and Pre-Trial of an Antitrust Claim*, 18 SECTION ANTITRUST L. 15 (1961).

[295] *See supra* Section IV.C.

which will further incentivize executives to institute internal compliance programs and thus avoid the risk altogether.[296]

CONCLUSION

Despite criminal enforcement and treble damages available in private suits, firms still engage in collusive activity.[297] These cartels manipulate the free market to overcharge consumers billions of dollars per year, impose allocative inefficiencies, and create umbrella costs.[298] Traditional Chicago School of thought has derided the treble damages remedy available in private antitrust actions, fearing that it promotes frivolous suits and causes overdeterrence.[299] The recent analyses of anti-cartel enforcement activities, however, have demonstrated that the enforcement landscape is different than previously thought.[300] Specifically, this literature has shown that private antitrust actions are more effective and less harmful than traditionally thought, yet still fall far short of actually awarding treble damages.[301] Moreover, the literature shows that the combination of public and private action does not adequately deter cartel activity, even according to optimal deterrence models.[302] In addition to rejecting concerns of overdeterrence, contemporary scholarship rejects the Chicago School's reliance on monetary fines leveled only against the colluding firm.[303] This shift, away from William Landes's model of economic efficiency and towards individual accountability, has also manifested itself in Department of Justice policy, which has increasingly emphasized prosecution of individuals within collusive firms.[304]

The combination of public and private cartel enforcement is woefully failing at deterring and policing collusion between firms and its harmful effects.[305] In order to lessen the power that the "supreme evil" of antitrust holds over our economy, Congress

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[296] *See supra* Part IV.
[297] *See supra* Part I.
[298] *See supra* Part I.
[299] *See supra* Section II.B.
[300] *See supra* Section III.B.
[301] *See supra* notes 146–49 and accompanying text.
[302] *See supra* notes 124–30, 150–55 and accompanying text.
[303] *See supra* notes 119–23 and accompanying text.
[304] *See supra* notes 113–18 and accompanying text.
[305] *See supra* Part I.

should pass legislation creating a New Per Se Rule that makes firms and executives of firms liable per se in civil antitrust actions when the firm or any of its employees is criminally convicted of collusive activity. New Per Se liability would radically change the decision-making formulas of both firms and executives by transforming what is now less than single damages awarded in private antitrust actions into actual treble damages.[306] Thus, the New Per Se Rule will make collusion irrational for both the firm and firm executives. Moreover, New Per Se civil liability will strike at the root of the problem: executives with perverse incentives and will change the outcome of their rational decision-making calculations.[307] It will also incentivize firms to create robust compliance programs to ensure that the firm does not engage in collusive activity on any level.[308] Finally, potential counterarguments either mistake the New Per Se Rule's strengths for weaknesses or do not account for the presence of a cooperative insider who has defected under the New Per Se Rule's leniency policy.[309]

Firms and firm executives are rational decision makers. Only when collusion is irrational will the "supreme evil" of collusion cease to plague our economy. The New Per Se Rule will make collusion irrational for both firms and the individual executives who command them.

[306] *See supra* Section IV.B.
[307] *See supra* Section V.B.
[308] *See supra* Section V.C.
[309] *See supra* Section V.D.