

The Paper Label Sentences: Critiques

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As Judge Renfrew recognizes, the first step in determining an appropriate criminal sentence is to identify the purposes to be served by sentencing persons convicted of the particular type of crime. In the paper label case, unfortunately, Judge Renfrew failed to identify all the purposes of white-collar sentencing and to appreciate the superiority of imprisonment as a means of achieving general deterrence—the purpose he did identify.

The Judge correctly observes that in an antitrust sentencing decision such purposes of criminal sentencing as incapacitation and rehabilitation are not involved. We do not send a price fixer to jail to keep him during that period of time from engaging in continued price fixing. And certainly no one would claim any rehabilitative effect from the imposition of criminal punishment on those pillars of the community who agree with their competitors to fix prices.

But the conclusion that incapacitation and rehabilitation are irrelevant does not necessarily rule out imprisonment as an appropriate sentence. Before excluding incarceration as an option, we must complete our consideration of the purposes that are supposed to be served by sentencing price fixers. General deterrence is perhaps the primary purpose for which the legal system invokes the criminal sanction to deal with price fixing and most other economic offenses.¹ The concept of general deterrence, the punishment of today's offender for the purpose of discouraging others from engaging in similar conduct, derives its support from the Benthamite philosophy of utilitarianism. As such, deterrence recognizes the validity of imposing a cost on one person in order to bring about a greater benefit for society as a whole. For example, in setting out the objectives of the Model Penal Code, Herbert Wechsler noted that “while invocation of a penal sanction

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The views expressed herein are those of the authors. They are not intended to and do not necessarily reflect the views of the Department of Justice.

1. As for specific deterrence, we are not familiar with any study on the level of recidivism among individuals convicted of price fixing. It is reasonable to assume, however, that a corporate officer convicted of price fixing who returns to an executive position after receiving little or no punishment may decide that it is worthwhile to engage in price fixing again.

necessarily depends on past behavior, the object is control of harmful conduct in the future."²

This consideration is especially important in price fixing and other covert economic crimes. The Antitrust Division of the Justice Department cannot hope to monitor the competitive behavior of every business entity in our economy any more than the Internal Revenue Service can monitor effectively every taxpayer. Accordingly, primary reliance must be placed upon voluntary conformity with the law, backed by the threat of sanctions brought against those who attempt to further their own economic advantage, or that of their corporation, by violating the law.

A sentencing strategy that stresses general deterrence is likely to be particularly effective in the field of economic activity. Individuals and firms that conspire to fix prices are motivated by neither passion nor poverty. They have ample opportunity to calculate their courses of action and to weigh the risks against the expected gains. Judge Renfrew shares this perception of price fixing,³ but he ignores its corollary. Precisely because price fixing is a crime involving rational choice, it takes a substantial enforcement effort and a substantial punishment to make and keep the deterrent threat a potent one.

Furthermore, the general-deterrent purpose of white-collar sentencing cannot be considered apart from a related purpose to which Judge Renfrew pays too little attention: the preservation of public confidence in our legal system. Crimes by prominent corporations and businessmen "establish an example which tends to erode the moral base of the law and provide an opportunity for other kinds of offenders to rationalize their misconduct."⁴ This erosion of confidence in the law is increased when it is perceived that blue-collar criminals go to jail and white-collar criminals do not. Those who argue that price fixers, being nonviolent, do little damage to the fabric of our society and therefore do not warrant severe punishment must also

2. Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1105 (1952). Another commentator on general deterrence observed:

[T]he singular power of the criminal law resides . . . not in its coercive effect on those caught in its toils but rather in its effect on the rest of us. That effect is a highly complex one. It includes elements of coercion and of terror: if I do as he did, I too shall suffer for it. But it also includes conscious and unconscious moralizing and habit-forming effects that go far beyond the crassness of a narrowly conceived deterrence.

H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 69 (1968).

3. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 593-94 (1977).

4. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT* 104 (1967).

recognize that society punishes those who engage in a wide range of nonviolent criminal activity. Those who steal thousands or millions of dollars by nonviolent larceny, burglary, fraud, counterfeiting, embezzlement, and various types of organized crime are commonly punished by incarceration. If it is the "respectability" of an offender rather than the character of his offense that lies at the heart of much price-fixing sentencing, then judges are making ad hominem distinctions that should be alien to a government of laws and not of men.

The question, then, is what form of punishment best serves the relevant objectives—that of deterring persons and corporations from conspiring with their competitors to fix prices and that of maintaining confidence in the criminal justice system. Various sources suggest that a prison term, rather than some alternative penalty, is most likely to achieve these objectives. The ABA's project, *Standards Relating to Sentencing Alternatives and Procedures*, for example, supports a sentence of total confinement in those cases in which imposition of a different sentence would unduly depreciate the seriousness of the offense.⁵ The commentary to that section notes that "[f]or certain offenses, such as embezzlement from a bank, the failure to impose a prison sentence might be unduly encouraging to similar attempts in the future and might destroy the confidence of the public in the system."⁶ The same considerations that justify imprisoning those who perpetrate the premeditated white-collar crime of bank embezzlement apply to the sentencing of price fixers. Indeed, the key difference between embezzlement and price fixing is that in the embezzlement case the victim (the bank) is more visible and the loss more easily calculated. This is, of course, no reason to treat the two crimes differently for purposes of deterrence. Both are a "non-violent form of theft."⁷

As Judge Renfrew notes, to be an effective general deterrent a sentence must not only be widely known but also widely abhorred by potential offenders.⁸ Experience supports the conclusion that businessmen view prison as uniquely unpleasant and that therefore incarceration is a uniquely effective deterrent. This conclusion was given striking confirmation by the events following the sentencing of seven corporate executives for price fixing in the electrical equipment industry 16 years ago. On February 7, 1961, front-page headlines of the *New York Times* announced, "Seven Electrical Officials Get Jail

5. ABA PROJECT ON STANDARDS AND PROCEDURES FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.5(c)(iii) (Approved Draft 1968).

6. *Id.* § 2.5(n), at 107.

7. Renfrew, *supra* note 3, at 612 (quoting responding attorney).

8. *Id.* at 594.

Terms in Trust Case—GE and Westinghouse Vice Presidents Must Serve Thirty Days.”⁹ The article was complete with photographs of some of the sentenced men. The men sentenced were “typical businessmen in appearance, men who would never be taken for lawbreakers.”¹⁰ The article described the sentencing, including the scene in which the first executive sentenced, as he turned to go back to his seat in the courtroom, was grabbed by a marshal and escorted off to prison. Reading that account must have shocked more than a few businessmen.

What was the effect of prison on those who served time? In testimony before a Senate committee, a general manager from General Electric, who had served 30 days in prison, testified with respect to his involvement in the price-fixing conspiracy: “They would never get me to do it again as I feel it now. I would starve before I would do it again.”¹¹ Another former general manager and vice president of General Electric, who had also served time in prison, testified about the effect of the sentences on the business community: “I think that this example that was shown to us has been far reaching. I think that a lot of people now have reevaluated their sense of values”¹² He observed that “realizing the taint of a jail sentence is enough to put some fear into people, and then once fear is in people then they start looking at the moral values a little bit on whether or not [price fixing] makes any sense.”¹³

There is additional evidence of the effect these sentences had upon other businessmen. Some old Department of Justice files reveal that clandestine price-fixing meetings that had been held regularly for a number of years in many large industries, including the tire industry,¹⁴ were abandoned in the aftermath of the publicity about the prison sentences imposed on the electrical industry executives. The increasing number of price-fixing conspiracies being uncovered today indicates that unfortunately the deterrent effect of a few 30-day sentences does not endure.

Sentencing for the purpose of deterrence makes the character of the offense, rather than that of the offender, the central determinant in the sentencing decision. Individual offender characteristics, such as

9. N.Y. Times, Feb. 7, 1961, at 1, col. 4.

10. *Id.* at 26, col. 2.

11. *Administered Prices: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 16790 (1961).

12. *Id.* at 17067.

13. *Id.*

14. Antitrust Division Memorandum on *United States v. The Firestone Tire and Rubber Company*, at 2 (Feb. 23, 1976) (referring to files of 1950s) (on file with *Yale Law Journal*).

moral uprightness or drug addiction, are irrelevant to the calculation of a sentence justified by general deterrence, since the offender is not being imprisoned for the purpose of self-improvement. Under such circumstances, tailoring sentences to suit personal characteristics actually undermines deterrence by making the sentences more uncertain and difficult to predict in advance. As Judge Marvin Frankel has noted, "Since the effects for general deterrence . . . are really aimed at people other than the defendant himself, uncertainty in the sentence tends to diminish or dissipate its impact."¹⁵ Thus, to the extent that Judge Renfrew was influenced by the defendants' status as pillars of the community and by their physical innocuousness to their fellow citizens, he either misperceived the purpose of antitrust sanctions or considered factors irrelevant to the appropriate purpose.

Although the number of offenders prosecuted by the Antitrust Division has been increasing substantially in recent years—24 persons were indicted for Sherman Act violations in fiscal 1972, more than 100 in fiscal 1976—those convicted of antitrust violations usually have received light sentences, with little or no prison time imposed.¹⁶ Even the fines that were imposed were little more than license fees when compared with the benefits realizable from price fixing. In any case, since price fixers for a number of years have run the risk of incurring criminal fines, single damages in actions on behalf of the United States, and treble damages in actions by private plaintiffs, the growing number of violations suggests that in the price fixer's cost-benefit analysis monetary sanctions do not carry great weight.

That businessmen consider imprisonment the most costly of penalties may not necessarily dispose of the sentencing issue. Some of Judge Renfrew's respondents, for example, argued against imposing prison sentences for antitrust violations on the ground that the antitrust laws are too complex to put businessmen on notice of what constitutes criminal conduct.¹⁷ This argument is untenable, for it has long been Antitrust Division policy to proceed criminally only where there were willful violations of the law (with willfulness being presumed in cases of clear, *per se* offenses) or where there is evidence that the defendants knew they were violating the antitrust laws or acted with flagrant

15. M. FRANKEL, *CRIMINAL SENTENCES* 109 (1973).

16. No one convicted of antitrust violations received prison sentences during fiscal 1962-1968, the seven years following the electrical equipment sentences. From 1969 to the present, fewer than a dozen individuals have received prison sentences of more than 30 days. Antitrust Division data on file with *Yale Law Journal*.

17. See Renfrew, *supra* note 3, at 601 n.20, 603.

disregard for the law.¹⁸ Where complex or novel issues of law are involved, or where there is clear evidence that the defendants did not appreciate the consequences of their actions, the Division proceeds civilly.

In the Antitrust Procedures and Penalties Act of 1974, Congress recognized the need for greater criminal antitrust sanctions and increased the maximum penalties under the Sherman Act to a three-year jail term and \$100,000 fine for individuals and a \$1-million fine for corporations.¹⁹ This congressional mandate, as well as the evidence indicating that prison sentences are uniquely effective in deterring antitrust violators, prompted the Antitrust Division to adopt sentencing guidelines calling for recommended prison sentences ranging from 18 months to three years, depending on the presence of specified aggravating factors.²⁰ Applying the provisions of the parole statutes, such sentences would translate to approximately five to eleven months actually served.²¹

The Antitrust Division believes that prison sentences in this range will achieve the deterrent effect necessary to enforce the Sherman Act.²² More than 15 years ago an Attorney General characterized antitrust violators in the same light as "the racketeer who siphons off money from the public in crooked gambling or the union official who

18. See, e.g., REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMM. TO STUDY THE ANTITRUST LAWS 349 (1955); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 4, at 110; Address by Assistant Attorney General Donald I. Baker, Federal Bar Association Antitrust Briefing Conference (Feb. 28, 1977), reprinted in 804 ANTITRUST & TRADE REG. REP. (BNA) A-17 (Mar. 8, 1977).

19. See 15 U.S.C. § 1 (Supp. V 1975). Previously the maximum sentence for individuals was one year imprisonment and a \$50,000 fine, and for corporations was a \$50,000 fine.

20. Antitrust Division Memorandum on Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act (Feb. 24, 1977) (on file with *Yale Law Journal*), excerpted in 45 U.S.L.W. 2419 (Mar. 8, 1977) [hereinafter cited as Sentencing Guidelines]. Eighteen months, the midpoint of the range prescribed by Congress, is a base period designed to deter the average individual from participating in an average price-fixing conspiracy. Under the new guidelines, the Antitrust Division will consider five aggravating factors in determining whether to raise its recommended sentence: (1) amount of commerce involved; (2) position of the individual; (3) existence and degree of predatory or coercive conduct; (4) duration of participation; and (5) previous conviction. Personal, family, or business hardship, cooperation with the Government, and the extremely small scope of the conspiracy are mitigating factors that will be applied to reduce the recommended sentence. *Id.*

21. Parole statutes provide for parole after one-third of the sentence, less time off for good behavior, has been served. See 18 U.S.C. §§ 4161, 4162, 4202 (1970).

22. The Division has also taken the position that individual fines, starting from a base of \$50,000 and adjusted upward or downward by the same aggravating and mitigating factors applicable to prison sentences, are a second-best option and should be sought only where the court refuses to impose prison sentences. Fines will be recommended against corporations, based upon 10% of the corporation's total sales in the affected line of commerce during the conspiracy. Sentencing Guidelines, *supra* note 20.

betrays his union members.”²³ The absence of any substantial punishment for convicted antitrust offenders since that time, however, has prevented that perception from becoming widespread. If antitrust violators are subjected to the serious criminal penalties recommended by the Antitrust Division guidelines, businessmen will begin to realize that price fixing is a “real” crime. Moreover, heavy sentences will publicize the underlying violations and serve to inform the businessman of the kind of conduct that is illegal. After all, potential antitrust violators are a class of potential criminals who read newspapers and consult lawyers.

Public reaction to alternative sentences, like the speechmaking requirement imposed in the paper label case, indicates that these novel approaches do attract attention the first time they are used. But as their novelty wanes, so will their “communicative possibilities.”²⁴ Furthermore, such sentences are neither sufficiently unpleasant nor sufficiently stigmatizing to drive home the point that price fixing is a crime and convicted price fixers are felons. The point must be conveyed in order to induce general compliance with the law despite the temptation that the perceived gains from price fixing may offer.²⁵ Finally, alternative sentences only reinforce the perception that white-collar criminals are accorded special treatment by the criminal justice system. The only suitable punishment for price fixing, therefore, given the purposes to be served, is a prison sentence. The hope, of course, is that the threat of such a sentence will be sufficient to deter price fixing substantially and that the punishment will seldom need to be imposed. We shall never know unless we try.

23. Department of Justice News Release, at 9 (Nov. 13, 1961) (address by Attorney General Robert F. Kennedy before Economic Club of New York) (on file with *Yale Law Journal*).

24. Renfrew, *supra* note 3, at 594. *See id.* at 617.

25. The Ethiopians may have found a solution. It was reported last year that seven Ethiopian merchants were charged with overpricing and attempting to create artificial scarcity in grain and peppers. The Ethiopian military rulers summarily executed the merchants. In the following three weeks, prices for those commodities dropped by nearly 60%. *Wash. Post*, Aug. 9, 1976, § A, at 21, col. 3.

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Among the punishments devised by the “humane Mikado” was one requiring “society sinners”—the 19th-century equivalent of today’s corporate criminals—to “hear sermons from mystical Germans.”¹ Judge Renfrew has reversed the roles somewhat: his “prisoners pent” do the preaching rather than the listening. But the “object all sublime” remains the same: “to let the punishment fit the crime.”

The elusive quest for the fitting punishment has riveted the attention of lawmakers from the beginning of recorded history. The Biblical “eye for an eye” reflects at once the centrality of relating the punishment to the crime and the difficulty of going beyond simplistic symmetry.² The creation of an enduring proportionality between a crime and its punishment is an unrealizable goal in a world in which the perceived seriousness of neither the crime nor the punishment remains constant for more than a fleeting historical moment. What is a realizable goal—indeed an indispensable necessity in a democratic society of law—is the development of institutions capable of reassessing the relationships between crimes and punishments and of determining appropriate punishments for particular crimes and criminals at a given point in time.

In attempting to evaluate his own actions in imposing the novel punishment of compulsory preaching for the crime of corporate price fixing, Judge Renfrew has, I fear, failed to ask the crucial question. He has asked a series of *substantive* questions: whether the sentences he imposed were too harsh or too lenient; whether they had sufficient deterrent impact on other potential antitrust violators; whether the failure to imprison white-collar criminals is fair in the context of a policy of imprisoning lower-class offenders. As the responses cited in Judge Renfrew’s article indicate, reasonable people disagree about the answers to each of these and the other questions raised by the Judge. The critical *institutional* question—and the one he never asks—is whether it is the proper function of an appointed judge, in a democratic society, to devise and impose novel punishments about which there is certain to be a fundamental diversity of views.

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1. W. GILBERT & A. SULLIVAN, *The Mikado*, in THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 343, 382-83 (Mod. Library ed. n.d.).

2. This paraphrases a point made and elaborated in Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 297-98 (1974).

No one would quarrel with Judge Renfrew's authority to deviate from the normal application of a statutory provision if that would promote the legislative purpose under circumstances not anticipated by the legislators. For example, a judge might have to devise a suitable "special" punishment for a convicted felon who could not endure the legislatively prescribed imprisonment because—to use a recent example with which I am familiar—he had spent years in a concentration camp and had become suicidal at the prospect of even short-term reconfinement. But the paper label case was not an occasion requiring what Justice Cardozo might have termed "interstitial legislation."³ Rather, Judge Renfrew devised a wholly new genre of punishment—one that he knew would be controversial—and proceeded to impose it on a group of typical offenders convicted of committing what the Judge himself calls a "classic violation"⁴ of a conventional statute. Admittedly, the Judge took this course of action with the best of intentions, in the most open and self-questioning way. But was the decision properly his to make?

The kind of decision Judge Renfrew made, involving the weighing of policy alternatives with general application, is quintessentially a legislative one. It is clear that no democratic society would ever allocate to an individual judge the authority to decide—on a case by case basis—whether classic violations of the antitrust laws should or should not be deemed criminal. Nor would it allocate to an individual judge the authority to decide—without any statutory guidance—the appropriate punishment for a typical violation of a criminal statute.⁵ These are decisions that should be made by the most representative elected bodies in a democratic society. The legislative process, whatever its shortcomings in practice, is the most open: debates are public, votes are recorded, and legislators are accountable to the electorate in the next election.

Judge Renfrew, in deciding that compelled lectures are the appropriate punishment for "classic" price fixers, has performed this legislative function and performed it well. He has invited input from a wide range of concerned citizens; he has been open about the reasons for his actions; and he has made himself accountable—at least to the academic and professional community. But his well-intentioned actions

3. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-15 (1921).

4. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 *YALE L.J.* 590, 591, 592 (1977).

5. For a discussion of the problem of assigning responsibility for sentencing decisions, see Dershowitz, *Background Paper*, in *TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT* 117-24 (1976).

raise the most profound questions about the proper limits of judicial authority in deciding which punishments "fit" a given crime.

To be sure, in recent decades judges have exercised enormous discretion—virtually unbounded by legislative limitations and almost entirely unreviewable—in the imposition of criminal punishments and in the creation of a vast array of sometimes bizarre probationary conditions.⁶ But such widespread judicial discretion has been almost universally criticized in recent years.⁷ The need for legislatively imposed uniformity—or at least standardization—in sentencing has become apparent to most observers of the criminal justice system. Recent legislative proposals, almost without exception, have been moving in the direction of curtailing judicial discretion and enhancing legislative responsibility for the standardization of sentencing.⁸

It is against the background of this important movement for uniformity that Judge Renfrew's decision to fashion a novel and questionable punishment and apply it to one isolated group of typical offenders should be evaluated. The upshot of his "creative" sentencing is that *certain* typical price fixers are now sentenced to imprisonment, while *other* typical price fixers—indistinguishable from those who are imprisoned except by the luck of the draw of judges—are now sentenced to give lectures. Which is the "correct" sentence is really beside the point: the important fact is that typical price fixers are receiving extremely disparate sentences for reasons having nothing to do with their individual culpability. Such disparity, which is rampant in sentencing today, contributes to the widespread perception—among all segments of our population—that our courts are not administering evenhanded justice.

There is an urgent need for greater uniformity in antitrust sentencing. I have proposed elsewhere the adoption of what I call "presumptive sentencing."⁹ Under that system, or any of the many variations of it that are now under consideration by legislatures around the

6. See Best & Birzon, *Conditions of Probation: An Analysis*, 51 GLO. L.J. 809 (1963); Note, *Limitations Upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466 (1974).

7. E.g., M. FRANKEL, *CRIMINAL SENTENCES* 3-25 (1973); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *CORRECTIONS* 141-47 (1973).

8. See, e.g., S.181, 95th Cong., 1st Sess., 123 CONG. REC. S373 (daily ed. Jan. 11, 1977) (bill introduced by Sen. Kennedy to establish, *inter alia*, guidelines for sentencing); 1976 Cal. Legis. Serv., ch. 1139, at 4752 (California legislation abolishing indeterminate sentencing).

9. Dershowitz, *Let the Punishment Fit the Crime*, N.Y. Times, Dec. 28, 1975, § 6 (Magazine), at 27. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 5, at 19-61; A. VON HIRSCH, *DOING JUSTICE* 98-106 (1976) (Report of the Comm. for the Study of Incarceration).

country, a single sentence—or at least a narrow range of sentences—would be prescribed by the legislature (or by a legislatively created commission) as presumptively appropriate for typical first-offender price fixers. In the absence of specified mitigating or aggravating circumstances, this presumptive sentence would be imposed by the sentencing judge. Whether the appropriate presumptive sentence for typical first-offender price fixers should be a three-month prison term, a specified fine (either absolute or proportionate to profits or assets), a requirement to give lectures, or any combination of the above, would be determined by the legislators (or commission) as a matter of general policy rather than by a particular judge as a matter of individualized justice.

If Judge Renfrew's sentence is the one that most appropriately fits the crime of price fixing, then let the legislature adopt compelled lecturing as the presumptive sentence for that crime. If our society is unwilling to adopt this punishment as the appropriate one for *all* typical price fixers, then no single judge—regardless of his good will, creativity, or sophistication—should take it upon himself to impose this punishment on one fortuitously selected group of typical price fixers.

In Gilbert and Sullivan's *Titipu*, governmental functions ranging from Chief Justice to Commander-in-Chief to Archbishop were "all rolled into" the personage of one Pooh-Bah. In Judge Renfrew's United States, the authority to legislate rules of general application is separated from the authority to judge particular cases. Judge Renfrew's decision to devise a novel punishment for typical price fixers encroached on the legislative prerogative.

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Judge Renfrew has reminded us what a difficult, distasteful business sentencing is. The judge must be concerned with the impact of the sentence upon the life of the offender and his family. He must also be concerned with its impact on society. Frequently, these concerns clash—nowhere more often than in white-collar cases. The crime is serious. The defendant is the fellow next door. That was the dilemma confronting the sentencer in the paper label price-fixing case.

Judge Renfrew is a member of a new generation of judges who sentence not by instinct but by textbook. Having concluded, in the paper label case, that general deterrence was the only valid theory of punishment, he was understandably dissatisfied with the traditional choice of sanctions. Fines alone seemed too lenient to serve as a discouragement to others bent on violating the antitrust laws. Imprisonment, on the other hand, seemed too harsh because the defendants were “community leaders of previously unsullied reputation, who held top executive positions in their corporations.”¹ Accordingly, Judge Renfrew devised a unique alternative—fines with a requirement that the defendants deliver lectures about their offenses to business and civic groups.

Based on responses from audiences before whom the defendants appeared, and reactions from others, Judge Renfrew, with more than a tinge of doubt, suggests that his experiment may have served its end of promoting obedience to the antitrust laws. I remain a nonbeliever.

We know little about deterrence of antisocial behavior. But this much may safely be said: If the maximum statutory penalty for price fixing were a fine and an obligatory speech, then the antitrust laws would be as forbidding as the village parking ordinance. Experience shows that businessmen and their advisers are more willing to take liberties with the antitrust laws when the only sanction is a civil fine, an injunction, divestiture, or damages—as under § 7 of the Clayton Act and most of the Robinson-Patman Act²—than they are when a miscalculation can lead to imprisonment. For the purse snatcher, a term in the penitentiary may be little more unsettling than basic training in the army. To the businessman, however, prison is the inferno, and conventional risk-reward analysis breaks down when

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1. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 592 (1977).

2. See ABA, *ANTITRUST DEVELOPMENTS 1955-1968*, at 94-100, 119-20, 155 (1968).

the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations.

The embarrassment of appearing before one's peers as a convicted offender does not have the same impact as imprisonment. It is true that public humiliation is a venerable form of punishment aimed at discouraging others from following in the offender's footsteps. Our colonial forebears put offenders in stocks. Our mainland Chinese contemporaries place dunce caps on their deviants and parade them before the public with signs proclaiming their crimes. But Judge Renfrew's experiment has demonstrated that speechmaking by businessmen is not a comparable experience, particularly before an audience of peers: the speeches aroused sympathy for the defendants, not ridicule. Moreover, as Judge Renfrew is the first to recognize, the impact of his speechmaking edict stemmed largely from its novelty. If routinely given to all white-collar offenders, the exercise, I submit, would be more punishing to the audiences than to the speakers.

Judge Renfrew also acted in the belief that the fines themselves had some deterrent value. But, as one judge wrote in his response to Judge Renfrew, fines are often absorbed, one way or another, by the corporation—and through it by its customers and stockholders. Indeed, the indemnification statutes of many states now permit corporations to reimburse convicted executives for their criminal fines and expenses if they acted in good faith for the benefit of the company and had no reasonable cause to believe their conduct was illegal.³ Loss of a job is a more costly possible consequence of conviction, but apparently none of the paper label defendants suffered this fate.

As his principal evidence that the sentences served a deterrent function, Judge Renfrew points to the comments by the business audiences that the lectures made them more conscious of the antitrust laws and more determined to seek guidance from their lawyers. He believes that if the defendants had been more candid in describing their behavior the deterrent effect would have been strengthened. I believe that the evidence suggests the contrary.

Virtually all the businessmen who responded to Judge Renfrew's questionnaire stated that they had been aware before attending the lectures that price fixing is illegal. Moreover, jail sentences for

3. See Klink, *Liabilities Which Can Be Covered Under State Statutes and Corporate By-Laws*, 27 *BUS. LAW.* 109, 109-14 (1972); Sebring, *Recent Legislative Changes in the Law of Indemnification of Directors, Officers and Others*, 23 *BUS. LAW.* 95, 98-101 (1967). The expansion of statutory indemnification coverage may have been prompted in part by the large fines imposed on the corporate executives convicted in the electrical equipment price-fixing case of 1961. See Watkins, *Electrical Equipment Antitrust Cases—Their Implications for Government and for Business*, 29 *U. CHI. L. REV.* 97, 100 (1961).

businessmen invariably receive wide publicity in a community, thereby heightening consciousness of the antitrust laws. What sent the defendants' audiences scurrying to their lawyers, I submit, was the defendants' self-serving obfuscation of their offenses. The responses quoted by Judge Renfrew stress that the defendants portrayed themselves as unwary victims of complex and unintelligible laws, who were convicted for something far short of price fixing. What group of businessmen, upon hearing that they could be subject to criminal prosecution for seemingly lawful conduct, would not run to their lawyers for an explanation? If the defendants had frankly acknowledged that they had engaged in collusive bidding and market allocation, their audiences might have found their speeches less alarming. Ironically, the very distortions that bothered Judge Renfrew gave the speeches their most didactic impact.

The suggestion that the court should have retained some control over the speeches to ensure candor is a bad idea. If judges are not only to impose speechmaking requirements but to edit the text of the speeches, serious First Amendment issues will cloud the whole sentencing process. Why should the judiciary have any more right than Congress to tell a citizen what to say or what to think? Courts have correctly limited the power of prison officials to censor communications by incarcerated offenders.⁴ They should not now get into the business of censorship themselves in order to avoid the unpleasantness of imposing a jail sentence.

One may also question Judge Renfrew's premise that general deterrence is "the only theory of punishment that could justify imprisoning the defendants."⁵ Community expectations are also a legitimate factor in the calculus of punishment. It is not always clear by what standard Congress decides to make particular forms of undesirable business behavior subject to criminal, not just civil, penalties. Whatever the criterion, however, the very act of branding violations criminal creates an expectation that imprisonment will be the normal punishment. This expectation is reinforced in price-fixing cases by the headline publicity surrounding prosecutions.

When antitrust offenders routinely escape jail sentences, there is an appearance of preferential treatment. I say "appearance" because, in reality, first offenders are customarily put on probation except for the most violent crimes, and a thief with the community credentials of an antitrust defendant would not face imprisonment. But there is a pervasive belief in our society that businessmen are immune from the

4. *E.g.*, *Procunier v. Martinez*, 416 U.S. 396 (1974).

5. *Renfrew*, *supra* note 1, at 592.

sanctions of the law, and cynicism toward the criminal justice system is particularly pronounced among the disadvantaged.

The publicity about ingenious sentences such as those imposed in the paper label case may, as Judge Renfrew believes, serve the worthy end of increasing awareness of the antitrust laws. But the publicity also amplifies the impression of a double standard of justice. What street criminal was ever sentenced to make speeches? Silent suspended sentences at least do not create the same impression that the judge is doing something extraordinary for the defendant because he is a businessman.

The near unanimity among Judge Renfrew's respondents that his sentences were appropriate does not assuage this concern. The defendants' audiences were caught in the same dilemma as the sentencing judge. According to the survey, they believed that antitrust violations were "serious or moderately serious" crimes.⁶ Yet nearly 90% of those who responded agreed with the sentences, and some of the dissenters would have been even more lenient.⁷ This apparent inconsistency is not puzzling. As Judge Renfrew observes, "[t]o decide to incarcerate a fellow human being is difficult,"⁸ particularly when, through exposure, a judge or a member of an audience can see that the defendants are not very different from his neighbors, or from himself. Distance, however, turns the heart to stone. Judging from the newspaper coverage, the public at large was far less sympathetic to the defendants' predicament and considered the sentences to be no punishment at all. And most of the members of the audiences responded that prison sentences should be imposed on price fixers—but on strangers, not on persons whom they had met.

In my view, therefore, tested by Judge Renfrew's stated goal, the speechmaking sentences appear to be failures. They are not realistic deterrents; indeed, they are likely to inspire more skepticism than respect for legal institutions. Judge Renfrew's reasons for not imposing jail sentences on otherwise good citizens may seem appealing, but they exist in almost all antitrust cases. The defendants generally are individuals with unblemished reputations, a record of philanthropy or other community service, and a family with which the judge can sympathize. If these factors are to rule out jail sentences, then the threat of imprisonment will not remain a credible deterrent in antitrust cases.

The reluctance of judges to impose sentences of imprisonment upon

6. *Id.* at 600 & n.18.

7. *Id.* at 602.

8. *Id.* at 603.

white-collar first offenders has evoked unwise demands to circumscribe too severely the discretion of sentencing judges. The Antitrust Division is now urging that as a general rule there be prison sentences of 18 months in all antitrust cases.⁹ Other prosecutors have demanded that all defendants convicted of business crimes be given a "taste" of jail.¹⁰ These demands for mandatory prison sentences go too far. They are an overreaction to the frequency of suspended sentences. To believe that judges must overcome their inhibitions about sending white-collar offenders to prison is not to say that imprisonment is always the appropriate punishment. It is not; and the threat of imprisonment as a deterrent can be preserved without imposing jail sentences in every case.

Flexibility and common sense remain essential to a fair sentencing process. Not all defendants are the same; nor is all unlawful behavior deserving of the penalty of imprisonment. Age, health, degree of culpability, and past record are still appropriate criteria for all criminal sentences. Some business executives will, because of their convictions, lose their livelihood; others will not. Some will admit their offenses; others will conceal them. Given the differences among offenders, even uniform sentencing standards and procedures—sorely lacking in our courts—will and should lead to disparate results.

The difficulties of sentencing are accentuated in the new kinds of white-collar cases with which prosecutors are now experimenting. Judge Renfrew was dealing with a classic case of price fixing. All but one of the defendants acknowledged that they knew that their conduct was illegal. Many judges, however, are being faced with new classes of offenses created by the present trend toward criminalizing all forms of unethical business conduct.

It once was a first principle of our law that no one could be tried for a crime unless the offense had been defined by the legislature in advance with sufficient clarity to warn the offender of the consequences of his conduct. But today laws and regulations to which criminal sanctions have been tacked are often so vague and complex that the verdict, *ex post facto*, defines the crime. Consider these examples:

- Last year, a transportation executive was tried under the Railway Labor Act¹¹ for committing the crime of an unfair labor practice—a

9. See Antitrust Division Memorandum on Guidelines for Sentencing Recommendations in Felony Cases Under the Sherman Act (Feb. 24, 1977) (on file with *Yale Law Journal*), excerpted in 45 U.S.L.W. 2419 (Mar. 8, 1977).

10. See, e.g., N.Y. Times, Aug. 1, 1976, § 1, at 25, col. 1 (reporting interview with United States Attorney for Southern District of New York).

11. 45 U.S.C. §§ 151-152 (1970).

concept so elastic that the National Labor Relations Board has had to evolve its meaning on a case-by-case basis. The executive was found guilty by a jury. Although unfair labor practices by industrialists are not even criminal offenses under the National Labor Relations Act,¹² he was sentenced to jail under the Railway Labor Act.¹³

- The publisher of *Hustler* was given a seven-to-twenty-year sentence¹⁴ for distributing a magazine that in most states would be considered constitutionally protected.

- Without waiting for Congress to enact a law making overseas bribery as such a federal crime, the Justice Department has formed a task force to search the United States Code for provisions that can be stretched to authorize such prosecutions.¹⁵

Under present standards it is easier to convict an accountant for the crime of securities fraud than to hold him civilly liable. It is surely easier to convict a publisher than to obtain a civil finding by a judge that a publication is obscene. And the form-book charge for conspiracy, applied to cases of business offenses, can and does lead to guilty verdicts based on vicarious liability under circumstances in which the executive could not be held civilly liable for the corporation's acts. We are pushing the criminal sanction to its outer limits; and where an offense is not well-articulated, jail sentences can have a chilling effect on legitimate activity.

Courts must therefore resist demands for prison sentences in all white-collar cases. Jail sentences are frequently appropriate, even if only for short terms. But not always. General deterrence is only one consideration. Fairness, hard to define and impossible to measure, is a more important one.

Ultimately, that is what makes Judge Renfrew's decision not to send the defendants to jail so difficult to evaluate. Although suspended sentences may not be effective deterrents, they may be appropriate in the circumstances of a particular case. Judge Marvin Frankel has written that sentences are "judgments that must turn in the end upon the weighing of values, interests, and choices in the everyday province of legal rather than psychiatric study."¹⁶ I am inclined to believe that judges who are as conscientious about sentencing as Judge Renfrew will do the right thing—for society as well as for the individual. But, please, no more speeches.

12. See 29 U.S.C. §§ 158, 160 (1970 & Supp. V 1975); Fanning, *Remedies under the Taft-Hartley Act*, in 1971 BNA LABOR RELATIONS YEARBOOK 142, 143.

13. *United States v. Winston*, No. 75-CR-83 (N.D.N.Y. Sept. 16, 1976).

14. *N.Y. Times*, Feb. 9, 1977, § A, at 1, col. 5.

15. *Id.*, Oct. 14, 1976, at 53, col. 1.

16. M. FRANKEL, *CRIMINAL SENTENCES* 56 (1973).

Stanton Wheeler[†]

I applaud Judge Renfrew for his candid admission that in sentencing we know not what we do, and for his effort to overcome our ignorance. It is unusual to find a sentencing judge so clearly expressing the need for firmer empirical guidance in sentencing, and rare indeed to find a court that takes the initiative in providing potentially relevant data. My enthusiasm for Judge Renfrew's endeavor is tempered, however, by doubts about the sanctions he imposed; the assumptions he implicitly holds about the roles of defendant, judge, and attorney in the criminal process; and the methods he employed to study the effects of his sentences. I shall comment briefly on the first and second of these points and more fully on the defects of the study and how they might be remedied.

My disquiet about the sanctions is simply this. Probationary conditions traditionally have been imposed to promote the defendant's welfare. Abstinence from alcohol in the case of a drinking check-writer, therapy for the sex offender, or prohibitions against associating with other offenders are common examples. But probationary conditions are increasingly being used to fashion novel sanctions. Sometimes they are imposed to bring the offender closer to the victim (*e.g.*, price fixers in the milk industry being required to work in charity dining halls¹); sometimes, as in this case, to bring special attention to the offense; and sometimes, undoubtedly, for still other purposes. The conditions are real sanctions, imposing very special obligations on the offender. And they are being *judicially* imposed.

What should be the limits of such judicially imposed sanctions? A principle of criminal law is that the potential offender should know the nature of the penalties to which he is subject for the commission of an offense. If a judge can make literally anything a condition of probation, this basic principle is violated. Suppose Judge Renfrew wanted to reach an audience larger than the membership of the 12 civic, business, or other groups the offenders were asked to address. Could the Judge have imposed a modern version of the scarlet letter, perhaps some visible symbol to be worn on the businessman's suit, announcing his conviction on a price-fixing charge? Perhaps less extreme, could he dictate the actual words spoken to the civic groups in

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1. See *White-Collar Justice: A BNA Special Report on White-Collar Crime*, 44 U.S.L.W., pt. II, at 10 (Apr. 13, 1976).

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question? That he might like to do so is suggested by his apparent displeasure that some offenders presented themselves in a sympathetic light, and by his suggestion that the offenders' speeches might require "[c]loser judicial supervision."² The desirability of restricting judicial creativity is addressed, apparently, by only one of the persons from whom Judge Renfrew solicited opinions.³ Yet it would appear to be the single most crucial question raised by his sentences, for such judicially imposed sanctions transfer to the judicial branch functions historically resting with the legislature.

I turn now to the delicate subject of judicial *chutzpah*. It is one thing to recognize the authority of the bench, quite another to insist that the judicial reality is the only reality of worth or relevance in the criminal process. At several points in his presentation, Judge Renfrew seems to reflect that view. His charge to the defendants was lacking in specifics. Indeed, it gave them great leeway, seemingly, in presenting themselves to their various audiences. Each was to "make an oral presentation . . . about the circumstances of this case and his participation therein."⁴ The order did not require a humble admission of guilt, or a presentation of the case as it may have appeared to prosecutor or judge. Yet when Judge Renfrew learned that the offenders were perceived sympathetically and that their accounts stressed features other than those he would have stressed, he was taken aback. They had failed to make clear the "true nature of their unlawful conduct."⁵

He also asked each counsel to "disassociate himself from his role as advocate, 'and instead [to] approach the issue from the perspective of a judge'";⁶ but he notes that some found it impossible to do so, and he suspects that others "though perhaps not conscious of their professional bias, were similarly unable to transcend their role as advocates."⁷ In the case of both the defendants and their attorneys, then, there was a failure, an incapacity, to experience the events as did the judge.⁸

But is it not expecting too much, in the highly structured world of the courtroom with its distinctive roles, to expect any of its actors

2. Renfrew, *The Paper Label Sentences: An Evaluation*, 86 YALE L.J. 590, 617 (1977).

3. *Id.* at 615 n.30.

4. *Id.* at 590.

5. *Id.* at 600.

6. *Id.* at 607 n.25.

7. *Id.*

8. There is one important difference in the two cases. Attorneys who announced their incapacity to adopt the judge's perspective are regarded as showing "admirable candor." *Id.* No such charitable phrases are invoked in behalf of the defendants.

easily to adopt the perspective of one in a very different position? Offenders of all types tend to develop accounts of their conduct that enable them to conceive of themselves as "not really criminal" even though in violation of the law. They normalize their deviance, explaining it to others and themselves in a variety of ways that make it more tolerable and that may come closer to explaining the pattern of their involvement, as subjectively experienced, than does the picture perceived by a judicial officer. If this is true of embezzlers ("I was really borrowing the money temporarily"), forgers ("You can't really hurt anybody with a pen") and swindlers ("You can't cheat an honest man"), why not in the *malum prohibitum* world of the price fixer?⁹

This observation leads me to offer a suggestion to Judge Renfrew concerning the problem of general deterrence. If there are multiple definitions of the social reality of conviction, each corresponding roughly to the social roles played by the parties (prosecutor, judge, defense attorney, and defendant) it is a mistake to assume that any one party can easily play another's role. As we would not send a boy out to do a man's work, perhaps we should not send an offender out to do the court's work. Perhaps it is enough to be convicted and subject to the usual toils of conviction. If the judge has a view of the appropriate moral and legal tone to be expressed in conveying the message of general deterrence, he should deliver it directly or through a bureau of public information attached to the court. The offender is unlikely to be able to deliver the same message as the judge, for, alas, he did not experience the process from the same lofty position.

Whatever my reservations about the sanctions, I am struck by the innovative effort of Judge Renfrew and his clerks in undertaking the evaluation of them. As the Judge notes at a number of points, the inquiry was not conceived or carried out with scientific precision. On the assumption—and hope—that other legal officials may share Judge Renfrew's desire to learn more about the effects of their actions, I will explore some of the weaknesses of the Judge's inquiry in order to provide a fuller appreciation of the problems they pose and to suggest solutions.

Judge Renfrew's study has the following characteristics:

1. The analysis is based on the responses of a nonrandom, 4% sample of the population that heard the speeches.¹⁰

9. Similarly, I suspect that the attorney who finds it easy, within a given case, to embrace the role of both his adversary and the judge, may play his own part with a bit less rigor and conviction. It is one thing to comprehend the moves of the adversary and the bench, quite another to identify with their perspectives.

10. Renfrew, *supra* note 2, at 595 & n.11.

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2. That population itself is difficult if not impossible to enumerate.¹¹
3. The relevant sample for most of his purposes is his “category one,” 57 total respondents¹² sometimes reduced to close to 50 because of nonresponse to particular questions.¹³
4. The questionnaires were filled out some six months to a year after the event they were designed to evaluate.¹⁴
5. The questionnaires were solicited by a person (the judge) who had a direct stake in the results of the study.
6. The primary measure of long-term “effect” is a response to a single item on the questionnaire.¹⁵

Each of these characteristics creates problems in interpreting Judge Renfrew’s results, but each could be remedied in future studies.

1. *The problem of unrepresentative respondents.* The fact that Judge Renfrew’s questionnaires were returned by only 4% of those who heard the talks is critical not so much because 4% is small but because we cannot know whether that 4% is representative of the other 96%. After all, major polling agencies do quite well in predicting national outcomes from samples of far less than 4% of the population at large. The difference is that they work very hard to achieve a representative sample. In the case of Judge Renfrew’s study, however, there is every reason to believe that these respondents were distinctly unrepresentative. Frequently in social research, questionnaire respondents differ from nonrespondents in that they tend to care more or know more about the issues addressed in the survey. If this was true in Judge Renfrew’s study, it means that the sample was probably biased towards a more articulate, more knowledgeable audience, those who had already been closer to some of the issues than had the nonrespondents. There is simply no warrant for assuming, in this case, that the 4% who did respond were typical of the population as a whole. Yet how easy it is to forget this possible bias in the presentation of the results. Judge Renfrew, for instance, notes, “Of the persons who responded to the questionnaire, about 40% in the business category . . . had heard of the defendants’ offenses before attending a speech.”¹⁶ It is quite likely, however, that the 4% of the respondents on whom

11. *Id.*

12. *Id.* at 595-96.

13. *E.g., id.* at 600 n.18, 601 n.21.

14. *Id.* at 595-96 n.11.

15. *Id.* at 605 (question concerning changes in business practice).

16. *Id.* at 596-97.

this "40%" is based were more cognizant, more "tuned in" than the remainder of the audience population. In making an accurate assessment of the impact of these sanctions, we have to assume that the whole process had a different impact on those who responded to the questionnaire than on those who did not bother to do so.

What can be done about this nonrandomness of response? A number of corrective measures can be taken. Some of these are not cheap: often survey analysts engage in call-backs or recontacts with those who have failed to respond, and give up only after extraordinary efforts have been made to elicit responses from everyone in the sample. That would be impossible without more resources than those available to the Judge. But the Judge probably could have done much better with the limited resources available to him. For example, instead of spending a given amount of energy trying to reach all those who heard any of the 60 speeches, the Judge might have selected a smaller sample and invested the energy thus saved in trying to get a complete response from this smaller group. If pursued persistently, people usually respond to survey researchers. Had the Judge concentrated his efforts he would have been able to come closer to a representative sample of respondents, a cornerstone of any fruitful study of effects. As it is, we simply cannot know what to make of the Judge's results because we have no idea whether the respondents were typical of those who heard the speeches.

2. *The problem of specifying the population.* Judge Renfrew wished to reach all those who had attended the speeches given by his five convicted offenders. This presumes that someone was taking attendance at all the meetings, and that all those (and only those) who had attended the sessions were reached via questionnaire. The Judge reports that the population of speech listeners approximated 2700.¹⁷

If all these persons did hear the defendants, and if all of them did receive questionnaires, and yet only 4% cared enough to respond, that would indeed tell us something about the general lack of impact of the talks. It is difficult to tell from Judge Renfrew's account of the process of reaching the various groups precisely what transpired. But there is no evidence that it was anyone's formal responsibility to locate all those who had heard the message. Quite possibly, the Judge was successful in reaching some groups, unsuccessful in reaching others. (One would get some feeling for this if information were introduced with regard to the relative success of the sampling for each of the 60

17. *Id.* at 595.

different groups, or each of the 5 different speakers, or each of the persons who arranged to put the speaker and group together.) In any event, a full interpretation requires that we know much more about who attended the meetings.

The relevance of these unknowns becomes clear if we focus for a moment on the population we may presume Judge Renfrew was most interested in reaching, namely, those businessmen who may engage in antitrust violations or who may directly influence those in a position to do so—what we may call the “population of potential offenders.” Judge Renfrew clearly wished to separate the population of potential offenders from other respondents (hence his distinction between “category one” and “category two”), but a full interpretation would require that we know more about the distribution of those categories in the various groups. One group, for example, was a law school class. Now, students in a law school may someday be in a position to fix prices, but they probably were not when they heard the speech. If there were many groups like this (and we have no idea of the distribution of groups), then perhaps the “population of potential offenders” who heard the speeches was only a half, or a quarter, or even a tenth of the total population that heard the speeches. If that were the case, then we might attach more significance to the 57 businessmen who actually responded to the questionnaire. At the same time, we might have grave doubts about the value of a means for spreading the message of deterrence that reached only a small portion of the population of potential offenders.

From the materials before us, however, it is virtually impossible to know what significance to attribute to the numbers and findings reported in the article. Interpretation of the results would have been much easier if a brief survey had been taken at the time of each group meeting, simply to identify those in attendance and perhaps to record their addresses for a followup questionnaire. Such straightforward procedures, if invoked at the outset of similar undertakings in the future, would improve greatly the basic quality of the data and would allow a much fuller and more confident interpretation of the findings.

3. *The problem of total sample size.* Suppose that neither of the above problems had plagued Judge Renfrew's study. Suppose, in fact, that he had been able to draw a true random sample from the subset of the population with which he was most concerned, namely his category one. Would we then have a firm basis for generalization to the business population at large? Yes, but only within the broadest limits. Sampling theory tells us that if we were to draw repeated

random samples of 50 from a very large population, we could expect to observe quite different proportions from sample to sample depending on the persons we happened to choose. Over all possible samples of 50, the mean of all the various sample proportions would approximate the proportion in the population from which they were drawn. But any one sample might diverge from it by quite a bit. Judge Renfrew is concerned, for example, with whether the sentences he meted out increased public awareness of antitrust violations. He tells us that 40% of category one respondents had heard the message. If they had been randomly chosen from the population, the odds are about one in 20 that the true population figure might be as low as 26% or as high as 54%.

Whether that is a sufficiently narrow range could well be a matter of discussion in connection with the implications of the report. Here I simply want to highlight that, even if the sample had been drawn according to all requirements of sampling theory, a sample as small as 50 leaves room for a good deal of fluctuation in the result. Presurvey consideration of the minimum number of respondents necessary for a given level of accuracy might have dictated a different sampling strategy.

4. *The problem of timing.* Judge Renfrew notes that the idea for the study came some months after the sentences and that the project was mounted over six months after the speeches themselves were delivered. Judge Renfrew wanted to use the followup questionnaires to find out what actually transpired when the speeches were delivered—how the offender presented himself, how he characterized his offense, and the like. For this purpose, the six-month-to-one-year delay is much too long. Memories fade, other events intervene, and persons move or change jobs between speech and survey.

But the Judge was also interested in long-term effects, for which this period of followup is not long enough. Perhaps an optimum design, with the Judge's interests in mind, would have been a factually oriented interview (or questionnaire) administered shortly after the discussions, focused heavily on the content of the speeches and the impression made by the speakers, and followed-up over a year later to trace the effects of the speech on the subsequent behavior of the listeners. By trying to combine in a single research instrument a study of the offenders' presentations and a study of long-term effects on listeners, the Judge may have learned little about either subject.

5. *The problem of solicitation.* The role in which a researcher is cast is likely to influence the responses he or she elicits. In this in-

stance the Judge was aware that his formal role as the sentencing authority might influence the respondents, and in his cover letter he tried to reassure them so that they would respond with candor. But a common finding in most interview or questionnaire situations is that respondents try to please the investigator, and, if unsure of themselves, they may give a response they feel the investigator wishes to hear. In this case one wonders whether the responses would have been very different if the study had been carried out by a group independent of the sentencing judge—a group that had no stake whatever in the efficacy of this mode of sentencing. Relative to the other problems presented by this research, this particular one may seem minor. But it is important to remember that the researcher's role does have some effect on how the audience responds, and to be conscious of that effect in designing and interpreting a survey.

6. *The problem of measuring effect.* Given the Judge's concern for the effects of his sanctions, in particular the possible promotion of general deterrence, it is a bit surprising that only one of the survey questions addressed directly whether changes in business practice resulted from hearing a defendant speak. That question did indeed yield a number of interesting responses, the most revealing of which, one presumes, are reported in the article. But since the question of effect seems so crucial, since the "communicative possibilities" of the sentences are among the primary reasons the Judge offers for imposing them,¹⁸ it seems that a good deal more should have been done to try to define their impact. For example, if the Judge perceived the sentences as affecting chiefly the persons who heard the speeches, he might have specified in the questionnaire possible changes in business practice resulting from the speeches, perhaps with a checklist of actions persons might have taken. As it is, the open-ended character of the question, especially given the lapse of time, left a good possibility that the respondents would not recall some changes that had been introduced.

It seems more likely, however, that the Judge hoped the speeches would have a ramifying effect, with the listeners themselves conveying the message through conversations with friends, business acquaintances, and the like. This perspective might have suggested another set of questions: "Have you initiated conversations with other businessmen that were based upon the talk you heard? About how many? To your knowledge have any of them made real changes in their company practices because of their awareness of this case?"

18. *Id.* at 594.

These are only a few of the problems and potentialities of survey design raised by Judge Renfrew's study. Under ideal experimental conditions we would carefully assign different sanctions to similar offenders so as to assess the effects. Judge Renfrew is surely right in suggesting that this cannot be done, save in the rarest of instances. Short of a true experiment, one might select for comparison a group of businessmen who did not hear the speeches, to see if, as implied, they do less to prevent price fixing in their companies than do those who were audience members.

Even the general kind of survey undertaken by Judge Renfrew can teach us something. What we learn, of course, depends on how the survey is conceived and carried out. The most important lesson is that planning is crucial. Most of the weaknesses of Judge Renfrew's survey could have been overcome with adequate preparation, beginning prior to the imposition of the sentences themselves. It would not have required an enormous investment of resources, especially if the Judge's clerks could have been used as research assistants.

Nevertheless, it would be a mistake to expect too much from any one such study, even if the design defects were removed. The novelty of the sanction poses grave problems of generalizability, and a variety of local conditions may influence outcomes. That is why it is so important that more of these studies be launched.

Those in a position to undertake studies like Judge Renfrew's should familiarize themselves with the rudiments of social research so that they can design studies that produce reliable and useful results. This is not to suggest that judges become social scientists or that every judicial decision be evaluated empirically. For judges who are interested in taking advantage of social science techniques, however, assistance should not be hard to enlist. A number of law schools have faculty members who could provide some training and who might also be able to aid in research design. In addition, experts in sampling and in survey design and analysis can be found in survey research centers at many large universities.

Like the craft of lawyering, the craft of social research is part technique, part judgment, part experience. It is becoming increasingly relevant to the legal system, as we search for better ways of accomplishing such legal tasks as sentencing. If we can develop within the legal profession a greater capacity to design and conduct meaningful social research, we will take a major step toward providing answers to the important questions that Judge Renfrew has raised.