BREAKING UP THE TREBLE PLAY: ATTACKS ON THE PRIVATE TREBLE DAMAGE ANTITRUST ACTION

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I. INTRODUCTION

Although the Sherman Act[1] is nearly a century old, only recently has a major controversy arisen over one of the more significant innovations of that statute: the creation of the private treble damage action as a remedy for antitrust violations. Although the statutory language, providing that any person "injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee," has remained essentially unchanged since 1890,[2] there are currently calls for more or less radical revisions in the private remedy.

The criticism of the private treble damage approach to antitrust enforcement began in the law reviews and has taken on a new significance in the wake of a legislative proposal by the Reagan Administration to restrict treble damage liability to certain kinds of antitrust violations, remitting private plaintiffs to single damages, plus interest, for other varieties of misconduct.[3] It is the purpose of this article to explore the basic scholarly criticisms of the treble damages remedy as they have emerged in the past few years and then to consider the Administration's proposed legislative change, both on its own merits and as an expression of some of the concerns which underlie the scholarly criticisms. It is the thesis of this article that the treble dam-

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[1] 15 U.S.C. §§ 1-7 (1982).

[2] Section 7 of the original Sherman Act, Pub. L. No. 51-647, 26 Stat. 210 (1890), which first created the treble damages action has since been replaced by § 4 of the Clayton Act, 15 U.S.C. § 15 (1982). The Clayton Act, however, basically reenacted the damage provision of the Sherman Act and extended the remedy to the new substantive violations the Clayton Act established.

[3] The President's Cabinet approved a package of proposed legislative reforms in the antitrust area on March 24, 1983. *Reagan Administration Approves Proposal for Antitrust, Intellectual Property Bill*, Antitrust & Trade Reg. Rep. (BNA) vol. 44, No. 1108 at 681, 713-14 (Mar. 31, 1983) [hereinafter cited as *President's Proposal*]; see *infra* notes 221-37 and accompanying text for a full discussion of these proposals.

ages remedy for private plaintiffs offers unique advantages in the scheme of antitrust enforcement.[4] The criticisms of it are at best overdrawn. Even more to the point, modification of the treble damage action threatens negative consequences for antitrust law.

In order to develop this thesis, the article will briefly trace the history of the treble damage action in Part II. In Part III it will turn to an analysis of the first of the two basic schools of criticism of treble damage, considering the "efficiency" arguments against the remedy. Part IV will treat the "unfairness" contentions as a reason to restrict treble damages. In Part V, the article describes and analyzes the Reagan Administration proposal in light of the treble damage controversy.

II. Development of the Treble Damage Action

The private damage action to enforce the antitrust laws[5] has had an uneven history. Although conceived as a primary means of ensuring antitrust compliance,[6] this avenue soon fell into disuse and was rarely traveled for a half-century after the enactment of the Sherman Act[7] despite efforts to make it more appealing.[8] In view of the attrac-

[4] At the present time, there are five basic modes of enforcing the antitrust laws. In addition to the treble damage action, which is the subject of present concern, private persons may seek equitable relief, 15 U.S.C. § 26 (1982); the Justice Department may either bring criminal proceedings, 15 U.S.C. § 15(a) (1982) and/or seek equitable relief, 15 U.S.C. § 25 (1982); and the Federal Trade Commission may issue cease and desist orders. 15 U.S.C. §§ 21(b) (1982) and 45(b) (1982). As might be expected, each of these methods has its own advantages and disadvantages, and not every antitrust offense is subject to all five means of enforcement. *See generally* L. Sullivan, Handbook on Antitrust Law §§ 240-253 (1977). While a detailed survey of these enforcement approaches is beyond the scope of this article, some of the major limitations on government enforcement are treated in Part III. *See infra* notes 133–49 and accompanying text. As for private actions for injunctive relief see *infra* note 32.

[5] For purposes of § 4, the term "antitrust laws" basically embraces the Sherman and Clayton Acts. 15 U.S.C. § 12(a) (1982). The Federal Trade Commission Act, 15 U.S.C. §§ 45-57 (1982), has been held not to create a private right of action for either single or treble damages. *E.g.*, Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

[6] W. Hamilton & I. Till, Antitrust in Action 10, 82 (TNEC Monograph No. 16, 1940); H.B. Thorelli, The Federal Antitrust Policy 229, 603 (1954). *But see* K. Elzinga & W. Breit, The Antitrust Penalties: A Study in Law and Economics 66-68 (1976); *cf.* United States v. Borden Co., 347 U.S. 514 (1954) (attorney general primarily charged with ensuring antitrust compliance; private actions only supplement government enforcement of the antitrust laws).

[7] This limited early use of the private remedy, although cited by many commentators, *e.g.*, Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 Yale L.J. 1010 (1952), is revealed most starkly by data collected in Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 371 (1970). Table 3 of the Posner article reveals that an estimated 423 cases were brought from 1890 through 1939. *Id.* From 1940 to 1944 alone, however, 270 cases were commenced; and beginning in 1950, the figure for each five year period was never less than 1,000, a number more than twice that for the entire first half-century of the Sherman Act. *Id.*

[8] In 1914, § 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1982), was passed providing that plaintiffs in private antitrust suits may use nonconsent "final judgments" obtained by the United

tiveness of a route which may potentially yield damages three-fold those suffered as well as costs and a reasonable attorneys' fee,[9] this desuetude is startling. The explanation can hardly lie in the substantive doctrines of antitrust since the private remedy remained dormant during periods of considerable governmental trustbusting activity. Rather, the most probable reason was the widespread judicial hostility to this congressional innovation,[10] a hostility manifested by court-created doctrines such as the *in pari delicto* defense[11] and the requirement of a "public injury" as part of the plaintiff's cause of action.[12] In addition, the courts in this early period tended to require a degree of precision in proving the amount of damages which most plaintiffs found difficult or impossible to meet, at least as to their broader injuries.[13] As a result, the success rate of plaintiffs, whether after

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States in civil or criminal antitrust suits as "prima facie evidence." The purpose of § 5(a) was clearly to facilitate private actions. *See, e.g.*, President Wilson's Special Message to Congress, 51 CONG. REC. 1962, 1964, January 20, 1914; *see generally* Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U. L. REV. 991 (1961).

At the time this provision was passed, the "mutuality" doctrine barred government suits from having collateral estoppel effect in a subsequent private action against the same defendant. *See generally* Sullivan, *The Enforcement of Title VII: Meshing Public and Private Efforts*, 71 NW. U.L. REV. 480, 522-34 (1976). Although § 5(a) afforded a significant advantage to private plaintiffs, the subsequent decline of the mutuality bar, *e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 320 (1979), rendered the prima facie evidence effect of less value. Since lack of mutuality no longer necessarily precludes collateral estoppel, private plaintiffs will naturally seek to invoke the conclusive bar of collateral estoppel by prior governmental suits rather than merely obtain the prima facie evidence effect of § 5(a). An amendment to § 5 in 1980 ensures that collateral estoppel is available in such situations except as to findings by the Federal Trade Commission. Pub. L. No. 96-349, 94 Stat. 1157 (current version at 15 U.S.C. § 16(a) (1982)).

[9] 15 U.S.C. § 15 (1982); *see generally* Comment, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656 (1972).

[10] The history of the treble damage remedy and of the award of an attorney's fee as a part of recoverable costs is discussed in K. ELZINGA & W. BREIT, *supra* note 6, at 63-77.

[11] *See generally* Handler & Sacks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense*, 70 GEO. L.J. 1123 (1982); Lockhart, *Violation of the Antitrust Laws as a Defense in Civil Actions*, 31 MINN. L. REV. 507 (1947); Note, *In Pari Delicto and Consent as Defense in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965).

[12] *See* L. SULLIVAN, *supra* note 4, at § 247; *see generally* Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 488 (1980).

[13] *See generally* Clark, *The Treble Damage Bonanza: New Doctrines of Damage in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954) (in antitrust cases courts have rejected standard of "certainty" in calculating damages); Donovan & Irvine, *Proof of Damages Under the Antitrust Law*, 88 U. PA. L. REV. 511 (1940); Greenwald, *Capitalized Pricing of Injury to Capital in Treble Damage Suits*, 45 CORNELL L.Q. 84 (1959); Greenwald, *Measurement of Damages in Private Antitrust Suits*, 5 ANTITRUST BULL. 293 (1960); Guilfoil, *Damage Determination in Private Antitrust Suits*, 42 NOTRE DAME LAW. 647 (1967); Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 MINN. L. REV. 651 (1980); Lanzillotti, *Problems of*

litigation or by way of settlement, was too low to encourage private suits.[14]

The growing interest in private damage actions after 1940 was in part an outgrowth of the rebirth of interest in antitrust as an instrument of national economic policy by the public enforcement authorities,[15] but it can perhaps be more appropriately attributed to a shift in the Supreme Court's approach to antitrust law.[16] This occurred primarily through the Warren Court's development of a plaintiff-oriented jurisprudence.[17] The groundwork for expansion was established by earlier decisions liberalizing such aspects as the calculation of damages[18] and expanding the "commerce" reach of federal law.[19] Nevertheless, it was the Warren Court which undertook a major broadening of substantive violations[20] and evinced a concomitant con-

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Proof of Damages in Antitrust Suits, 16 ANTITRUST BULL. 329 (1971); Parker, *Measuring Damages in Federal Treble Damage Actions*, 17 ANTITRUST BULL. 497 (1972); Weinberg, *Recent Trends in Antitrust Civil Action Damage Determinations*, 1976 DUKE L.J. 485.

[14] "Success" is a difficult concept to define or measure in this context. Thus, it has been stated that plaintiffs prevailed in only 13 of 175 private actions pursued to final adjudication between 1890 and 1940. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959). Similarly, between 1952 and 1959, plaintiffs were successful in only 20 of 144 reported cases. *Id.* at 11. But Posner questions studies showing a low incidence of private plaintiff "success" since they focus only on reported cases. Posner, *supra* note 7, at 382. He notes that, since the vast majority of cases were dismissed by agreement of the parties, the plaintiffs presumably obtained some satisfaction. *Id.* at 382-83. There has been little effort to explore this aspect of private suits.

[15] R. Hofstadter, *What Happened to the Antitrust Movement?* in THE PARANOID STYLE IN AMERICAN POLITICS (1965).

[16] *See infra* notes 17-18 and accompanying text.

[17] *See* Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353, 1355.

[18] For example, the Court authorized damage calculations which provided plaintiffs with realistic chances of substantial recoveries. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). Posner suggests that the *Bigelow* decision may have been an important factor in the increase in private litigation. Posner, *supra* note 7, at 373-74.

[19] Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948). The *Mandeville Farms* Court viewed the inquiry whether a restraint occurs in interstate or intrastate commerce as "merely a preliminary step" and found the "vital question [to be] whether the effect [of a restraint on trade] is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence." *Id.* at 234.

[20] Perhaps the two most significant substantive decisions from the private plaintiff's perspective were United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (creating a rule of per se illegality for certain vertical territorial restrictions) and Fortner Enters. v. United Steel Corp., 394 U.S. 495 (1968) (liberalizing the elements of proof for tying arrangements). In addition, the Court's Robinson-Patman decision in Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967), significantly eased the burdens of making out a primary line injury case. There were, of course, other areas in which the Warren Court engaged in activist interpretation of the antitrust law. For example, the Court demonstrated hostility toward corporate mergers, but this was not a major source of private damage suits. *E.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

cern with dismantling some of the doctrines which posed significant barriers to private damage suits. Perhaps the three most notable steps in this latter direction were the rejection of the pass-on defense,[21] the narrowing of the *in pari delicto* concept,[22] and the elimination of "public injury" as a distinct requirement of proving a private antitrust cause of action.[23] These liberalizations, coupled with an unprecedented resort to the class action device,[24] produced an avalanche of private antitrust litigation.[25]

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[21] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 382 U.S. 481 (1968). The pass-on defense would have permitted a defendant to avoid liability to a particular plaintiff on the ground that that plaintiff had not in fact suffered any harm because it had "passed-on" to a subsequent purchaser any increase in costs stemming from the antitrust violation. Although the *Hanover* Court rejected the defense, the decision may have proved a Pyrrhic victory for private lawsuits since it left unresolved the question of the rights of other private plaintiffs, those to whom the overcharges may have been passed on. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the present Court answered this question by holding that a damage suit may not be brought by "indirect purchasers." *See infra* notes 27 & 214 and accompanying text.

[22] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1967) ("nothing in the language of the antitrust acts . . . indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions"); *see supra* note 11.

[23] Klors, Inc. v. Broadway-Hale Stores, Inc., 357 U.S. 207 (1959); Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 660 (1961) (per curiam); *see* L. SULLIVAN, *supra* note 4, at § 247 (suggesting that rigorous standing doctrines have been developed to replace the public injury limitation on private suits).

[24] *See, e.g.*, DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (I)*, 1976 AM.B.FOUND. RESEARCH J. 1023 [hereinafter cited as DuVal (I)]; DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II)*, 1976 AM.B.FOUND. RESEARCH J. 1273 [hereinafter cited as DuVal II]; *see infra* note 214 and accompanying text.

[25] Posner's statistics reveal that 3,136 private suits were commenced between 1965 and 1969. *See* Posner, *supra* note 7, at 371. This figure is all the more surprising in that, despite the huge number of electrical equipment conspiracy cases, the figure is almost double that of the preceding period, 1960-1964. *Id.* Subsequent data reveal a continued high number of private actions. The following table is drawn from M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION 128-29 (2d ed. 1983) (citing 1982 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. 102):

1970	877
1971	1,445
1972	1,299
1973	1,152
1974	1,230
1975	1,375
1976	1,504
1977	1,611
1978	1,435
1979	1,234
1980	1,457
1981	1,292

In 1982, the number of private antitrust cases declined significantly to 1,037. 1982 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. at 102, 105. The decrease in filings may well reflect some of the recent Court decisions adversely affecting private suits.

The advent of the Burger Court, however, has signaled a substantial shift in judicial receptivity to private suits. That Court's changes in substantive antitrust doctrine are, of course, well-known.[26] Some procedural and remedial developments have also been adequately treated in the literature, especially the demolition of large consumer class actions worked by *Eisen v. Carlisle & Jacquelin*[27] and the foreclosure of indirect purchasers from a damage action in *Illinois Brick Co. v. Illinois* (*Illinois Brick*).[28] A third potentially important line of authority began with *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[29] where the Court for the first time established a broad limitation on the kinds of injury for which antitrust plaintiffs could obtain a damage recovery.[30] While the net effect of these Court decisions in

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[26] The three areas of greatest change have been: (1) the elimination of the per se rule as applied to certain vertical territorial restraints, Continental T.V. Inc. v. GTE Sylvania, Inc., 443 U.S. 36 (1977); (2) expanding the requirements for proving a tying violation, United States Steel Corp. v. Fortner Enters., Inc., 492 U.S. 610 (1977); and (3) a series of merger decisions which, without fundamentally altering prior doctrine, have nevertheless created a far more hospitable climate for business amalgamations by making proof of illegality more difficult, *e.g.*, United States v. General Dynamics Corp., 415 U.S. 486 (1974). The first two areas, those reflecting the greatest doctrinal change, were the most fertile ground for private actions.

In addition, the present Court has taken an interest in the Robinson-Patman Act, 49 Stat. 1526 (current version at 15 U.S.C. §§ 13-13(b), 21(a) (1982)), passed by Congress in 1936. Although that statute is frequently criticized as not a "true" antitrust law because of its perceived effect of restricting competition, *see generally* ABA ANTITRUST SECTION, THE ROBINSON-PATMAN ACT: POLICY AND LAW Vol. 1 (Monograph No. 4, 1980), it is technically an amendment of § 2 of the Clayton Act, 15 U.S.C. § 13 (1982), and therefore one of the antitrust laws for purposes of the treble damage provision.

Over the past several years, the Court has tended first to narrow the substantive prohibitions of the Robinson-Patman Act to make private treble damage recovery more difficult even when a violation exists. *E.g.*, Falls City Indus., Inc. v. Vanco Beverage, Inc., 103 S. Ct. 1282 (1983) (meeting-competition defense may be invoked in an entire geographic area, not only on a customer-by-customer basis); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) (holding that private plaintiff in secondary line case could not recover "automatic damages," *i.e.*, three times the amount of the price difference by which its competitor was favored; rather, plaintiff must show actual injury resulting from the discrimination); Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979) (buyer not generally liable for inducing price discrimination if seller's discrimination is justified by meeting competition defense).

[27] 417 U.S. 156 (1974) (federal rules require individual notice to all class members who can be reasonably identified and plaintiff must bear full costs of sending notice); *see infra* note 214 and accompanying text.

[28] 431 U.S. 720 (1977).

[29] 429 U.S. 477 (1977).

[30] Essentially, the *Brunswick* Court articulated the concept of "antitrust injury" as a requirement for monetary recovery. *Id.* at 489. Put simply, it is not enough that a private plaintiff prove causation in fact resulting from conduct which violates the antitrust laws. In addition, "[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (emphasis in original). "Antitrust injury" is a kind of "standing" doctrine, but it is not clear whether *Brunswick* will replace, or be superimposed on, the standing rules articulated by the lower courts. *See generally* Berger & Bernstein, *An Analytical Framework for Antitrust Stand-*

undermining private enforcement should not be underestimated,[31] the focus of present concern is on the even broader attacks which threaten the treble damage action.[32]

Although the treble damage action has never been free of criticism, over the last ten years it has become the focus of two distinct lines of attack. One approach, significant mainly because of the preeminence of its authors, is the concern of Professors Phillip Areeda and Donald Turner who, in their multivolume work, *Antitrust Law*,[33] raise the potential unfairness of treble damage recovery to defendants.[34] Their proposed reform is that treble damages be made discre-

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ing, 86 YALE L.J. 809 (1977). The Supreme Court's encounters with antitrust standing after *Brunswick* are scarcely definitive due in part to the case-by-case approach which it has adopted. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 908 (1983) ("the infinite variety of claims that may arise may [sic] it virtually impossible to announce a black letter rule that will dictate the result in every case"); Blue Shield of Va. v. McCready, 102 S. Ct. 2540, 2548 (1982) (in determining question of standing, court must analyze several factors including the causal connection between the alleged violation and the harm to plaintiff and the nature of plaintiff's alleged injury); *see* Merican, Inc. v. Caterpillar Tractor Co., 45 Antitrust & Trade Reg. Rep. (BNA) 212, 214-15 (3d Cir. 1983); Brauman v. Bassat Furniture Indus., 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977).

[31] It is true that the Court has decided some cases in ways which facilitate private suits. Most notable in this area are Reiter v. Sonotone Corp., 442 U.S. 330 (1979) and Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978). The former decision recognized consumer standing to bring treble damage actions while the latter permitted foreign governments to sue.

Despite these decisions the net effect of the Burger Court's jurisprudence has been restrictive of the private right of action. The *Pfizer* decision is, obviously, not of great importance in terms of the number of suits commenced. And *Reiter*, although potentially a very permissive decision, will remain of limited significance in light of *Illinois Brick*, 431 U.S. at 720; *see supra* note 21. Read together, *Reiter* and *Illinois Brick* permit consumer suits only when the antitrust violators sell directly to the consumers, a limitation which may immunize most antitrust violations from consumer attack.

[32] A private action for injunctive relief is an additional remedy which will often be available to plaintiffs. 15 U.S.C. § 26 (1982); *see generally* Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Law*, 1967 UTAH L. REV. 344; MacIntyre, *Antitrust Injunctions: A Flexible Private Remedy*, 1966 DUKE L.J. 22. Further, this avenue of relief has recently become more attractive because of the Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1396 (amending 15 U.S.C. § 26 (1970)), which authorizes for the first time the award of attorneys' fees to plaintiffs who obtain an injunction.

Injunctive relief, however, has its own problems. These range from general questions of "standing," to special problems such as the availability of dissolution in a private suit under § 7. *E.g.*, Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U. L. REV. 374, 399 n.178 (1976); *see generally ABA Antitrust Section, Monograph No. 1*, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION VII OF THE CLAYTON ACT—POLICY AND LAW at 4-6, 59-61 (1977). Even though equitable relief may be available in a broader range of situations than treble damages, *e.g.*, Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979), it will remain a far less attractive remedy than a damage award in most cases. Accordingly, the textual discussion is limited to the treble damage alternative.

[33] 2 P. Areeda & D. TURNER, ANTITRUST LAW ¶ ¶ 300-536 (1978).

[34] *Id.* at ¶ 331(b).

tionary with the courts rather than mandatory.[35] The current Reagan Administration proposal, while considerably different from the Areeda-Turner approach, is responsive to at least some of their concerns.[36]

A second line of attack on the treble damage action emerges from the economic analysis approach to antitrust which is associated with the Chicago school, most notably with now-Judge Richard A. Posner.[37] The basic predicate for this attack is that economic analysis is not only appropriate in substantive antitrust rules of law but also has significance in addressing procedural and remedial questions. The basic work in this direction was done in a series of articles by Professors Elzinga and Breit, culminating in their book, *The Antitrust Penalties: A Study in Law and Economics (Antitrust Penalties)*,[38] which concluded that the treble damage action ought to be eliminated as inefficient and be replaced by a fine-oriented system of public enforcement.[39] Although works by other scholars, most notably Professor Warren F. Schwartz,[40] have important implications for any economic analysis of the treble damage action, the Elzinga and Breit approach deserves primary consideration in any reevaluation of this enforcement device.[41] The economic approach is especially important since it seems likely that the efficiency concerns they reflect underlie, at least in part, the Reagan Administration proposal to limit the applicability of treble damage recovery.[42]

In sum, any comprehensive consideration of the private treble damage antitrust action must come to grips both with issues of fairness

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[35] *Id.*

[36] *See infra* notes 224-43 and accompanying text.

[37] *See, e.g.*, R.A. POSNER, AN ECONOMIC ANALYSIS OF LAW (2d ed. 1977).

[38] K. ELZINGA & W. BREIT, *supra* note 6.

[39] The authors devote an entire chapter to this theory. *Id.* at 112-38.

[40] Schwartz, *An Overview of the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1075 (1980); *see infra* notes 150-72 and accompanying text. Several articles printed in *Georgetown Law Journal* respond to Professor Schwartz's work. Block & Sidak, *The Cost of Antitrust Deference: Why Not Hang a Price Fixer Now and Then?*, 68 GEO. L.J. 1131 (1980); Dorman, *The Case for Compensation: Why Compensatory Components are Required for Efficient Antitrust Enforcement*, 68 GEO. L.J. 1113 (1980); McChesney, *On the Economics of Antitrust Enforcement*, 68 GEO. L.J. 1103 (1980); Reynolds, *The Economics of Antitrust Enforcement: Theory on Measurement*, 68 GEO. L.J. 1121 (1980). This compilation represents the most important work since *Antitrust Penalties*. Yet another important contribution to the economic analysis of antitrust penalties is Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983), which was, however, published too recently to permit consideration in this article.

[41] A less radical suggestion of selective government preemption is explored in Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319, 1346-50 (1973).

[42] *See infra* notes 224-43 and accompanying text.

to defendants and with issues of efficiency. The remainder of this article will address these questions.

III. "EFFICIENCY" AND TREBLE DAMAGE SUITS

A. *The Elzinga and Breit Proposal*

The basic thesis of *Antitrust Penalties* is that the present multi-pronged system of mixed public and private antitrust enforcement is less "efficient" than the suggested alternative of a fine system enforced solely by the government.[43] Analysis of this proposal depends first on ascertaining the meaning of the term "efficient," the operative concept of the Elzinga-Breit proposal. It will then be possible to turn to the three major sources of inefficiency which Elzinga and Breit perceive.

1. "Efficiency"

Efficiency is frequently used as a means-end or cost-benefit concept: the amount of input necessary to obtain a given output. This notion, which might be called "productive efficiency,"[44] is clearly not what Professors Elzinga and Breit have in mind. They propose replacement of the treble damage remedy with a system of fines payable to the government.[45] Whatever the problems of the treble damage remedy, it is a more efficient device than the fine system *if the goal is to compensate injured parties for harm done to them.* Since no compensation is envisioned under the proposed fine-only system, it is necessarily a less efficient means of achieving this particular goal[46] (although the fines approach, to the extent that it is an effective deterrent, would reduce the need for compensation).[47]

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[43] *See generally* K. ELZINGA & W. BREIT, *supra* note 6, at 112-38.

[44] R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91, 104-06 (1978).

[45] K. ELZINGA & W. BREIT, *supra* note 6, at 112-38.

[46] If compensation is a separate goal of antitrust, which is the rule elsewhere in our legal system, the means of balancing compensation with other factors, such as level of deterrence in devising an efficient system of enforcement, are formidable. *See* Schwartz, *supra* note 40, at 1086-87, 1091. Schwartz also deals with problems of deciding who is to be compensated. These are issues which antitrust law deals with under such rubrics as "standing," and "indirect purchasers." *Id.* at 1091-1100.

[47] To the extent that a fine system effectively deters violations, there will be fewer victims in need of compensation. This does not alter the fact that no compensation would be paid to actual victims. Since *Antitrust Penalties* envisions an optimal level of violations, *see* K. ELZINGA & W. BREIT, *supra* note 6, at 83, it is clear that individuals would continue to be damaged, without remedy, if the Elzinga and Breit approach were adopted.

The concept of efficiency which *Antitrust Penalties* employs is, of course, the economist's notion of "allocative efficiency." Although this concept can be defined in a number of ways,[48] it generally embraces the allocation of societal resources to produce outputs which will maximize the welfare of individuals. For present purposes this article deals with Elzinga and Breit's concern with efficiency in the sense of enforcing the antitrust laws to the point where the courts' marginal costs of enforcement equal the marginal benefits of increased competition.[49] While efficiency is familiar territory to scholars dealing with substantive violations, *Antitrust Penalties* attempts to break ground by applying economic analysis to the remedial scheme.[50] The overarching principle is that "[p]ublic policy should attempt to balance the loss in the value of production against the gain in the value of production resulting from the policy."[51] The application of this principle is made plain by a revealing footnote in the Elzinga-Breit work. Of Golda Meir, who is said to have taught a lesson to the Israeli Knesset, they write:

> In the face of a rising rate of rapes, the politicians proposed a bill to protect the nation's women by placing them under curfew. Mrs. Meir pointed out that such a law would be punishing the victim, not the criminal, and suggested the curfew be placed on men. *Both missed [the] point. . . . [I]f a curfew is to be imposed, it should be placed on that group whose loss would cause the least sacrifice of total output.*[52]

Antitrust Penalties, then, subordinates notions of "fairness" or "justice" to the concept of increased output. Indeed, the conflict between "efficiency" and "justice" can be sharpened even more by slightly altering the example. Elzinga and Breit suggest dividing society into two classes—men (potential rapists) and women (potential victims)—and choosing a remedy (a curfew for one group) on the

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[48] *See generally* Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 S. CAL. L. REV. 221 (1980); Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982).

[49] K. ELZINGA & W. BREIT, *supra* note 6, at 9-12.

[50] Allocative efficiency is not unrelated to productive efficiency since competition should impel producers to minimize costs, but the concepts are distinguishable. Consider the slide-rule business after the advent of electronic calculators: the decline in demand for slide-rules and consequent fall in price might well force each producer towards the highest production efficiency to maximize profits or minimize losses. Nevertheless, the use of that industry's resources might well be more valuable in making calculators than in continuing production of slide-rules. And this could be true even if the resources were used inefficiently (production-wise) to make calculators.

[51] *Id.* at 83.

[52] *Id.* at 83 n.6 (emphasis added).

basis of how "total output" would be affected. But the basic analysis of *Antitrust Penalties* would not change even if the groups were redefined: the decision whether actual rapists should suffer a penalty (either being "curfewed" or sent to prison) or the group of potential victims—all women—should be subjected to the curfew should be made on the same grounds.[53] Thus, in the name of increasing total output, individual rapists might be freed while their potential victims are immured![54]

This position is so absurd, even for an economist, that one must ask whether there is some way to justify it.[55] The basis proffered by Professors Elzinga and Breit is the "reciprocal nature of externalities," a concept drawn from the work of Ronald Coase.[56] It is not clear, however, that Elzinga and Breit have correctly applied Coase's perception to the antitrust area. Coase's major contribution is his demonstration that, under certain assumptions, the placement of liability by "fault" will not change the final outcome in terms of economic production.[57] Rather, it will merely shift payments between the parties involved. This can be seen in the frictionless world of the economic model where transaction costs are not present. In this world, Coase's theory demonstrates that the efficiency aspects of liability-placement are unimportant: those who are hurt would bribe those who are benefitted in order to attain the economically efficient result.[58] The Coase theorem, therefore, might be stated as follows: in the absence of

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[53] One might go further—a curfew on *either* group should be rejected if the curfew with the lesser impact on total output resulted in greater reduction than simply doing nothing about the rape problem. Indeed, if output costs exceed output benefits for any remedy, the Elzinga-Breit analysis would indicate that rape should go unpunished.

[54] Of course, as the class of law violators decreases in size vis-à-vis the class of victims, it is less likely that total output would be more adversely affected by placing liability on the innocent rather than the guilty. On the other hand, as the quantum of punishment of the guilty increases—prison terms mean costs of maintenance *and* loss of the rapists' productivity—output losses rise. How these conflicting tendencies will balance out under an *Antitrust Penalties* approach could only be decided on a case-by-case basis.

[55] It also has the defect, at least in the United States, of being unconstitutional. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) ("any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience" is unconstitutional) (emphasis in original).

[56] Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). This article has produced a substantial body of commentary applying, analyzing, and criticizing the work. *E.g.*, Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Gjerdingen, *The Coase Theorem and the Psychology of Common Law Thought*, 56 S. CAL. L. REV. 711 (1953); Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979).

[57] *See* Coase, *supra* note 56, at 32-34.

[58] The point is well illustrated in R.A. POSNER, *supra* note 37, at 51-52 which utilizes the example of a railroad and adjacent farmland which Coase had used as one illustration of his

transaction costs, economic efficiency will occur regardless of the initial assignment of legal rights.[59] This is not to say, however, that liability placement rules are unimportant. The imposition of liability will obviously create income transfer effects, which not only have moral and social implications but economic ramifications as well.[60]

Regardless of the theoretical importance of the Coase theorem,[61] Coase himself recognized that analysis became considerably more

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analysis, Coase, *supra* note 56, at 32-34. If liability is placed on the railroad for sparks emission which damages nearby crops, the *land use results* will not differ from those which would occur if the railroad were immunized. R.A. POSNER, *supra* note 37, at 52. If a railroad is the more valuable use, the railroad will purchase the adjacent land from the farmers when liability is imposed on the railroad; the land will then lie fallow (or be transferred to a use with which sparks would not interfere). *Id.* This is, land-use-wise, the same result which would follow if liability were put on the farmers; they would then be compelled to let the land lie fallow (or transfer it to a nonconflicting use). *Id.*

[59] *See, e.g.*, Calabresi & Melamed, *supra* note 56, at 1094-95.

[60] In the railroad hypothetical, *supra* note 58, for example, it is scarcely a matter of indifference to the competing parties where liability is placed. And, even from a purely economic analysis, the struggle to avoid liability—whether by lawsuits, legislative lobbying, concealment of harms caused, etc.—may itself have significant costs. "Fault" may provide a relatively simple and appealing means of solving these problems, at least compared to other alternatives. *See* Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1671-75 (1974).

[61] There is, of course, a certain "Wonderland" quality to the Coase Theorem, even in theory. In the railroad example, *supra* note 58, Coase considered the respective rights of the railroad owners and the owners of the adjacent land, arguing that the decision as to whether the railroad would be liable for fires resulting from sparks emitted should depend on a comparison of "the total social product yielded" by different rules of liability assignment. Coase, *supra* note 56, at 34.

Let us, however, take the example a little further. Suppose the railroad is not liable for spark damage, and the farmers could, together, bribe the railroad into installing sparkcatchers with no transaction costs. Coase posits crop damage to adjacent farmers from fires caused by engine sparks at $60 a year. Presumably, the farmers would pay the railroad whatever sum would still leave them a profit in the cultivated land. Precisely what sum is indeterminate would result from the bargaining between the parties. Suppose the land profits were $20 per year and the sparkcatcher installation cost five dollars for the same period. The sum paid by the farmers would range between five dollars and $20. But what if one stick of dynamite, costing one dollar, would destroy the tracks for a year. Obviously, it is economically rational for the farmers to destroy the tracks, thereby saving themselves four dollars to $19.

What is wrong with this solution? The obvious answer—that it is illegal—is, of course, wrong. For we are debating the very question of whether it *should* be illegal from an economic perspective. If the farmers have no "right" not to have their crops burned, it is not clear why the railroad should have a right not to have its tracks bombed.

Once one sees that "whether [bombing] is desirable or not depends on the particular circumstances," *id.*, the attractiveness of the Coase Theorem, even in theory, diminishes if only because the complexities of its application increase. Coase built his Theorem on a foundation of assumed legal rights, and applied it to fringe cases. In those instances, there is some appeal to using Coase's approach. But when it is seen that every right is susceptible to the same analysis, the possibility of working out Coase's analysis, even in the theoretic world of no transaction costs, is not so clear. *See generally* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

complex in the real world: "Once the costs of carrying out market transactions are taken into account it is clear that . . . a rearrangement of rights [through the market] will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about."[62]

Further, some market transactions may be too costly to warrant any reassignment of rights. "In such cases, the courts directly influence economic activity,"[63] and therefore must take economic consequences into account.[64] Indeed, in any decision, the courts should try "to reduce the need for [market] transactions, and thus reduce the employment of resources in carrying them out."[65]

In short, in the real world Coase's Advice, as opposed to the Coase Theorem, may be only that:

> The problem which we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them. What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.[66]

Although Elzinga and Breit purport to apply Coasian analysis to the antitrust remedial scheme, they fail to do so in any meaningful way.

To begin, *Antitrust Penalties* explains:

> If liability is imposed on the consumer, a monopolist causes damage to the consumer of his product in the form of consumer's surplus lost. But if the liability is imposed on the monopolist through some form of antitrust law, the customer of the monopolist, in insisting through the law that the monopolistic behavior end, imposes a cost on the monopolist, the cost of lost monopoly returns. *The question of "fault" is largely irrelevant in such a setting. The real issue is: what party to the transaction is the most efficient in preventing the misallocation resulting from monopoly?*[67]

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[62] Coase, *supra* note 56, at 15-16.

[63] *Id.* at 19.

[64] Although Coase favors courts taking economic consequences into account, he warned that they should do so "insofar as this is possible without creating too much uncertainty about the legal position itself." *Id.* Apparently, he feared that uncertainty about rights would itself adversely affect economic activity. To the extent that this perception is true, and it certainly seems plausible, Coase's advice can only be applied on the frontiers of otherwise settled legal rights. Perhaps that explains the problem of how far to take the Coase analysis discussed *supra* note 61.

[65] *Id.*

[66] *Id.* at 27.

[67] K. ELZINGA & W. BREIT, *supra* note 6, at 83 (emphasis added).

This example totally misapplies Coase. The whole point of Coasian analysis is to increase output—that is, of course, the "social product" which is the end of his analysis.[68] The one kind of action which, by definition, cannot maximize social product is monopoly,[69] simply because a rational monopolist, in order to raise the price, will reduce its production. Further, where a true monopoly is concerned, only the monopolist can avoid misallocation effects: the consumer, again by definition, has no choice. At best, the consumer can reduce the allocative inefficiencies by shifting to the best substitutes; however, if equally desirable substitutes (in price/quality terms) were available, there would be no monopoly to begin with.[70]

Economic analysis, therefore, makes the problem identified by Elzinga and Breit a nonproblem and reinforces the noneconomic approach. On the moral level, "fault" is irrelevant for Elzinga and Breit only because the conduct in question is accorded equal value. But the analysis is useful only if all conduct is morally neutral, and neither Coase nor *Antitrust Penalties* resolves this question, they merely posit it away.[71] If particular conduct—physical rape or monopolistic ripoff—is judged to lack any value, however, then there are no "costs" involved in proscribing it, at least not costs that "count."

Despite this flaw, Elzinga and Breit do offer some more concrete approaches to the economic analysis of treble damages in terms of what has been called Coase's Advice. Working in the real world, *Antitrust Penalties* states that, given transaction costs, "there is no single policy or set of policies that would *a priori* lead to an efficient output [and thus] [p]ublic policy should attempt to balance the loss in the value of production against the gain in the value of production resulting from the policy."[72] The authors then attempt to employ this balancing process by identifying the sources of inefficiency (i.e., wasted resources) in the treble damage suit.[73] They conclude that a

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[68] An example of proper use of Coase on externalities may be tobacco smoking. The act of smoking imposes costs on nonsmokers, ranging from irritation (moral, mental or physical) to serious health problems. On the other hand, to bar smoking imposes "withdrawal" costs on smokers.

[69] This is universally accepted as true except where the "second best" theory obtains. *See generally* F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 24-29 (2d ed. 1980).

[70] Monopoly can, of course, be defined economically only in terms of competing products. If widgets are interchangeable with gizmos, the "monopolist" of widgets would have no power: any attempt to raise the price of widgets would be met by a shift of demand to gizmos. An economist, therefore, would not describe the sole producer of widgets as a monopolist.

[71] Indeed, Coase stated his views "questions of equity apart." Coase, *supra* note 56, at 19.

[72] K. ELZINGA & W. BREIT, *supra* note 6, at 83. The search for efficiency in the real world of high transaction costs can be complex. *See generally* Polinsky, *supra* note 60, at 1671-74.

[73] K. ELZINGA & W. BREIT, *supra* note 6, at 84-96.

fine-oriented government enforcement system is preferable.[74] Any analysis of this approach must consider both the asserted inefficiencies of the compensation-oriented system and the relative inefficiencies of the proposed alternative.

2. Inefficiencies of Treble Damage Suits

Much of Elzinga and Breit's case against treble damage suits rests on the three sources of inefficiency which they identify: the "perverse incentives effect"; the "misinformation effect"; and "reparations costs." Upon analysis, none of these sources appears to pose an appreciable "real world" efficiency problem.

(a) Perverse Incentives

The "perverse incentives effect" refers to the possibility that "a private party neglects to modify his behavior when the damage done to him by the monopolistic firm exceeds the cost to him of avoiding that damage or that the consumer modifies his behavior in order to increase the damage done to him by the anticompetitive activity."[75] Elzinga and Breit claim that, in antitrust, this effect tends to be more severe than in other areas of the law because the trebling feature of antitrust recovery magnifies the potential profits of running up damages.[76] And the availability of attorneys' fees and costs to a successful antitrust plaintiff means that any judgment is more likely to be "profitable" than in ordinary litigation where the costs of recovery must be deducted from the award to determine net compensation.[77]

These factors prove the existence of a perverse incentives *tendency* in antitrust. Assuming this is undesirable,[78] it remains to be seen whether other antitrust principles operate to suppress that tendency. Basically, Elzinga and Breit contend that the tendency is given full play in antitrust because there is no doctrine of avoidable conse-

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[74] *See id.* at 112-38.

[75] *Id.* at 84.

[76] *Id.*

[77] This is not to suggest that the attorneys' fees due from the plaintiff are limited to the amount awarded as a reasonable attorneys' fee, or that in most antitrust cases the compensation scheme is structured in that fashion. In fact, contingent fees seem common. *See generally* Comment, *Attorneys' Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656 (1972).

[78] To elaborate a point at *supra* note 30, it is not realistic to expect all injured parties to sue. Any particular plaintiff who runs up her damages in order to escalate her treble damage award will simply be increasing the deterrent effect of the statute. The defendant's total liability may still be less than the total harm done by the defendant. In short, a perverse incentive viewed as to an individual plaintiff may be justified as a means of adjusting the ratio of deterrence to harm.

quences nor one of *in pari delicto*, and they cite some anecdotal evidence to suggest that perverse incentives may exist in the economy. On all counts, it appears they are wrong.

Consider first the doctrine of avoidable consequences or, as it is sometimes known, mitigation of damages. As it operates in contract[79] and tort law,[80] the doctrine precludes a plaintiff from recovery for damages which, though caused by defendant's wrong, could have been avoided by reasonable efforts on the plaintiff's part.[81] Obviously, such a doctrine would be a strong counterbalance to any perverse incentives tendency. Elzinga and Breit, however, apparently deny the applicability of that doctrine in antitrust.[82] As support for their position they cite one piece of gratuitous dictum in an obscure district court opinion[83] and then, citing no authority, claim that the view "has prevailed."[84] This statement is flatly incorrect. Indeed, it is refuted by two circuit court cases Elzinga and Breit themselves discuss,[85] and an independent search for authority on the mitigation question leaves little doubt that the courts will apply the doctrine to antitrust cases.[86]

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[79] *E.g.*, 5 CORBIN, CONTRACTS §§ 1039, 1043 (2d ed. 1964); RESTATEMENT (SECOND) OF CONTRACTS § 350 (1979).

[80] *E.g.*, RESTATEMENT (SECOND) OF TORTS § 919 (1977). Another common law doctrine, "consent," is somewhat akin to mitigation but broader: it completely immunizes a defendant from suit by any plaintiff who consented to the wrong. *Id.* at § 892. It seems doubtful whether such a defense applies in antitrust, especially given the difficulties of determining what constitutes "consent." *See generally* Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965).

[81] This "negative" rule is what is normally meant by the doctrine; there is, however, an "affirmative" branch of it. A plaintiff may recover from the defendant for the costs of such mitigation. *See, e.g.*, Triebwasser & Katz v. Am. Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976).

[82] K. ELZINGA & W. BREIT, *supra* note 6, at 84. Their position has been repeated by Professor Schwartz without independent verification. Schwartz, *supra* note 40, at 1086, 1092.

[83] K. ELZINGA & W. BREIT, *supra* note 6, at 85 (citing State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 202 F. Supp. 768, 777 (N.D. Ill. 1961)). The vitality of *State Wholesale Grocers* is dubious in light of subsequent circuit court authority. A.C. Becken Co. v. Gemex Corp., 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963), discussed *infra* note 86.

[84] K. ELZINGA & W. BREIT, *supra* note 6, at 86.

[85] *See* American Can Co. v. Russelville Canning Co., 191 F.2d 38 (8th Cir. 1951); Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949).

[86] An independent examination of case authority reveals that the doctrine of mitigation had been almost uniformly assumed or applied even prior to the publication of *Antitrust Penalties*, and several cases since its publication have confirmed this principle. Perhaps the first case to consider the issue was Lowry v. Tile, Mantel & Grate Ass'n, 106 F. 38 (C.C.N.D. Cal. 1900), *aff'd sub nom.* W.W. Montague & Co. v. Lowry, 115 F. 27 (9th Cir. 1902), *aff'd*, 193 U.S. 38 (1904). In *Lowry*, the defendant claimed that the plaintiff could have avoided damages by joining the defendant's association. 193 U.S. at 46. This argument was rejected by the Supreme Court because it was not clear that the plaintiffs would have been admitted had they applied for membership, and because the requirement of membership was an onerous condition that could not be imposed. *Id.* at 47. The arguments were necessary, however, only if there is a duty to act reasonably to mitigate damages as a condition for recovery. Otherwise, the discussion is entirely irrelevant. Therefore, the Court in *Lowry* at least assumed the applicability of avoidable

It would be a foolhardy plaintiff indeed who would run up her damages in order to reap a trebled profit in her antitrust suit.

It should also be noted that, if *Antitrust Penalties* had been correct as to the inapplicability of the avoidable consequences doctrine, the solution would be an extension of that rule to antitrust cases.[87] In using this evidence of perverse incentives as a reason to move to a fine-only enforcement system, the Elzinga and Breit work uses a cannon to kill a flea. Perhaps recognizing this, later in their book the authors note that even if the doctrine of avoidable consequences applied, "the perverse incentives effect would remain unless compensation were not paid to those actually damaged."[88] This is both unexplained and inexplicable, unless the authors are referring to a second source of perverse incentive they identify: the absence of an *in pari delicto* rule in antitrust.

They argue that, "[i]n antitrust the rule regarding the plaintiff's behavior is precise: plaintiff's behavior is seldom, if ever, a bar to collection. As a result, the perverse incentives effect is given full sway."[89] If this were true, the indicated solution is, again, to restore the doctrine, not to eliminate the private suit. But, once more, *Antitrust Penalties* mischaracterizes the law in its eagerness to reach the economic argument.

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consequences in an antitrust case. This is true despite the fact that the case is best viewed, in modern terms, as establishing that participation in an illegal conspiracy is not a "reasonable" mitigation.

Similarly, in A.C. Becken Co. v. Gemex Corp., 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963), the court rejected a defense to a resale price maintenance claim that the plaintiff-buyer should have mitigated damages by resuming purchases where the defendant offered to do so. The court did not, however, reject the avoidable consequences doctrine; rather, it accepted the doctrine, but found that the plaintiff need not have resumed purchases because the offer to sell did not clearly renounce any efforts to control the buyer's resale price. *Id.* at 841-42; *accord* Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F.2d 1080 (7th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

In Momand v. Universal Film Exchs., Inc., 72 F. Supp. 469, 477 (D. Mass. 1947), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949), the court was more direct, denying a plaintiff's suit for losses of hundreds of thousands of dollars claimed to be incurred in order to avoid losses of $10,000. Similarly, the Fifth Circuit invoked the doctrine before the publication of *Antitrust Penalties*. Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972). Subsequently, several federal circuit courts have routinely applied the rule. Construction Aggregate Transp., Inc. v. Florida Rock Indus., 1983-2 Trade Cas. (CCH) ¶ 65,521 (11th Cir. 1983); Borger v. Yamaha Int'l Corp., 625 F.2d 390 (2d Cir. 1980); Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356 (2d Cir. 1976).

[87] An analogous provision was in fact written into Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1976) which limits employment discrimination recoveries. "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." *Id.*

[88] K. ELZINGA & W. BREIT, *supra* note 6, at 114-15.

[89] *Id.* at 88-89 (footnotes omitted).

To prove their point, Elzinga and Breit quote from Justice Black's opinion in *Perma Life Mufflers, Inc. v. International Parts Corp.*[90]: "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."[91] But taken alone this statement is inherently ambiguous—does it extirpate *in pari delicto* root and branch or merely declare inapplicable the common law tort notion in favor of a rule more adapted to antitrust concerns? In context with the rest of Black's opinion, it seems likely that he took the latter position since he reserved the question of "whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action."[92] Further, Black wrote only for a plurality of the Court, and five justices, concurring or dissenting, seemed to favor some sort of defense when "truly complete involvement" of the plaintiff was shown.[93] This is, in fact, how the lower courts have interpreted *Perma Life*.[94]

Contrary to the argument raised in *Antitrust Penalties*, the state of the law on the *in pari delicto* question is not "precise." While *Perma Life* limited the broader reaches of the defense, it seems clear that some constraints remain. Further, it is not clear that Elzinga and Breit correctly approach the whole concept. They write that "[g]iven this state of the law, many businessmen and consumers, cognizant of the potential for collecting damages, can view the antitrust laws as a type of insurance policy against 'poor purchasing' and will at the margin reduce their precautionary purchasing efforts."[95]

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[90] 392 U.S. 134 (1968).

[91] K. ELZINGA & W. BREIT, *supra* note 6, at 89 (footnotes omitted) (quoting *Perma Life*, 392 U.S. at 139-40).

[92] 392 U.S. at 140.

[93] *See, e.g., id.* at 147 (Fortas, J., concurring) (plaintiff's right to enforce the antitrust laws cannot be denied on the basis of the doctrine of *in pari delicto*, however, "[i]f the fault of the parties is reasonably within the same scale—if the 'delictum' is approximately 'par'—then the doctrine should bar recovery"); *id.* at 151 (Marshall, J., concurring) ("I cannot agree that . . . a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit [should] be permitted to demand redress"); *see generally* Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L. F. 621, 656-57.

[94] *E.g.*, THI Hawaii, Inc. v. First Commerce Fin. Corp., 627 F.2d 991 (9th Cir. 1980); Wilson P. Abraham Const. v. Texaco Indus., Inc., 604 F.2d 897 (5th Cir. 1979), *aff'd sub nom.* Texaco Indus., Inc. v. Ratcliff Materials, Inc., 451 U.S. 630 (1981); Premier Elec. Constr. Co. v. Miller Davis Co., 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *see generally* Note, *Plaintiff's Misconduct as a Defense in Private Antitrust Actions*, 11 MEM. ST. U. L. REV. 382 (1981).

[95] K. ELZINGA & W. BREIT, *supra* note 6, at 89.

To begin with, it is hard to see what *in pari delicto* has to do with *consumer* purchasing.[96] Second, it would seem to have relatively little to do even with business *purchases*. The core application of the doctrine would appear to be horizontal conspiracy—to preclude one conspirator from suing another when their scheme backfires. While such a view can be transferred to the vertical violation setting, the typical vertical restraint does not involve "equal fault" at all, but is rather a restraint imposed by the manufacturer upon its retailers. Even before *Perma Life*, the cases refused to apply *in pari delicto* to these situations on the view that manufacturer coercion negated the fault element.[97] And, assuming there is truly equal fault in a vertical situation (e.g., an exclusive dealing arrangement between a large manufacturer and a large retailer), it is hard to see what damage might flow from this.[98]

In any event, the quotation is peculiarly revealing of the fundamental flaw with the "perverse incentives" problem, whether caused by perceived inadequacies in the antitrust doctrines of mitigation of damages or of *in pari delicto*. Professors Elzinga and Breit obviously have in mind the "rational economic man" whose decisions, at least "at the margin," are influenced by the law's perverse incentives. It seems doubtful, however, whether any appreciable number of real persons will increase their damages in order to profit by trebling them. The risks of litigation are too severe to make this feasible. Indeed, elsewhere in their book the authors point out that it is generally thought that businesspersons are risk-avoiders rather than risk-preferrers.[99] If this is true, potential plaintiffs are unlikely to incur unnecessary damages in the hope of future treble recovery. The treble damages, after all, must be discounted by the chances of not prevailing on the merits and of having an *in pari delicto* or mitigation defense applied.

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[96] It may be possible to conceive of *in pari delicto* as a kind of "avoidable consequences" (or vice versa), but that scarcely advances the antitrust analysis.

[97] Goldlawr, Inc. v. Schubert, 268 F. Supp. 965 (E.D. Pa. 1967); Ring v. Spina, 148 F.2d 647 (2d Cir. 1945); *see* Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1977); *see generally* Note, *supra* note 80.

[98] *Perma Life*, 392 U.S. at 134, is itself an example of this point. The plaintiff franchisees challenged certain restrictions on their ability to purchase and stock parts from anyone other than the defendant franchisor. *Id.* at 137. Justice Black noted that such restraints were not in their self-interest, and therefore could not reflect the free choice of plaintiffs. *Id.* at 139; *see also* 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 347(c) (arguing that the damage measurement may be reduced by plaintiff's illegality even if an absolute defense is not recognized).

[99] K. ELZINGA & W. BREIT, *supra* note 6, at 116-20.

While *Antitrust Penalties* pays lip service to this reality, the basic reliance on "perverse incentives" as a substantial reason for dismantling the private treble damage action reflects a judgment, however unsupported, that the damage maximizer is an appreciable problem. Indeed, the paucity of cases on point suggests the rarity of "perverse incentives" leading to damage maximization. The antitrust defense bar is rarely to be faulted for not actively pressing arguable legal theories.

Perhaps sensing the unpersuasiveness of its case, *Antitrust Penalties* seeks to bolster its perverse incentives argument by evidence of this inefficiency in operation. The best it can do in this regard is to argue that "[i]n the case of the electrical equipment conspiracy, there was evidence that the customers of this cartel were either aware (or had strong suspicions) [sic] that they were purchasing under a regime of rigged bidding."[100] From this Professors Elzinga and Breit apparently infer that the failure to challenge such conduct prior to the government indictments was an instance of the perverse incentives effect in operation: the victims were gleefully running up their damages in the hopes of trebling them.

This scenario is far from convincing. Assuming that purchasers in fact are "aware" of or "suspicious" about price fixing, there are more plausible reasons for their failure to sue than the operation of perverse incentives. First, suspicions are not a basis for an antitrust judgment, and uncertainties of proof (especially without the leverage afforded the government by its criminal law enforcement processes) may lead potential plaintiffs to prudently forebear from suit until the conspiracy is uncovered by others.[101]

Second, the chief purchasers of electrical equipment are utilities whose rates are regulated. This may have a dampening effect on such customers' incentives to sue. Most obviously, the costs of supracompetitive prices for the price-fixed equipment can readily be passed

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[100] *Id.* at 87.

[101] *See* Hay, *Book Review*, 31 VAND. L. REV. 427, 433 (1978). This explanation is reinforced by the fact that the electrical equipment cartel was a long-lived one, and, since the limitations period must have run on numerous causes of action, it is unlikely that "intentional damage maximizing" was occurring. While the government's 1960 indictments reached back only to 1955, some private suits challenged conduct at least to 1948. C. BANE, THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS 2, 76-77 (1973). Until 1955, there was no federal antitrust statute of limitation, leaving the federal courts to borrow state statutes. In 1955 Congress enacted a four-year statute of limitations applicable to any cause of action under 15 U.S.C. §§ 15, 15a, Pub. L. No. 84-283, 69 Stat. 283. In 1976 the statute was amended to apply to causes of action under § 15(c). Pub. L. No. 94-435, 90 Stat. 1396 (current version at 15 U.S.C. § 15b (1982)).

along to consumers: prior to the federal indictments, one could not realistically expect public utilities commissions to look beyond the bidding process to investigate this aspect of utility costs. And a treble damage recovery might not swell real profits. Due to regulation of the rate of return, any "profit" on such suits might simply mean a downward adjustment of rates in order to limit overall return. Indeed, it has been argued that in regulated industries, purchasers may find paying an inflated price *more* profitable than paying a lower price, since the rate of return will be computed on the basis of invested capital: thus, the larger the investment, the more profit yielded by application of the basic rate of return.[102]

In sum, *Antitrust Penalties* does not present a persuasive case for an appreciable "perverse incentives" inefficiency as a result of treble damage suits. In an attempt to justify their attack on the private action, the authors identify other sources of inefficiency which are equally unconvincing.

(b) The Misinformation Effect

Antitrust Penalties also looks to the "misinformation effect" as a source of inefficiency and therefore a reason to eliminate the private treble damage action. This effect is "the propensity for a private party to claim that anticompetitive behavior has taken place when it has not."[103] This claim is both familiar and difficult to assess. On the one hand, the "misinformation effect" (usually referred to as "strike" or "nuisance" suits by those not economically sophisticated) has been frequently proclaimed as a reason for limiting antitrust procedural and substantive doctrines.[104] It is scarcely surprising to find it pressed into service in the cause of limiting antitrust enforcement.

On the other hand, the merits of the claim are hard to assess. It ultimately rests on the assertion that appreciable numbers of meritless cases are brought merely in order to obtain a settlement. But Professors Elzinga and Breit offer no evidence to support this assertion. In a statement which is as far as they go in empirical proof, they write:

> Nuisance suits are quite common in personal injury cases. And the present structure of private treble damage suits, with their empha-

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[102] *See* Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 914 n.118 (1975).

[103] K. ELZINGA & W. BREIT, *supra* note 6, at 90.

[104] *E.g.*, Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971); *see* Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1062 (1952).

> sis on strict liability, offers even greater incentives for suits of this nature. Given the attitudes of the managers of large corporations towards risk, lawyers and their clients may see businessmen as tantalizingly vulnerable.[105]

Analysis of the "misinformation effect" must focus on the empirical question. Obviously, as long as it remains unresolved no definitive judgment as to the "inefficiency" of the treble damage enforcement action is possible. Ultimately, Elzinga and Breit's position rests on an intuitive perception of a significant problem, perhaps bulwarked by anecdotal evidence of the "strike suits I have known" variety, and impelled by the fact that, under their economic model, the misinformation effect should be a real problem.

That, however, is not enough. Both in law and in the more mundane concerns, the force of inertia typically leads us to put the burden of persuasion on those who wish to change the status quo. *Antitrust Penalties* completely fails to carry that burden. It offers no empirical evidence that the problem it discerns is a serious one, and there is something of the surreal about the image of corporate America as "tantalizingly vulnerable," bringing to mind hulking Goliaths quivering in their sandals as predatory Davids roam unrestrained. Less picturesquely, the very absence of data on the misinformation effect casts serious doubt upon the significance of the problem. Admittedly, taking a census of strike suits would pose severe data collection problems.[106] Nevertheless, it is unlikely that studies of the question would be totally absent if it were a serious problem.[107]

Further, one must not underestimate the significance of the Elzinga and Breit "misinformation effect." That effect exists in every case in which the law awards compensation to an injured party, whether the cause of action be contract, tort, property, or state or other federal statutory schemes. While the seriousness of the problem may vary depending on many factors, including the opportunity for fraud-in-fact allegations, the problem is an inevitable concomitant of

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[105] K. ELZINGA & W. BREIT, *supra* note 6, at 91 (footnotes omitted).

[106] Since fraud will not be confessed by the perpetrators, no definitive quantification of the problem would be possible no matter how obvious it might be. It would, however, be feasible to undertake random case studies by neutral parties who could make their evaluation of the nature of the suit.

[107] Additional evidence suggesting that fraud is not a serious problem in antitrust cases lies in the paucity of decisions on "bad faith" litigation. One major exception to the "American Rule" that each party bears its own attorneys' fees is that a prevailing party can recover such fees from an adversary who has brought or conducted the litigation in bad faith. Although there is some question as to whether this doctrine is available to antitrust defendants, *see infra* note 113, the very absence of cases litigating this issue is some evidence that the problem is not prevalent.

any compensation system. In this light, it may be significant that the "nuisance" suit has rarely been considered an important enough problem to warrant corrective action by way of eliminating the cause of action in question.[108]

Rather than meet the empirical challenge, *Antitrust Penalties* tries to specify why nuisance suits are *a priori* likely to pose a significant problem in the antitrust area. Basically, the authors suggest this results from a confluence of two reasons: (1) the unpredictable outcome of antitrust suits (due to uncertain substantive law, unclear doctrines of plaintiff standing, and the lack of means to assess the damages that might be awarded in a successful suit); and (2) the fact that corporate management tends to be risk-averse. The authors also note that, from a defendant's perspective, the uncertainties are heightened by the possibility of jury trial: the jury may decide adversely to the "defendant company, usually a larger firm than the plaintiff," on moral rather than legal grounds.[109] They summarize:

> The upshot is that, however groundless a claim might be in reality, every defendant must attach some positive probability to the prospect of losing if the claim is litigated. In such cases, a nuisance suit can become a realistic threat if the defendant fails to settle on terms agreed to by the plaintiff. In fact, the term nuisance suit may be inappropriate. The amount of damages claimed, particularly under the umbrella of a class action, can be substantial. A rational management, faced with the vagaries just mentioned, may settle out of court—not so much to eliminate a nuisance—but as an *in terrorem* response to the repercussions of an (even slim) chance of losing.[110]

There are several assumptions in this argument,[111] but even conceding the basic predicates of uncertain outcome and risk-averse man-

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[108] Even in the personal injury area, frequently cited as a source of fraudulent claims, the "misinformation effect" has not played an important part in the debate about no-fault. *See generally* M. FRANKLIN, INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 793-841 (2d ed. 1979).

Another area in which the alleged strike suit problem has provoked legal response is with respect to the corporate derivative suit. But even under these circumstances, solution to the perceived problem was "security for expenses" statutes, not elimination of the cause of action. *See generally* Dykstra, *The Revival of the Derivative Suit*, 116 U. PA. L. REV. 74 (1967).

[109] K. ELZINGA & W. BREIT, *supra* note 6, at 93. Precisely the contrary effect of juries has been suggested. Wheeler, *supra* note 41, at 1323 ("when the judge informs the jury that the actual damages they fix will be trebled, the jury may reduce its estimate of actual damages").

[110] K. ELZINGA & W. BREIT, *supra* note 6, at 94-95 (footnotes omitted).

[111] For example, even a risk-averse management may not be so cautious that it will pay any significant amount to avoid the remote possibility that a suit judged to be "groundless" may be won by the plaintiff. Similarly, the uncertainties are not undifferentiated and do not all cut against the defendant. Unclear standing, for example, is more a deterrent to the plaintiff's suit,

agement, it does not follow that such suits present a significant problem. There are, after all, countervailing factors. These include: (1) the investment of plaintiff in terms of costs and attorneys' fees;[112] (2) the risk of plaintiff being assessed defendant's attorneys' fees if bad faith is proven;[113] (3) the likelihood that plaintiff's attorney will be subject to disciplinary sanctions and assessment of defendant's costs for bringing such an action;[114] (4) the possibility of plaintiff triggering a counterclaim;[115] (5) the specter that defendants, though normally risk-averse, will react nonrationally to being "held-up" and refuse to settle; and (6) the possibility that defendants will view litigating particular suits as a necessary investment to prevent groundless suits from routinely being brought.[116] These factors will interact in unpredictable ways in particular cases, making highly uncertain the extent to which a potential plaintiff will believe that it can recover by way of settlement of a groundless suit.

Although the net result of these opposing tendencies cannot be deduced *a priori*, the analysis does suggest that there is some reason to doubt whether the theoretical tendency identified by Professors Elzinga and Breit is an appreciable practical problem with treble damage suits. Further, if nuisance suits are a real antitrust problem, less radical solutions are available as alternatives to elimination of the

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groundless or otherwise, in terms of liability. This is especially true since the more "groundless" the suit the less likely is a "striking" plaintiff to pursue it in the face of a resolute defense.

[112] Even if the attorney is, in practical terms, the real party in interest in a nuisance suit, he or she will have to incur the lost opportunity cost of the time spent litigating.

[113] Unlike some other statutes which permit the award of attorneys' fees to the "prevailing party," *e.g.*, Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(k) (1976); *see* Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Sherman Act provides for attorneys' fees only to a successful *plaintiff*, 15 U.S.C. § 15 (1982). *But see* 15 U.S.C. § 15 c(d)(2) (1982) (providing for the award of attorneys' fees to prevailing defendants in state *parens patriae* actions). As a general rule, however, attorneys' fees may nevertheless be awarded to a prevailing defendant if the action was commenced by the plaintiff in bad faith. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); *see generally* Comment, Nemeroff v. Abelson, *Bad Faith, and Awards of Attorneys' Fees*, 128 U. PA. L. REV. 468 (1979). While this principle has been rejected by one court of appeals for antitrust cases, Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649 (3d Cir. 1967), the reasoning is open to question. *See* Lawrence v. Fuld, 32 F.R.D. 329 (D. Md. 1963) (defendant's argument for attorneys' fees "adequately grounded in the law"). And although *Byram* was cited by the Supreme Court, the case was used as support for an argument in favor of presumption of the bad faith rule by a federal statutory scheme. Christianburg Garment Co. v. EEOC, 434 U.S. 413, 419 n.13 (1978).

[114] *See* FED. R. CIV. P. 11; *see generally* Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure* 11, 61 MINN. L. REV. 1 (1976).

[115] *See* Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir.), *cert. denied*, 423 U.S. 802 (1975).

[116] It is true that factors (5) and (6) are not costless for the defending business, and therefore represent a disadvantage of the misinformation effect. But the existence of such behavior in relatively few cases (with a concomitantly minimal social cost) may deter a large number of groundless suits by raising the ante for items (1) and (2) and (3).

private action. For example, costs and attorneys' fees could be awarded to a successful defendant, either routinely or upon some finding of "unreasonableness" or "bad faith" by the plaintiff.[117]

(c) *Reparations Costs*

The third indictment of the treble damage action advanced in *Antitrust Penalties* is the problem of "reparations costs."[118] Compared to public enforcement, which normally does not involve reparations, "[t]he compensation element of private enforcement further complicates and extends the usage of multidistrict litigation, out-of-court negotiations, legal strategy, and all of the other trappings of reparations-induced private damage actions."[119] One aspect of the general problem is stressed: "[R]eal resources are utilized not only in the conviction of violators but in the determination of damages. [This] involves the use of scarce resources that could be put to better uses."[120]

The general point seems to be that private litigation is more costly than government litigation; the more specific point identifies the cost of ascertaining the amount of damages as one important reason for the alleged higher costs. The general point seems of doubtful importance apart from the latter. First, there is reason to doubt that the statement is true, and no empirical evidence is adduced to support it. There are certainly many examples to the contrary.[121] Second, even if the typical government litigation is now more easily resolved than private actions, the explanation almost certainly is that there is usually less at stake than in private litigation. The predominate use of consent decrees,[122] for example, could scarcely be expected

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[117] *See supra* note 95. *Antitrust Penalties* recognizes this alternative, and even the possibility of further penalties on plaintiffs, but dismisses them as "not persuasive." K. ELZINGA & W. BREIT, *supra* note 6, at 115. The only reason offered is that it "might dampen the enthusiasm not only of those with groundless claims but those with viable grievances as well." *Id.* This observation is true, undoubtedly reflecting the rationale for the rule against attorneys' fees for the prevailing defendant. But it is hardly an objection Elzinga and Breit have standing to make since their government-fines proposal would not just dampen, but effectively douse, private plaintiffs' enthusiasm by barring such suits entirely.

[118] K. ELZINGA & W. BREIT, *supra* note 6, at 95.

[119] *Id.*

[120] *Id.* at 96.

[121] With respect to IBM, a number of private antitrust cases were brought and resolved, whether by litigation or settlement, while the government's monopolization case dragged on. *See generally* Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEX. L. REV. 587 (1982).

[122] *See generally* Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA. L. REV. 822 (1975); Zimmer & Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 1976 DUKE L.J. 163.

to continue if heavy penalties were typically demanded.[123] Should substantial penalties become typical of government suits, one can confidently predict an increase in the complexity of public enforcement efforts.[124] Third, it is strange to have economists suggest that monopoly enforcement is likely to be less costly than competitive enforcement.[125]

The more specific point—that eliminating the costs of identifying damages would save the resources entailed in ascertaining damages—is undeniable. Further, this aspect of antitrust litigation is not insignificant. Nevertheless, the cost of computing reparations can be dismissed as wasteful only if compensation is not a proper purpose of antitrust. This is not the case now and, taking a somewhat wider perspective, it is scarcely conceivable outside the economist's model: there is hardly an area of the law where private compensation has been wholly subordinated to government enforcement. Even in the situation often viewed as a governmental monopoly—the law of crimes—there is almost always a tort counterpart available if the wrongdoer's assets make the game worth the victim's candle.[126]

Even within the economist's model, the costs of determining compensation are not necessarily wasteful since they may be necessary to efficiency. Absent compensation, persons who perceive themselves as possible victims (which, given the broad scope of antitrust, is everyone) may engage in protective behavior which is, in the aggregate, more costly than maintaining a reparations system.[127] For exam-

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[123] Indeed, the ease with which the government now can obtain consent decrees may be viewed as the result of a confluence of two factors. First, the decrees typically demand little of the defendant beyond a promise not to violate the antitrust laws. *See generally* Zimmer & Sullivan, *supra* note 122. Especially where the decree merely parrots basic antitrust prohibitions, it costs the defendant little to enter into a decree restating that obligation. Second, the willingness of defendants to enter consent decrees is enhanced by the Clayton Act which provides that, unlike litigated government judgments, consent decrees will have no prima facie evidence effect in subsequent private suits. 15 U.S.C. § 16(a) (1982). In practical terms, the specter of treble damage actions undoubtedly increases the effectiveness of Department enforcement.

[124] It can scarcely be coincidental that the most complex government litigations are the monopolization suits where the defendant often has at stake its very existence as a unified enterprise. The IBM litigation is again the best example. *See generally* Sullivan, *supra* note 121.

[125] Of course, to the extent that any plaintiff utilizes "free" court resources, there is less tendency to cut costs than would otherwise be the case.

[126] The main exception is "victimless crimes." Interestingly, however, there has traditionally been widespread hostility to the criminalization of such conduct. It is also the area which has traditionally presented the most difficulties with respect to corruption of governmental enforcement. *See infra* note 141.

[127] *See* Landes & Posner, *The Private Enforcement of Law*, 4 J. LEGIS. STUDIES 1, 34-35 (1975). The example given is that of railroad crossings. *Id.* If liability for negligence is not placed on the railroad with compensation going to the victim, potential victims may take steps to

ple, the costs of searching for products may increase if buyers have no assurance of a right of action should they prove to have been victims of a price-fixing conspiracy.

In short, the error of *Antitrust Penalties* is to ignore the benefit which is purchased by the reparations cost—fairness. Like all other scarce resources, fairness is not free, and the basic failure of the Elzinga and Breit effort is its almost total omission of any treatment of this aspect of the antitrust remedies problem. Perhaps to repair this defect, Professor Breit delivered a paper devoting two paragraphs to the question.[128] He asserted that "[b]oth economic theory and the actuality of the antitrust laws make the laudable goal of full restitution impossible,"[129] and concluded that therefore no effort at compensation is warranted.[130] With whatever deference is due,[131] this argument is less than compelling. One might as well conclude that since the elimination of antitrust violations is impossible, the antitrust laws ought to be repealed.[132] In both cases, the issue is whether the gain (be it fairness or enhanced economic efficiency) is worth the cost. The error of *Antitrust Penalties* is to exclude from the cost side of the ledger "soft variables" such as fairness.

3. Inefficiencies of Monopoly Government Enforcement

Although there is substantial reason to doubt that the efficiency costs of private enforcement are nearly as high as *Antitrust Penalties* argues, an even more telling criticism of the book is the failure of Professors Elzinga and Breit to adequately assess the costs of the exclusive public enforcement mechanism they propose. Vesting exclusive power in public authorities raises several problems.[133]

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protect themselves—such as circuitous routes, building underpasses, etc.—which would require more resources than the traditional compensation system. *Id.* at 35.

[128] Breit, *Efficiency and Equity Considerations*, 8 SW. U.L. REV. 539, 548-49 (1976).

[129] *Id.* at 548.

[130] *Id.*

[131] Breit properly disclaims any special expertise on equity. *Id.* at 539-40.

[132] Breit would scarcely take this position. Indeed, in a panel discussion on his paper he states that "nobody would argue, I hope, that all crime must be eliminated. There is an optimal amount of crime. Everybody knows that." Panel Discussion, 8 SW. U.L. REV. 564, 575 (1976) (statement of William Breit).

[133] In addition to the problems discussed, there are also difficulties in setting the optimal fine which are not adequately treated by *Antitrust Penalties*. *E.g.*, Schaefer, *supra* note 102, at 908-09 n.99 ("[a]lthough the fine justifiably might be excessive, it also might be too small because corporate profits may not measure accurately the damages inflicted by an antitrust violator").

(a) *The Possibility of Inadequate or Distorted Prosecution*

An obvious advantage of a multipronged enforcement system is that numerous enforcers will provide for more total enforcement, if only because of different factual and legal perceptions, enforcement strategies, or interests.[134] It is true that it may also increase the possibility of "overenforcement"—enforcement efforts which yield less compliance than their prosecution costs.[135] But there is no empirical evidence to prove that overenforcement exists, and, even if there were, a fines-only system could result in *under*enforcement[136] for several reasons.

First, if the general low regard of governmental efficiency is justified, the governmental enforcers may be too inefficient for optimal enforcement.[137] There may also be bureaucratic tendencies systematically cutting against efficient enforcement.[138] Second, the government enforcer may be mistaken in its enforcement philosophy or strategies;[139] these mistakes will become social costs without a backup system to ensure optimal enforcement.[140] Third, the government en-

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[134] Indeed, Professor Posner suggests that the government enforcement agencies take into account private incentives to sue in determining what kinds of cases to bring: they should concentrate on situations where the victims do not have the ability and incentive to protect their own interests. *See* Posner, *supra* note 7, at 419; Zimmer & Sullivan, *supra* note 122, at 202-06.

[135] *See supra* notes 44-74 and accompanying text.

[136] There is no theoretical reason, from an economic efficiency standpoint, to believe that it is better to have underenforcement rather than overenforcement if it is impossible to have "optimal" enforcement. But fairness would point towards overenforcement, and, practically speaking, an error on that side of optimal is likely to be less costly than an error on the other side: overenforcement costs are transactions costs of litigation, and are likely to be a fraction of underenforcement costs—permitting output reduction/price increases by antitrust violators.

[137] There would obviously be no market incentives for a monopolist government enforcer to keep costs down. To this extent, the use of resources to achieve a given result may be less efficient than if enforcement were committed to a competitive private enforcement "industry" (which may also provide a yardstick to permit evaluation of the efficiency of public efforts). Although the provision for attorney fee awards to successful private plaintiffs may somewhat dull their incentives for costcutting, this tendency should be largely offset by the incentive to minimize costs in order to hedge against losing (in which case neither costs nor fees will be recovered) and by the fact that only "reasonable" fees may be recovered even by a prevailing plaintiff. 15 U.S.C. § 15 (1982).

[138] McChesney, *supra* note 40, at 1108-09 (government enforcers maximize their own self-interest at expense of efficiency); Schwartz, *supra* note 40, at 1093 (conceding that a disadvantage of public enforcement is the absence of an incentive structure motivating public prosecutors); *see* Crumplar, *An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement*, 13 HARV. J. ON LEGIS. 76 (1975); Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

[139] A recent example is the new Department of Justice Merger Guidelines, 48 Fed. Reg. 28, 493 (1982). The correctness of the approach they embody is a subject of considerable controversy. *E.g.*, Cohen & Sullivan, *The Herfindahl-Hirschman Index and the New Antitrust Merger Guidelines: Concentrating on Concentration* (unpublished manuscript).

[140] Obviously, what is "correct" policy is controversial. A number of strategies for enforcement have been suggested by scholars. *E.g.*, R. BORK, *supra* note 44, at 415-16; Posner, *A*

forcers may be subject to bribes, with the "dishonesty incentive" rising as (i) the amount at stake increases and (ii) the absence of other enforcers guarantees the bribe-giver immunity if it succeeds.[141] Fourth, there is increased possibility of abuse of power by public officials: the more power conferred, the greater the opportunities for misuse.[142] Fifth, the effectiveness of the government enforcer will

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Program for the Antitrust Division, 38 U. CHI. L. REV. 500 (1971); *see generally* S. WEAVER, DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION (1977). Further, the controversial motive of some of the proposals underscores the problems of a monopolist enforcer: adherence to wrong policies by the prosecutor will freeze federal antitrust policies into that mold. A multipronged enforcement system, on the other hand, encourages different views, leaving "errors" to be corrected in the litigative process where conflicting ideas of correct policy can compete in an adversary context.

A current example is the policy of the Antitrust Division not to prosecute cases of vertical price-fixing. The appropriateness of a refusal to enforce what is undoubtedly established law is questionable, regardless of whether the enforcement agency views the law as correct policy. *Compare* Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEX. L. REV. 649, 650 (1982) (Antitrust Division is precluded from unilaterally ignoring established antitrust rules in favor of a purely economic approach to antitrust enforcement) *with* Baxter, *Separation of Power, Prosecutorial Discretion and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 702 (1982) (Antitrust Division is afforded broad discretion in enforcing the antitrust laws; it has a duty to prosecute on the basis of conduct which has been found unlawful in the past only when such action will promote the public interest). Even more questionable is the fact of *announcement* of a nonenforcement policy. Such an announcement will encourage violations and can scarcely be justified on grounds that other cases are more pressing in terms of enforcement resources. Uncertainty about government intentions would discourage violations. Nevertheless, the important point for present purposes is not who is right or wrong on the merits of the vertical price-fixing debate, nor whether the Antitrust Division's refusal to enforce now-settled law is correct. The point is that, with government monopoly of enforcement, such a decision, unreviewed and, perhaps, unreviewable by either the judiciary or the Congress, would become determinative of national policy. The existence of the private action, however, offers a fail-safe mechanism to ensure a more thorough consideration of the issues by the judiciary.

[141] *See* Becker & Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGIS. STUDIES 1 (1974). The existence and extent of possible venality in the federal Antitrust Division and the Federal Trade Commission is, of course, undocumented. There have, however, been occasional questions raised. *See, e.g.*, Blake, *Conglomerate Mergers and the Antitrust Laws*, 73 COLUM. L. REV. 555 (1973); Note, *The* ITT *Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 COLUM. L. REV. 594 (1973). The only response of *Antitrust Penalties* to this possibility is the triumph of hope over experience: "[A] compensation structure [for enforcers] that would eliminate malfeasance can be developed. The higher the salary paid to enforcers, the greater is the cost to them of violations of trust. An alternative would be to increase the penalties for dishonesty." K. ELZINGA & W. BREIT, *supra* note 6, at 116 (citing Becker & Stigler, *supra*). Despite the supporting citation, it seems unlikely that economists will develop a solution to a problem that has eluded rulers for centuries. In any event, Becker and Stigler recognize that rewarding victim enforcement is an alternative method of dealing with bribery: "Private triple damage suits have become the only effective sanction of the antitrust laws." Becker & Stigler, *supra*, at 13. Indeed, they basically advocate a shift to private enforcement. *See id.* 13-14; *see also* Landes & Posner, *supra* note 127.

[142] Crumplar, *supra* note 138, at 97-98.

depend entirely on the level of resources allotted it by Congress, and there is reason to doubt that such allocations will be apportioned according to any real cost-benefit analysis.[143] Sixth, regardless of the actual operations of the government enforcer, the *perceptions* of potential law violators may be influenced in favor of illegality by making the government a monopoly enforcer. Despite the considerable remedies available to the government in the past, many attribute the real deterrence of the antitrust laws to fears of private suit.[144]

(b) *The Possibility of Court or Jury Unwillingness to Convict if a Large Fine is at Issue*

As is well known in the field of criminal law, increasing the potential penalty does not necessarily result in more enforcement: the very size of the sanction may lend itself to less prosecution or more jury (or judge) nullification.[145] While a similar objection could be made to the treble damage award, here there is a conflicting consideration. Although it has occasionally been argued that the mandatory trebling feature actually has been counterproductive for plaintiffs insofar as it has led to the judicial development of restrictive doctrines such as standing and to adverse jury verdicts,[146] the very existence of a damaged plaintiff may counterbalance the harshness of a pure fine rule. Instead of the money going to a faceless government, it will redound to the benefit of an actual victim, a result which may temper some of the less rational nullification that might otherwise be feared.[147]

4. Summary

Obviously, these logical possibilities do not demonstrate that the present multipronged enforcement scheme is optimal. They do, how-

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[143] *Id.* at 98-99; *see* Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGIS. STUDIES 47, 67-68 (1975).

[144] *See* Berger & Bernstein, *supra* note 30, at 848-49; Note, *supra* note 7, at 1058-61.

[145] *See* Panel Discussion, 8 SW. U.L. REV. 564, 573-74 (statement of Mr. Blecher); Wheeler, *supra* note 41, at 1323; *see generally* Note, *Controlling Jury Damage Awards in Private Antitrust Suits*, 81 MICH. L. REV. 693 (1983).

[146] *See* Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5 (1959); Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954); *see also Discretionary Treble Damages in Private Antitrust Suits: Hearing on H.R. 4597 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 83d Cong., 1st Sess. (1953) [hereinafter cited as *Discretionary Hearings*].

[147] Dorman, *The Case for Compensation: Why Compensatory Components are Required for Efficient Antitrust Enforcement*, 68 GEO. L.J. 1113, 1118-19 (1980). Indeed, this is only the other side of the coin noted by *Antitrust Penalties:* the tendency of juries to favor small private plaintiffs against their typically larger adversaries. *See supra* text accompanying note 109.

ever, show that there are disadvantages, in purely economic efficiency terms, to a monopoly public enforcement scheme,[148] and advantages to a multipronged system. Indeed, much of the Antitrust Division's success in obtaining consent decrees may be due to the fact that such decrees—unlike litigated judgments—may not be utilized as prima facie evidence in private actions.[149] At least absent empirical evidence of present overenforcement, the very existence of many enforcers may be a real benefit, solely in terms of deterrent effect, and one which is enhanced by the fact that private interests diverge from public interests in ways which ensure a fuller presentation of enforcement options to the courts.

While it is probable that the present multipronged enforcement scheme does not have precisely the correct "mix" to ensure optimal enforcement, the difficulties of measuring and balancing the conflicting tendencies are obvious. As a result, there may be more than a grain of wisdom in the current approach. Whatever its defects, it has safeguards against the egregious errors of underenforcement, whether by design or mistake, while leaving to the courts the responsibility of barring overenforcement by substantive, procedural, and remedial doctrines. Finally, the fairness appeal of a compensation-oriented scheme is strong. Employed purely as a tie-breaker, fairness might compel continuation of essentially the present approach, at least until it has been empirically demonstrated to be inefficient. Indeed, some such concerns underlie a second "economic" approach to reforming the private suit, that of Professor Schwartz.

B. *The Schwartz Proposal*

A somewhat less radical "economic" suggestion for altering the private remedy has been forwarded by Professor Warren F. Schwartz.[150] Basically, he perceives fundamental deficiencies in the present scheme of private enforcement but is unwilling to shift to

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[148] This result could be traced to the transaction cost factor. The effect of shifting to a pure government scheme is to put some of the costs of violations on the victims by eliminating compensation to them. *See infra* notes 193-95 and accompanying text. Theoretically, they should be able to either bribe the violator not to act illegally or somehow convince the government to sue. The problem is simply that the victims may not be able to efficiently organize themselves to do so because of high transaction costs. Ultimately, the government must act as their surrogate in order to maximize efficiency. In many cases, however, the government may not be able (or willing) to do so.

[149] 15 U.S.C. § 16(a) (1982); Bicks, *supra* note 146, at 8 & n.5.

[150] Schwartz, *supra* note 40. For Schwartz, "efficiency" in enforcement can be utilized to examine even the definition of substantive violations, and therefore he explores issues going beyond the interplay of public and private enforcement which is our present concern. Most notably, he considers the efficiency considerations involved in the substantive decision whether

monopoly government enforcement because of uncertainty about the reality as opposed to the "ideal of optimal public enforcement."[151] Instead, Schwartz would retain a mixed system of public and private enforcement but alter the private remedy in order to enhance its efficiency. In formulating his proposal, Schwartz both agrees and disagrees with portions of the Elzinga and Breit analysis.

The basis of Schwartz's analysis is a "cost minimization approach," that is, reducing to the minimum the costs of enforcement in terms of (1) the costs of the harmful conduct being proscribed; (2) the process costs of catching and trying violators, including the risk of erroneously convicting an innocent person; and (3) the costs of punishing the persons found guilty.[152] The theoretical point he shares with Elzinga and Breit is that penalties can either underdeter or overdeter.[153] That is, too little of the harmful conduct may be prevented (because the costs to society of increased enforcement are less than the costs of the remaining undeterred conduct) or too much harmful conduct may be prevented (as when the costs to society of the violation are less than the process and punishment costs incurred in attacking it).[154]

For Schwartz, there should be an enforcement scheme which will achieve the right "price" for violations:

> The essential notion of the cost-minimization approach is that the incidence of harmful conduct should be reduced to an efficient level by incurring an efficient quantity of process and punishment cost. The "price" for engaging in proscribed activities is determined by multiplying the magnitude of the sanction by the probability that it will be imposed if the law is violated. This price must be set correctly lest society incur excessive costs. If the price is insufficient, too much of the undesirable conduct will occur because not enough resources will be expended to reduce the incidence of the harmful conduct. Conversely, if the price is too high, *too little* of the undesirable conduct will occur; too much will be spent on law enforcement. Thus, a price which is either too high or too low imposes excessive costs.[155]

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to adopt a per se rule or a rule of reason. *Id.* at 1087-91. He also addresses the economics of assigning responsibility for litigation costs, and the appropriateness of the present system allowing a prevailing private plaintiff to recover its costs, including a reasonable attorney's fee, while leaving the defendant, even when it prevails, uncompensated. *Id.* at 1100-01.

[151] *Id.* at 1093.

[152] *Id.* at 1076. Schwartz draws on the work of Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[153] Schwartz, *supra* note 40, at 1079-80.

[154] *Id.*

[155] *Id.* (emphasis in original).

Setting the right price, however, requires an appreciation of both the social costs of the violation and the total process and punishment costs. It is only in light of these factors that the right balance can be struck. Moreover, as Schwartz clearly recognizes, the cost-minimization approach, which is desirable because it takes into account all relevant factors, is a "methodological nightmare" precisely because of the difficulty of balancing all factors.[156] Further, he recognizes that there are serious problems in obtaining the empirical data for applying the cost-minimization approach.[157] Schwartz also notes another complication: while setting the right price is difficult when "efficiency" is the only relevant goal, it is possible that other goals which increase the difficulty of pricing enormously[158] must also be taken into account, including compensation to injured persons.

Focusing on efficiency as the only goal, however, Schwartz argues that it is appropriate to consider only the harm caused by the antitrust violation, not the gains accruing to the violator, as the measure of the social cost of the violation.[159] The reason for this approach is, apparently, that the monopolist's gain does not necessarily correlate with the social loss entailed in resources wasted by the defendant's seeking monopoly prices, and in the misallocation of resources associated with monopoly pricing.[160] As a practical matter, however, Schwartz surmises that the "harms" focus will usually yield a higher figure than a "gain" oriented approach.[161]

Given this definition of harm, Schwartz believes that a private enforcement scheme presents unique difficulties:

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[156] *Id.* at 1078.

[157] *Id.* at 1079; *see generally* Reynolds, *supra* note 40. For example, Schwartz considers the cost of monopoly to be twofold: first, the resources used by a monopolist to obtain the monopoly, and, second, the welfare loss resulting from the higher price. Even assuming the latter element could be computed by hypothesizing the competitive price that would be charged absent the monopoly, the difficulties of ascertaining how much the monopoly cost to obtain are obvious. Schwartz, *supra* note 40, at 1084-85. And even if the social costs can be ascertained, no meaningful balancing can take place until the process and punishment costs are determined. *See supra* notes 153-57 and accompanying text.

[158] Schwartz, *supra* note 40, at 1085-87.

[159] *Id.* at 1082.

[160] *Id.* at 1082 & n.27. According to Schwartz, these damages, whether they are recovered by consumers who have had to pay a monopoly price instead of a competitive price or by competitors who have been hurt by the violator's efforts to obtain the monopoly, do not track the basic social harm caused by monopoly—the misallocation of resources. Indeed, "the allocative harm caused by monopoly pricing does not constitute legally cognizable damages to any plaintiff." *Id.* at 1084. Nor does Schwartz believe that the damages which are recoverable constitute even a reasonable proxy for the harms caused by antitrust violations.

[161] *Id.* at 1083.

> First, the sum awarded to the plaintiff serves both as an incentive for maintaining the action and as a penalty imposed on the defendant. Only one variable—the penalty—is fixed directly, but a second variable—the intensity of enforcement—is determined indirectly through the incentives to potential private enforcers engendered by the system. Thus, defining the allowable damages determines both the magnitude of the sanction and the frequency of its imposition. The dependence of these two variables makes it impossible to adjust the system optimally.[162]

The example given applies only when costs of deterrence have risen. Ideally, one might raise the penalty but decrease the incidence of prosecution; if done correctly, the same level of deterrence should be achieved with fewer process costs. With a private compensation scheme, however, the increase in the penalty will serve as an incentive which will actually lead to more enforcement.[163]

Theoretically, public enforcement can avoid this problem since the prosecutor is not motivated by obtaining the penalty imposed on the defendant.[164] Schwartz, however, is sufficiently concerned about the reality (as opposed to the theoretical model) of public enforcement[165] that he does not join *Antitrust Penalties* in recommending the abolition of private enforcement. Rather, he would simply "eliminate the present equivalence between the sum awarded to the plaintiff and that taken from the defendant."[166] The sum awarded to the plaintiff would, in short, become an "enforcement incentive," not compensation.

This proposal, as Schwartz admits, would require some safeguards. Most notably, a method would have to be devised for preventing trading between plaintiff and defendant which comes about because the plaintiff's incentive award may be less than the defendant's

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[162] *Id.* at 1092 (footnotes omitted). Schwartz's analysis in this regard tracks that of two commentators who purport to demonstrate that "private enforcement is less efficient than optimum public enforcement." Landes & Posner, *supra* note 127, at 15. They basically argue that potential violators will discount any fine by the fact that apprehension and conviction will not follow every violation. To offset this discount factor to achieve adequate deterrence one may raise the fine. That, however, provides incentive for overenforcement. But even these authors recognize that this tendency does not establish a case for preferring public to private enforcement: "That would require a comparison between private and actual, not optimal, public enforcement. . . ." *Id.* at 15-16.

[163] Schwartz, *supra* note 40, at 1092. Similarly, Schwartz is concerned that the very effectiveness of private enforcement, by reducing the number of violations, may drive enforcement costs up for the remaining violators. *Id.* at 1092-93.

[164] *Id.* at 1093.

[165] *Id; see supra* note 151 and accompanying text.

[166] Schwartz, *supra* note 40, at 1093.

liability.[167] Accordingly, both would be better off if an intermediate settlement were reached. It is, of course, scarcely clear that an effective mechanism to this end could be established.[168] Further, Schwartz concedes that such an approach, which would constitute essentially a bounty-hunter system, would require a redefinition of lawyer roles,[169] and the development of methods of determining priorities among the bounty hunters.[170]

Although there are serious problems with the mechanics of the Schwartz proposal,[171] the primary difficulty is not with the epicycles which are required to make this model work, but rather with the central idea. The concept requires *someone* to set both an incentive figure and a penalty figure. Aside from the formidable problems of data collection which must be solved for anyone to do this rationally, the process problems seem insurmountable. Schwartz envisions judges and/or juries doing so in individual cases,[172] but that is almost certainly not feasible. On a practical level, this aspect of the case would dwarf the liability phase; indeed, the extensive discovery that would be required for a judge or jury to make such a determination would make the normal antitrust suit seem simple. On a conceptual level, the results that are sought would be totally amorphous since the variables are both numberous and interdependent.

Imagine, for example, a simple price-fixing suit by a customer of one of the violators. In the present scheme, the liability question

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[167] *Id.* at 1095. To allow such trades will result in recovery of more than the optimal incentives for the plaintiff, and payment of less than the optimal penalty by the defendant.

[168] The example cited by Schwartz of a mechanism to control trades is the requirement of court approval which governs class action settlements and derivative suit settlements. *See* FED. R. CIV. P. 23(e) and 23.1. The efficacy of court supervision in this area, which is mainly to prevent attorneys and named plaintiffs from disproportionately benefitting vis-à-vis the class whose rights they are asserting, is dubious. *See* Latimer, *Damages, Settlements and Attorneys' Fees in Antitrust Class Actions*, 49 ANTITRUST L. J. 1553 (1982).

[169] Latimer, *supra* note 168, at 1094.

[170] *Id.* at 1096-1100.

[171] One such problem is the situation where the incentive needed to reward a successful plaintiff is *more than* the amount needed to deter. Suppose an antitrust violation exists with a social cost of $1,000,000 but which costs no particular victim more than $1,000 and which profits the violator only $100,000. Assuming a 50% chance of being caught and convicted, no rational person will violate the law if the penalty is $200,000. But if enforcement costs are $250,000, no private party will sue unless the sum to be recovered is in excess of the penalty. If no one sues, the chances of being punished diminish to zero, and the social cost of $1,000,000 will be imposed.

Schwartz might, of course, respond that it is these kinds of violations where public enforcement is appropriate. But, given the uncertainty he posits about government enforcement, it is not clear why the private remedy should not be structured to encourage enforcement.

[172] *Id.* at 1095.

would be complicated only by the remedial problem of determining the difference between the price fixed and the hypothetical competitive price that should have prevailed. Although there are obvious problems with determining a "competitive" price which may never have existed, the fact-finder, having made this reconstruction of history, need only multiply that difference by the number of units bought by the customer, add any consequential damages which might be indicated, and treble the result.

Under the Schwartz scheme, the liability phase would be the same. The remedial phase, however, would be a litigation nightmare. First, the act-finder must decide the appropriate penalty for the violator. This is done by computing the social harm caused and then setting a figure which, when discounted by the chances of the violator being caught, will result in the optimal level of deterrence. Ignoring for a moment what that level is (and it can be resolved only after the incentive award is decided), the social harm determination is much more complicated than establishing a hypothetical "competitive price" since some estimate of the costs of seeking monopoly must also be made. And even if "social cost" is decided, there is still the difficulty of determining the discount factor. That, of course, is almost certainly empirically indeterminable since those who violate the law have no incentive to admit it. Yet, despite being indeterminate, the discount factor is critical since relatively modest adjustments in it will grossly affect the ultimate penalty.

Moreover, the entire determination of a penalty is contingent on the incentive award. A small award will decrease the number of suits, thereby decreasing the amount of deterrence; conversely, a large award will tend to increase private enforcement. Thus, the discount factor interacts with the incentive award. But the incentive award has to take into account the costs of enforcement (presumably not only in the suit being adjudicated but more generally). The point is not that there are no mathematical models which will yield the correct answer; rather, it is that, even granting that such models exist or can be developed, the data is simply not available to yield the kind of accuracy that the Schwartz proposal requires in order to be effective.

In sum, neither the Elzinga and Breit proposal to replace private enforcement with an exclusive governmental remedy, nor the Schwartz proposal to shift from a private, compensation-oriented remedy to a bounty-hunting approach is desirable, particularly at this stage of development of antitrust economics. Once again, the treble-damage approach, whatever its theoretical shortcomings, may be the best alternative to the problems of antitrust enforcement.

IV. "FAIRNESS" AS A LIMITATION ON TREBLE DAMAGE SUITS

While economists have attacked the treble damage device on "efficiency" grounds, legal scholars have launched an assault based on "fairness" considerations.[173] Clearly, fairness is a central concern in fashioning legal remedies.[174] Indeed, the previous section rejected the efficiency challenge of Professors Elzinga and Breit in part because of fairness implications for *plaintiffs*. Professors Areeda and Turner, however, would impose restrictions on the treble damage suit because of perceived unfairness to *defendants*.[175]

A general theme of the Areeda and Turner treatise, *Antitrust Law*, is that government enforcement is preferable to private suit, an idea which finds expression in several recommendations.[176] The broader reaches of this approach are beyond the scope of this piece, although it might be questioned whether Areeda and Turner—like

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[173] Another area in which efforts to accord "fairness" to defendants may have adverse effects on plaintiffs' suits is the continuing controversy over contribution among antitrust violators. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) held that there was no basis in federal statutory or common law for allowing federal courts to fashion a right to contribution. *See* Burlington Indus., Inc. v. Milliken & Co., 690 F.2d 380 (4th Cir. 1982); *see generally* Bernard, *On Judgments and Settlements in Antitrust Litigation: When Should Damages be Trebled?*, 56 ST. JOHN'S L. REV. 1 (1981); Cirace, *A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits*, 55 ST. JOHN'S L. REV. 42 (1980); Easterbrook, Landes & Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331 (1980); Polinsky & Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447 (1981).

Three bills have been introduced in the Senate within the past year which would provide for contribution of damages: S. 904, 98th Cong., 1st Sess. (1983); S. 380, 98th Cong., 1st Sess. (1983); S. 995, 97th Cong., 1st Sess. (1982).

[174] The textual discussion focuses on fairness to the antitrust defendant as a single economic and legal entity. It has sometimes been suggested that the propriety of punitive damage awards ought to be reconsidered in the context of the modern corporation. The argument is that, since the damage award will injure shareholders who are innocent of the wrongdoing, and perhaps even powerless to stop it, punitive damages may be inappropriate. *See generally* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1299-1308 (1976).

The most obvious response to this is that those who stand to benefit should shoulder the risks. From a fairness perspective, the possibility of an antitrust judgment is merely one of the risks inherent in the investment. From an efficiency perspective, this novel variety of "piercing the corporate veil" *to save* innocent stockholders would effectively exempt all large corporations from the otherwise appropriate liability for their actions, thereby removing an incentive for them to obey the law. If treble damages are otherwise justified, the innocent stockholder problem is no reason to reject the remedy.

[175] 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 331b.

[176] For example, the authors' discussion of monopolization law suggests a broader rule of liability where the suit is a government action in equity than would apply to either a criminal proceeding or a treble damage action. 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶¶ 311-13. Another indication of this preference is the suggested limitations on private equitable relief as compared to public suits. *Id.* at ¶ 331b.

Elzinga and Breit—do not exaggerate the advantages of disinterested public enforcement and underestimate its disadvantages.[177] The focus of present concern, however, is the proposal in *Antitrust Law* that the courts treat the "trebling" feature of section four of the Clayton Act as "discretionary," utilizing that discretion to sometimes limit the award to single damages.[178] If taken seriously, this proposal would be likely to sharply tilt antitrust towards the exclusive government enforcement which Elzinga and Breit proposed.

The idea of discretionary treble damages did not originate with Professors Areeda and Turner.[179] The recommendation had previously been the subject of Congressional hearings[180] and appeared in the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws:[181] "On balance, we favor vesting in the trial judge discretion to impose double or treble damages. In all instances, this would recompense injured parties. Beyond compensation, the trial court could then penalize the purposeful violator without imposing the harsh penalty of multiple damages on innocent actors."[182] One major difference between this proposal and the Areeda-Turner approach is that the Committee's Report apparently envisioned that legislative change would achieve the suggested reform while *Antitrust Law* argues that the judiciary can find room in the statute itself. The

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[177] *See generally* Zimmer & Sullivan, *supra* note 122.

[178] 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 331b.

[179] See K. ELZINGA & W. BREIT, *supra* note 6, at 64-66 for a brief history of the evolution of the treble damage provision.

[180] *See Discretionary Hearings*, *supra* note 146. It is also apparently endorsed in M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION 153-54 (2d ed. 1983). Professor Posner also suggests a form of "discretionary" trebling, although he would differentiate, on the basis of "a theory of sanctions," between more concealable and less concealable violations. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 231 (1976). He argues that the latter do not warrant the trebling necessary for adequate deterrence. *Id.*

Perhaps worthy of separate note is the argument that mandatory trebling works to *plaintiffs'* disadvantages by making it more difficult for judges and juries to convict. Bicks, *The Department of Justice and Private Treble Damage Actions*, 4 ANTITRUST BULL. 5, 14 (1959). See also Baker, *Reagan Administration Proposal Opens Debate on Treble Damages*, 5 NAT'L L. J. 5, May 9, 1983, at 20, which is discussed *infra* note 232. Whatever the merits of the argument, however, it would support making treble damages "discretionary" at the plaintiff's option (with notification to judge and jury); it offers no reason to vest discretion in the trial judge.

[181] Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) [hereinafter cited as *Attorney General's Report*]. This recommendation did not pass unchallenged. *See* McConnell, *The Treble Damage Issue: A Strong Dissent*, 50 NW. U. L. REV. 342, 343 (1955) (arguing that courts' exercise of discretion with respect to such issues as proof of damages did not bode well for plaintiffs); Schwartz, *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 55 (1955).

[182] *Attorney General's Report*, *supra* note 181, at 379.

analysis in *Antitrust Law* is weak on this point[183] despite some limited case support.[184] Nevertheless, the real question is not the method of revising the law but whether the law needs revising.[185]

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[183] *Antitrust Law* concedes that the statutory language "seems to leave little room for judicial discretion," 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 331(b)(3), but nevertheless argues for implied qualifications "in infrequent situations not within the contemplation of those who wrote the statute and . . . where qualification would best serve both the fundamental purposes of the statute and the ends of justice." *Id.* The former principle has some appeal, although the difficulties of applying it are obvious. The latter, however, is too open-ended: it would permit courts to rewrite express statutory commands whenever broader policies, whether derived from the more general purposes of the statute or the ends of justice, would so indicate.

While some accommodation of statutory language is permissible, as to avoid unconstitutionality, *e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), or to accommodate other statutory schemes, *see, e.g.*, L. SULLIVAN, *supra* note 4, at § 177, the broader view advocated by Professors Areeda and Turner has never been recognized. Indeed, the statutory scheme created by Congress generally *defines* the "purposes of the statute" and "the ends of justice." *See* United Airlines, Inc. v. McMann, 434 U.S. 192 (1977). Put another way: Congress has determined that, generally speaking at least, treble damage recovery for violations is one goal of the statute and is not unjust.

An ingenious effort to provide a single damage antitrust remedy is set forth in Arnold, *Implied Right of Action Under the Antitrust Laws*, 21 WM. & MARY L. REV. 437, 470 (1979) (suggesting "[a]n implied remedy for nontreble damages [which] would comport with the compensatory policy underlying the antitrust laws").

[184] While no case directly holds that treble damages are "discretionary," there are holdings that the award is not necessarily mandatory when federal policies are contrary to treble liability. Thus, in Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494 (3d Cir. 1979), *vacated*, 448 U.S. 902 (1980), and *remanded* in light of NLRB v. Longshoremen, 447 U.S. 490 (1980), Judge Gibbons attempted to reconcile federal antitrust and labor law policies by narrowing the circumstances warranting treble damage liability. *See also* SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 998 (D. Conn. 1979) (accommodating federal patent and antitrust laws by holding that "some patent-related conduct creates antitrust liability only for prospective equitable relief, but not for treble damage remedies, at least in some circumstances"), *vacated on other grounds*, 599 F.2d 32 (2d Cir. 1979).

The Supreme Court has never held that the treble damage award is not mandatory, and at least Justice Blackmun appears to believe it is. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 442-43 (1978). The Court, however, may have at least held the question open in that case, *id.* at 401-02, and in its subsequent decision in Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 n.20 (1982). *See also* Cantor v. Detroit Edison Co., 428 U.S. 579, 599 (1976) (plurality opinion of Justices Stevens, Brennan, White and Marshall).

Even if it should be held that the award is not mandatory, the limited nature of the exceptions contemplated seems clear. The *Consolidated Express* and *SCM* courts would subordinate the treble damage award only to accommodate conflicting federal statutory policies. Likewise in *Lafayette* and *Cantor* the point raised was whether the concept of federalism should mitigate the strict application of the treble damage remedy. Neither of these exemptions would justify making the award "discretionary" in any generalized sense.

Still another possible argument for limiting treble damages is the change of law situation either by way of a defense to damage liability or by prospective overruling. *See generally* Ross, *Recognizing the Reliance Interest in Awarding Damages Under Section 4 of the Clayton Act: Of Mitigation and Prospectivity*, 12 GA. L. REV. 193 (1978). Again, accepting such a theory would be far from a generalized notion of discretionary treble damages. *See infra* note 210.

[185] When convinced in particular instances that treble damage suits may deter desirable conduct, Congress has chosen to limit private suits to actual damages. Export Trading Company

The basic argument of Professors Areeda and Turner is straightforward: the purpose of treble damages is punitive; in some situations punitive damages are inappropriate; therefore, in some situations treble damages ought not to be awarded. The links in this reasoning must be closely examined.

Initially, it is necessary to consider the assertion that the treble damage award is "punitive." Areeda and Turner argue, first, that even single damages can "punish" a defendant "who could not reasonably have foreseen liability,"[186] and, secondly, that "treble damages are indisputably punishment."[187] The usage of "punitive" with respect to single damages is objectionable. While one subjected to a money judgment may well feel punished by the legal system, the traditional line of demarcation for "punitive damages" is drawn with reference to compensation: a compensatory award is not punitive, without regard to the moral fault (or lack of it) of the defendant. An obvious example is strict liability offenses in tort.[188]

If this view undercuts the argument that single damages are "punishment," it seems to reinforce the notion that *treble* damages are punitive. Even this, however, is not necessarily true since "damages" as a legal concept is often narrower than actual harm. Occasionally Congress has recognized this by authorizing the award of sums in excess of damages actually proven. This has been done not to punish the defendant for wrongful conduct but rather to provide a rough-and-ready measure of compensation for real but unquantifiable damages. A prime example is the "liquidated damages" provision found in some employment discrimination contexts,[189] which has been held to have a compensatory purpose rather than a punitive one.[190]

Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at 15 U.S.C. §§ 4001-4021 (1982)).

[186] 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 311b.

[187] *Id.*

[188] *See generally* W. PROSSER, THE LAW OF TORTS § 75 (4th ed. 1971).

[189] Fair Labor Standards Act, 29 U.S.C. § 216(b), (c) (1976 & Supp. V 1981); *see generally* C. SULLIVAN, M. ZIMMER & R. RICHARDS, THE FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 10.15, at 668-74 (1980).

[190] Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942). It is true that even "pure" punitive damages are sometimes defended on the basis of compensation of unprovable losses and reimbursement for attorneys' fee. *See generally* Owen, *supra* note 174, at 1295-99. Nevertheless, this result seems more a byproduct of the basic purposes of punishment and deterrence rather than a separate goal of the award. Otherwise, it is hard to account for the general judicial reluctance to expand the recovery of attorneys' fees. Alyeska Pipe Line Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

Much the same could be said about the treble damage award.[191] It seems certain that single damages, as presently measured by the law, will undercompensate. This is due to several factors, including the absence of either an adjustment for inflation or the general availability of prejudgment interest.[192] Further, although the courts have liberalized the rules for proving the amount of damage suffered as a result of an antitrust violation, it remains difficult to establish many elements of damage with sufficient certainty.[193] Indeed, the Supreme Court's decision in *Illinois Brick*[194] denying indirect purchasers general standing to seek treble damages was predicated largely on the proof of damage problem. Although such problems are exacerbated in the "passing on" context, the holding in *Illinois Brick* may well result in particular cases in which the only parties damaged are not able to sue while the only parties able to sue are not damaged. Such an odd result, whether or not sound,[195] underscores the problems of proof of the quantum of antitrust damages. In this light, the suggestion that the trebling feature could be viewed as a means of compensating unquantifiable damages deserves serious consideration.

But even if the treble damage award is punitive, it does not follow that punitive damages are not justifiable. Professors Areeda and Turner conclude that a penalty would be unfair in some cases—primarily those in which the defendant could not reasonably have foreseen that its conduct was wrongful. Therefore, they conclude that the punitive trebling feature ought to be discretionary.

There are several responses to this argument. First, it could be met head-on by conceding unfairness in imposing treble damages on an "innocent" wrongdoer but arguing that the need to encourage private suits is the more compelling consideration. This is, of course,

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[191] Vold, *Are Threefold Damages Under the Antitrust Act Penal or Compensatory?*, 28 KY. L. J. 117, 157-58 (1940). *Contra* Owen, *supra* note 174, at 1262 n.17 ("treble damages under the antitrust laws are in the nature of punitive damages and achieve similar objectives"); *see also* North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673, 676-77 (4th Cir. 1960) (private action to recover treble damages is an action to recover a "penalty" for purposes of state statute of limitations).

[192] *See* Blair, *Antitrust Penalties: Deterrence and Compensation*, 1980 UTAH L. REV. 57. The author recommends replacing the trebling feature with a provision expanding the concept of damages to embrace prejudgment interest and an inflation allowance. *Id.* at 70-71. A narrow step towards prejudgment interest was taken by Congress in 1980, but such recovery remains generally unavailable. *See infra* note 212. Interestingly, the Reagan Administration proposal for single damages for some antitrust violation does provide for an interest award. *President's Proposal*, *supra* note 3, at 713; see *infra* note 228 for text of proposed amendment.

[193] *See generally supra* note 13.

[194] 431 U.S. 720 (1977).

[195] *See infra* notes 202-08 and accompanying text.

an "efficiency" argument which is predicated on the notion that the punitive aspect of the treble damage award has as its primary purpose the encouragement of "private attorney general" suits.[196]

The need for such suits stems from elementary economic reasoning that potential lawbreakers will discount any costs of a violation by the improbability of getting caught.[197] The trebling feature may, then, reflect an effort to offset the discount factors in order to achieve the proper level of detection. One must agree with Professor Posner that the particular multiplier of three was chosen "without any effort to determine whether the probability . . . that a violator will be caught is anywhere near .33."[198] Posner, however, admits the near impossibility of accurately estimating the chances of getting caught.[199] As a result, criticism of the .33 figure as too low a probability is no more persuasive than claims that it is too high. While it may be true, as Posner argues, that the success of concealment varies with the kind of offense involved,[200] the impossibility of a precise calculus in any area may support the rough-and-ready congressional trebling.

Such an efficiency-oriented argument can look to legal precedent for support. Strict liability, for instance, is well-known to the law, and is even found in the criminal area.[201] Indeed, there is support for this argument in recent antitrust jurisprudence; *Illinois Brick* was in large part based on considerations of efficient enforcement.[202] Nor does the trebling feature suggest a different result. Under the Areeda

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[196] The following discussion parallels that applicable to the question of whether a defense for "avulsive" change in the law should be allowed. *See* 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 322(f); *see also* Ross, *supra* note 184. While it seems most unfair to impose treble damages on a defendant for conduct which it had no substantial reason to believe was unlawful, recognition of such a defense would severely reduce the incentives for private plaintiffs to break new ground in antitrust theory or application. Of course, if a "change in law" defense were to be recognized, it would severely reduce the "need" for discretionary trebling by removing the class of defendants most deserving of protection from treble damage liability.

[197] Indeed, this reasoning is too elementary. Natural persons frequently act nonrationally, and institutional reactions are even more difficult to predict, since institutions are composed of multiple decisionmakers whose interests, and perceptions of the institution's interests, may vary widely. *See* Note, *Decisionmaking Models and the Control of Corporate Crime*, 85 YALE L.J. 1091 (1976); Wheeler, *supra* note 41, at 1343-46. What would deter a rational institution will not necessarily deter a real firm since actual conduct will be influenced or determined by persons whose interests do not necessarily coincide with those of the firm itself. *See* Blair, *Antitrust Penalties: Deterrence and Compensation*, 1980 UTAH L. REV. 57.

[198] R. POSNER, *supra* note 180, at 226.

[199] *Id.*

[200] *Id.* at 224-27.

[201] *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6 (1972); *see also* United States v. United States Gypsum Co., 333 U.S. 364, 388-89 (1947) (addressing the intent concept in the context of a criminal antitrust case).

[202] *See supra* notes 194-95 and accompanying text.

and Turner approach, intentional violators would in any event remain subject to discretionary multiple liability, and in the exercise of such discretion, it is precisely with respect to the "unwitting" defendant that the "bounty" aspect of the private antitrust action becomes most critical. By definition, "unwitting" violators have little reason to believe their conduct is illegal. For a private plaintiff to prevail, then, he or she must advance novel theories or novel applications of accepted theories. That, in turn, sharply increases the risks and costs of litigation. Accordingly, if there is a need to encourage such private enforcement,[203] efficiency demands may well outweigh the "unfair-

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[203] Whether there is such a need depends on two considerations. First, whether the amount of government antitrust enforcement is already optimal; and second, whether private attorneys general, will, on balance, produce good results by their innovative actions. Neither question is empirically answerable, but the general utility of private actions seems probable, and the very existence of the treble damage scheme requires recognition of that judgment by Congress. Consider:

(1) Optimal Enforcement

Elzinga and Breit in *Antitrust Penalties* devote considerable effort to graphically demonstrating the obvious proposition that there can be either too much or too little enforcement for efficiency. K. ELZINGA & W. BREIT, *supra* note 6, at 13. They, however, then note that, "[p]recisely where the United States is in regard to [optimal enforcement] is, of course, a most difficult matter to determine," with support for both sides of the question. *Id.* It may be useful to stress, however, that even conservative estimates of the losses due to monopoly, *see generally* F. SCHERER, *supra* note 68, at 459-74, far exceeded the annual budget of the Antitrust Division which was $41,200,000 for fiscal year 1982. Of course, the expenditures of the Division are scarcely the only relevant costs of enforcement and the notorious methodological problems make real reliance on estimates of aggregate monopoly loss treacherous. Nevertheless, they provide some basis for suggesting that we do not now have overenforcement or even optimal enforcement. *See* Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

(2) Cost-Benefits

Even assuming less-than-optimal public enforcement, it is possible that private suits will lead to overenforcement in terms of cost-benefit analysis. *See supra* note 136. Further, one of the "costs" of private enforcement is the possibility of "erroneous" legal theories being accepted by the courts, at least some of which may be anticompetitive. One case frequently cited as an example of this is Utah Pie Co. v. Continental Pie Co., 386 U.S. 685 (1967). While this constitutes a rational reason to oppose treble damage suits, especially those against "unwitting" violators, the significance of any such danger depends on the confluence of two factors. First, one must determine the likelihood that government enforcers will be correct in their judgment. Professors Areeda and Turner give great deference to the wisdom of the Antitrust Division; it is perhaps not merely coincidental that Professor Turner once ran it. If they are correct, private suits on innovative theories are less important: most innovations will be wrong. They can therefore view without alarm the adverse impact adoption of their proposals would have on private suits. *E.g.*, 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 322e. The second factor is the extent to which courts can be trusted to make correct policy choices in litigation. Critics like Robert Bork might well distrust private suits and wish to confine their scope because they despair about the competence of the courts and believe that it will be easier to "educate" one entity—the Antitrust Division—than hundreds of federal judges. R. BORK, *supra* note 44.

ness" of treble damage recovery against an "unwitting" defendant.[204] Further, mandatory trebling may be a necessary incentive for two reasons. First, there is little reason to expect judges, in the exercise of the discretion that Areeda and Turner would accord them, to reward private plaintiffs at the expense of innocent defendants.[205] Secondly, direct empirical support for the view that treble damages are a necessary incentive may be drawn from the fact that only single damages are available to the United States for harms to it in its proprietary capacity.[206] The paucity of such suits, even against defendants who have been sued in criminal or equitable cases,[207] suggests that the government rarely views the single damage game as worthwhile.[208]

This economic efficiency defense of the automatic trebling feature will not be pursued further, however, since an important theme of Part II of this article is that efficiency is not the paramount societal goal. Areeda and Turner quite rightly put the fairness issue on center stage, and any defense of automatic trebling must come to grips with it. Fairness arguments, however, are usually at least two-faceted. The

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[204] *See* Simpson v. Union Oil Co., 396 U.S. 13 (1969) (not inequitable to apply retrospectively rule that conduct of defendant was prohibited form of price-fixing since the rule announced was not innovative and cause of action against defendant has been established). Oddly enough, private suits have frequently been criticized as not being innovative enough on the grounds that most private plaintiffs "follow in the government's footsteps" by attacking basically those violations which have been the object of government proceedings. Although it is true that the bulk of private litigation has followed government action, significant recoveries have been obtained in cases in which the government did not blaze the trail. *See* L. SCHWARTZ, J. FLYNN & H. FIRST, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 22 (6th ed. 1983); *see also Antitrust Improvements Act of 1975; Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess., Part I, 371-86 (1975) (statement of Peter Max).

[205] For example, the courts have frequently been reluctant to impose either the maximum monetary criminal fines or meaningful prison sentences in antitrust cases. *See supra* notes 132-41 and accompanying text. Since these cases usually involve the most flagrant violations of the antitrust laws, it seems unlikely that the judiciary could be entrusted to exercise its discretion to award multiple damages even in cases of flagrant violations. To the extent that the violations are less clear, it would be foolish, on the basis of past experience, to anticipate that awards would often exceed actual damages, regardless of the theoretic justification for a higher judgment.

[206] 15 U.S.C. § 15(a) (1982). This provision was added in 1955, 69 Stat. 282, after the Supreme Court held that the United States was not a "person" for purposes of treble damages. United States v. Cooper Corp., 312 U.S. 600 (1941).

[207] While the numbers of reported cases involving 15 U.S.C. § 15(a) are not a perfect measure of the frequency of the use of that section, the paucity of citations strongly suggests that the Department of Justice has not often invoked the provision.

[208] An alternative interpretation—that the paucity of suits results from governmental inefficiency in pursuing viable damage claims—would scarcely support the Areeda and Turner general preference for governmental over private enforcement, nor the reliance on exclusive government enforcement by Elzinga and Breit. *See* 2 P. AREEDA & D. TURNER, *supra* note 33; K. ELZINGA & W. BREIT, *supra* note 6.

first facet is unfairness to the defendants. Put simply, the thesis of this article is that treble damages are rarely or never unfair to defendants in light of two important factors.

First, it is unlikely that "unwitting" violators frequently exist. One might expect a spectrum of law violators, ranging from someone approaching Justice Holmes' "bad man"[209]—the person who knew beyond doubt that his conduct was wrongful but hoped to escape detection—to the "good guy"—one who thought beyond doubt his conduct was lawful. In between lie persons with more or less uncertainty about the legitimacy of their conduct. In antitrust cases, oriented as they are towards large businesses with huge cadres of lawyers, the totally unwitting defendant will be a rarity. In the typical situation the defendant will have had knowledge of possible illegality and have taken a chance on the outcome. The fact that the judgment as to legality may have been reasonable when made does not detract from the fact that the defendant knew or should have known of the risks and chose to assume them in return for the business benefits which resulted.[210]

Second, a treble damage award may not be "unfair" even to a totally innocent defendant. The "unfairness" of an award ultimately turns on the relationship of plaintiff's gain to defendant's loss. If every dollar of damage suffered by plaintiff went into defendant's pocket by virtue of the antitrust violation, single damage recovery would exactly redress an inequity; indeed, it could be viewed as akin to restitution for unjust enrichment. From this perspective, it is irrelevant that the "unjustness" of the enrichment was not, or could not reasonably have been, known to the defendant before the occurrence of the conduct ultimately held illegal. Under this model, however, treble damages are unfair: the twofold add-on cannot be justified, either as a penalty (since the unwitting defendant has, by definition, done nothing deserving of punishment per se) or as compensation (since the plaintiff, by definition, has been made whole by single damages).

The only problem with this model—which must be the one Areeda and Turner have in mind—is that it has doubtful congruence with reality. The thesis on this point can be put simply in restitution terms: there is grave reason to doubt that the antitrust damages "disgorged" by a violator will exceed his "unjust enrichment." It is, of

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[209] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[210] Professors Areeda and Turner recognize this in their discussion of a possible "avulsive" change-in-law defense to a private damage claim. 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 322f.

course, true that the antitrust laws award damages, not restitution; nevertheless, restitution analysis is helpful in seeing that unfairness to defendants is improbable if not impossible in the treble damage remedy. And the use of restitutionary concepts in analyzing treble damage questions has strong precedential support.[211]

To understand this, it is essential to shift the focus from the individual plaintiff's suit to the total harm caused by the violation and the total gain accruing to the defendant. Although there are factors which tend to undercut the model, in any event,[212] the most telling point is simply that the class of antitrust *plaintiffs* is almost always less than the class of antitrust *victims*.[213] Further, the recovery of antitrust *damages* is likely to be less than the amount of harm caused by the violation. As a result, an award to plaintiffs, even if treble their damages, will rarely exceed the defendants wrongful gain. Even if up

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[211] *See, e.g.*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968). The *Hanover* Court rejected the defendant's attempt to defeat a direct purchaser's suit on the ground that the plaintiff had "passed-on" the overdamage. *Id.* at 494. In view of the likelihood that many indirect purchasers would not sue, even if they bore the passed-on overcharge, the Court found rejection of the defense necessary to prevent "those who violate the antitrust laws . . . [from] retain[ing] the fruits of their illegality because no one was available who would bring suit against them." *Id. But see In re* Hotel Telephone Charges, 500 F.2d 86, 92 (9th Cir. 1974) ("Congressional scheme does not contemplate that private attorneys are to act as prosecutors to force antitrust violators to disgorge their illegal profits in the general interest of society at large").

[212] First, the legal concept of provable damages is likely to be narrower than actual economic harm, so some of the double add-on may merely compensate for such losses. *See supra* notes 191-95 and accompanying text. Second, the economic loss to the defendant from an antitrust judgment is ameliorated by tax benefits, *see* Wheeler, *supra* note 41, and by the denial of prejudgment interest which permits the defendant to retain the economic advantage stemming from the use of the profits of the violation until judgment. *See also* Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Damages in Private Antitrust*, 5 ANTITRUST L. & ECON. REV. 101, 104-07 (1972); Parker, *The Deterrent Effect of Treble Damage Suits: Fact or Fantasy*, 3 N.M.L. REV. 286, 288 (1973); Parker, *Treble Damage Action-A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483, 486-92 (1971).

It is true that the strength of this latter argument is weakened somewhat by the 1980 amendment to § 4 of the Clayton Act to permit "single interest on actual damages" from the filing of the complaint to the date of judgment or for any appropriate shorter period, if the award is found "just" by the court. Pub. L. No. 96-349, 94 Stat. 1156 (1980). The amendment, however, clearly provides that in determining whether an interest award is just, "the court shall consider only" three specified factors, all of which essentially concern whether either party conducted the litigation for purposes of delay. *Id.* As a result, the statute seems to be more an effort to encourage expedition in antitrust litigation than a means of compensating the plaintiff for the loss of use of money during pendency of the suit.

[213] *See* Harris & Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 344-45 (1979) (excessive liability to violators would occur only if all victims sued and recovered treble their damages).

to two-thirds of the award could be deemed a windfall to the particular plaintiff, the unfairness to the defendant is not apparent.[214]

The reasons that the amounts recovered by treble damage plaintiffs are far smaller than the actual harm they suffer are not far to seek. First, there is the problem of detecting violations which are typically carefully concealed. Total nondetection, or nondetection during the limitations period, will exclude large numbers of victims or plaintiffs.[215] Second, restrictive standing doctrines operate to exclude suits by persons who have sustained real damages from violations.[216] Third, injuries may well be too diffuse to warrant any one plaintiff undertaking the risks of an antitrust suit, and the antitrust class action offers little relief since its significant erosion by the Burger Court.[217]

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[214] *Cf.* Denbeaux, *Restitution and Mass Actions: A Solution to the Problems of Class Actions*, 10 SETON HALL L. REV. 273 (1979) (arguing that restitution of total unjust enrichment to a particular plaintiff may be justified in certain cases without regard to relation of award to that plaintiff's actual damages). The idea advanced here is considerably narrower than that profferred by Professor Denbeaux: the fact that the defendant will usually have an unjust enrichment exceeding the total of all private plaintiffs' treble damage recoveries suggests that the trebling feature is not unfair.

[215] *See* Berger & Bernstein, *supra* note 30, at 847 n.172; *see also* Owen, *supra* note 174, at 1292-95. Indeed, Professor Posner suggests limiting trebling on the basis of the concealability of different types of violations. R. POSNER, *supra* note 180, at 231.

[216] See *supra* notes 29-30 and accompanying text dealing with "antitrust injury." Another doctrine restrictive of private suits is the ban on indirect purchaser suits worked by the Court in *Illinois Brick*. *See supra* note 28 and accompanying text. There has been considerable controversy over the correctness of *Illinois Brick*. *Compare* Harris & Sullivan, *supra* note 213, at 272 (calling for congressional overruling of *Illinois Brick*); Note, *Treble Damages and the Indirect Purchaser Problem: Considerations for a Congressional Overruling of* Illinois Brick, 39 OHIO ST. L.J. 545 (1978) *with* Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602 (1979) (concluding that to allow indirect purchasers to sue would retard rather than advance objectives of antitrust laws).

[217] *See* Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1976). Even in actions in which broad class claims have been successful, few class members actually collect their awards. See *Illinois Brick*, 431 U.S. at 747 n.31 and authorities cited therein; *see also* Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?* 25 BUS. LAW. 1259 (1970). Such considerations have led to suggestions for radical restructuring of Rule 23. *See, e.g.*, Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299 (1980).

It is true that the state *parens patriae* action created by Congress in 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1394 (codified at 15 U.S.C. § 15(c) (1982)), offers some hope for the equivalent of class actions. *See generally Panel Discussion, Parens Patriae and State Antitrust Efforts in 1978—Everybody's Getting Into the Act*, 47 A.B.A. ANTITRUST L.J. 1341 (1979); Whitman, *Parens Patriae: An Effective Consumer Remedy in Antitrust?*, 16 AM. BUS. L.J. 249 (1976); Comment, *Parens Patriae Antitrust Actions for Treble Damages*, 14 HARV. J. ON LEGIS. 328 (1977); Note, *Antitrust Improvements Act of 1976, Parens Patriae Act: Paper Tiger or Sleeping Giant*, 31 CLEV. ST. L. REV. 107 (1982). The effectiveness of the *parens patriae* action, however, has yet to be proven, especially in the wake of the *Illinois Brick* rejection of indirect

Finally, the realities of proving damages tend to filter out some harm that is a clear result of an antitrust violation, thus entirely eliminating the claims of some victims and reducing the claims of others.[218]

In sum, although there may be countervailing factors, the great tendency in antitrust as it functions in practice is to reduce the ratio of antitrust plaintiffs to antitrust victims and the ratio of antitrust damages to antitrust harms. In light of this fact, it seems likely that no great unfairness to defendants as a class will result from allowing treble damages since the plaintiff's recoveries are unlikely to exceed the defendant's gain.

Several responses to this argument are possible, but are unconvincing. First, it might be countered that the *potential* for unfairness remains since *all* injured parties *may* sue a particular defendant. But it is not clear that judges should ignore the fact that there is little likelihood that all persons will sue,[219] or that a correct legal rule in the general run of cases should be discarded because of the possibility of an occasional unfairness.[220] Of course, if one has confidence in the

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purchaser suits. *See* Comment, *Parens Patriae Actions on Behalf of Indirect Purchasers: Do They Survive* Illinois Brick?, 34 HASTINGS L.J. 179 (1982).

[218] Although other measures are possible, the generally used measure of recovery for price-fixing, for example, is the difference between the competitive price and the illegally fixed price, multiplied by the number of units purchased, and, of course, trebled. *See generally* Harrison, *supra* note 13; Donovan & Irvine, *supra* note 13; Lanzillotti, *supra* note 13. To express this with econometric rigor:

R = (FP–CP) x N x 3
where R = recovery
FP = fixed price
CP = competitive price
N = number of units

It is an economic commonplace that fewer items will be purchased as the price rises. Thus, the formula expressed will yield the plaintiff recovery only for the enhanced price of the units it did buy at a higher-then-competitive price. It does not take into account other losses such as drop in sales volume. While this element of loss seems theoretically recoverable, *Illinois Brick*, 431 U.S. at 743 n.27, it will frequently be impossible for the legal system to sufficiently quantify it as a basis for plaintiff's recovery. In such cases, the actual recovery will not compensate the plaintiff for her total loss. *See* R. POSNER, *supra* note 180, at 224. And this is true despite the serious misallocation effects in artificially shifting purchases from more desired goods to less desired ones by virtue of price-fixing.

[219] *See Illinois Brick*, 431 U.S. at 731 n.11. The Court there found unacceptable the risk that defendants might pay multiple damages if indirect purchasers and direct purchasers were both allowed to sue and if procedural devices failed to properly allocate damages between them. *Id.* Of course, the present concern is not with duplicate recoveries but whether treble damages may deprive an "unwitting" defendant of more than its gain from the violation.

[220] Note that applying this unfairness criteria on a case-by-case basis is difficult: the total recovery of all potential plaintiffs will rarely be known when any particular plaintiff sues. The only case in which this may be clear is where the plaintiff is bringing a class action on behalf of *all* victims, none of whom opt out.

ability of the judicial system to separate the wheat from the chaff, a more individualized approach is possible. But the imponderables involved in antitrust cases may cut heavily in favor of a general rule tailored to the majority of cases.

A second argument is that the restitution analogy collapses when one focuses on the "unjust enrichment" measured not by the increased price exacted but rather by the increased profits made. Harm to plaintiffs is not necessarily the reciprocal of benefit to the defendant. Consider a classic price-fixing case. Treating the defendant cartel as a unit, the object of the conspiracy will be to fix price/production at a level that will leave the greatest gap between total revenue and total cost. This means raising prices above the levels that would obtain under competitive conditions; but the power to raise prices is limited by the loss of sales as prices rise and by the effect of the concomitant production restrictions on costs of producing. In short, the benefit of the cartel may be significantly less than the detriment suffered by purchasers so that a one dollar increase in the price of each unit might yield only a twenty-five cent addition to profits.[221]

The response to this is also straightforward. Normal restitution analysis does not necessarily focus on the defendant's "profits." The "benefit" or "enrichment" to be disgorged may well be opportunities obtained. Thus, the defendant who gambles away misappropriated money will be liable for the value of the money if he loses it and the profits he makes if he wins.[222] It does not follow, therefore, that the net profit of the monopolist should be viewed as the benefit it obtains from its wrongful conduct.

The foregoing discussion may be summarized by noting that trebling may not exceed compensatory levels or restitutionary disgorgement to the extent that the number of plaintiffs seeking recovery is substantially less than the number of persons injured and plaintiffs' cognizable damages are often substantially less than the injury they actually suffer. While no one can ever be sure that trebling (as opposed to doubling or quadrupling) is the best measure of this, it may well serve to do rough justice. Indeed, if there is one thing which seems clear, it is that single damages would be *overgenerous* to de-

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[221] The textual discussion focuses on the harm done by a monopoly to purchasers simply in terms of the price increases they are forced to bear. Given the legal view of antitrust damages, this is entirely appropriate. One could, however, approach the monopoly problem from the economic perspective of "welfare loss" of "consumer surplus." Here, also, gain to the monopolist is less than loss of consumer's surplus. Hovenkamp, *supra* note 48, at 11-14.

[222] *See* RESTATEMENT ON RESTITUTION § 151 (1937).

fendants since the entire class of antitrust victims is rarely involved in the suit and those victims who do sue are often prevented from recovering for all harm suffered.

The Areeda and Turner proposal for a discretionary add-on of double or treble damages is beguiling, but ultimately unpersuasive once these considerations are taken into account.[223] The impact of the innovation would likely be severe since the fruits of a successful suit would be reduced by two-thirds while the costs and risks would remain the same. Indeed, the costs—both to plaintiff and to the court system—could increase substantially since a new issue of the "wittingness" of any violation by the defendant would also have to be proven to obtain multiple recovery, and it would be a rare plaintiff who would not seek to tailor his case to obtain a discretionary add-on.

It is, of course, true that all of these considerations favoring the present treble damage remedy could be taken into account by the judge in deciding whether to award "extra" damages. But that would necessarily add a number of other issues to an already complex proceeding, e.g., the amount of unjust enrichment to the defendant and the number of uncompensated victims. Indeed, if fully explored, these issues might dwarf the underlying dispute. Moreover, the benefit purchased by the added costs of discretionary trebling is at best marginal and at worst illusory. Truly unwitting violators would be treated more fairly because they would not be penalized, but there is no

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[223] Perhaps this can be seen by taking the case offered by Areeda and Turner in which they attempt to show the inappropriateness of treble damages. The "behavior-less monopoly," i.e., a monopoly "free of conduct that the law reprehends as such," 2 P. AREEDA & D. TURNER, *supra* note 33, at ¶ 311c n.9, would not be subject to either criminal sanctions or treble damage actions, allowing only government equity suits. From an efficiency standpoint, however, the rejection of criminal sanctions and treble damages is too facile: while this type of monopolist, by definition, engaged in no wrongful conduct in achieving the monopoly, it also, by definition, continued its monopoly too long. If it should be broken up by a government equity suit, then it can be dissolved "voluntarily," and the existence of criminal sanctions or treble damages provide a strong incentive to do just that.

It is true, of course, that there are difficulties with a private damage suit. Assuming damages are measured by the extent of the monopoly overcharge, the private action must fix the point when a legal monopoly became illegal by its persistent maintenance despite market forces. But this is scarcely insurmountable: the law routinely fixes points on continua to affect legal consequences even if there is some arbitrariness in the process. As for fairness, it is not clear why treble damages are unfair when a monopolist continues to extract its overcharge by having maintained its monopoly too long rather than engaging, voluntarily, in the dissolution *Antitrust Law* believes the law should require.

It may be thought that it is asking too much to expect a going monopoly to dissolve itself prior to a court order. That is, of course, precisely the reason to refuse to rule out criminal sanctions or treble damages for such monopolies. They can provide a motivation that would otherwise be lacking.

guarantee that they could not in fact profit by their mistake in terms of retaining most of the fruits of their violation.

IV. Legislative Reform of the Treble Damage Remedy

The Reagan Administration has proposed a number of modifications to the federal antitrust laws.[224] Although several of these proposals may have significant effects on antitrust policy,[225] the focus of present concern is the attempt to limit treble damage recovery to "per se" violations.[226] If this proposal were to become law, conduct held to

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[224] The President's Cabinet approved the package of proposed statutory changes on March 24, 1983. *President's Proposal*, *supra* note 3, at 713; *see infra* note 228. A somewhat narrower proposal, barring treble damages against joint ventures which disclose certain facts to the Department of Justice and Federal Trade Commission, has been sent to Congress by the President as part of the recommended National Productivity and Innovation Act of 1983, H.R. 3878, 98th Cong., 1st Sess. (1983).

It is more than a little ironic that there are calls for a limitation on treble damages in antitrust at a time when there seems to be a new interest in the treble damage approach in other areas of federal law. For instance, treble damages are available for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, § 1964 (c) (1976 & Supp. V 1981). *See generally* Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 Dick. L. Rev. 201 (1981); Wexler, *Civil RICO Comes of Age: Some Maturational Problems and Proposals for Reform*, 35 Rutgers L. Rev. 285 (1983). Similarly, the House of Representatives has passed the Insiders Trading Sanctions Act of 1983, H.R. 559, 98th Cong., 1st Sess. (1983), which would, *inter alia*, permit the Securities Exchange Commission to see up to three times the amount of profit gained, or loss prevented, by insider trading. Fed. Sec. L. Rep. (CCH) No. 1038, Part One (Sept. 21, 1983).

[225] These proposals would make certain changes in the treatment of intellectual property. More specifically, they would require rule of reason analysis with respect to joint research and development activities and with respect to patent, trademark, and copyright licensing. *President's Proposal*, *supra* note 3, at 681. They would also revise the patent misuse doctrine and expand process patentee rights to block the importation of products built abroad with the protected process. *Id.*

[226] The Supreme Court has utilized two distinct standards for evaluating the legality of an alleged antitrust violation. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965); L. Sullivan, *supra* note 4, at §§ 63-72. Under the first approach the Court will find per se invalid those business relations "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); *see* Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1 (1978); United States v. Topco Assoc., Inc., 405 U.S. 596 (1972).

Under the rule of reason approach the Court will inquire into the reasonableness of an alleged restraint, Standard Oil Co. v. United States, 221 U.S. 1 (1911), and, accordingly, will analyze "the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption." *Topco*, 405 U.S. at 607; Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

be an antitrust violation under the "rule of reason" standard[227] would subject the defendant only to actual damages plus interest.[228]

The origins of this proposal are unclear.[229] In terms of the two strains of criticisms of treble damage already discussed in this article, however, it seems reasonable to infer that the Administration's proposed modification of antitrust remedies derives, directly or indirectly, from both the Areeda-Turner concern with fairness to defendants and from the perception of some commentators that treble damages may deter conduct which is desirable insofar as the risk of such liability provides an incentive to stay well within the boundaries of the law.[230]

These two concerns would in fact be accommodated by adoption of the Administration's proposal. First, the limitation of treble damages to per se offenses would reduce fairness concerns. No longer (or, at least, less frequently) would defendants find themselves paying threefold a plaintiff's damages for conduct which the defendant had little reason to believe was illegal. Instead, the defendant would be charged with treble damages only when the damages are attributable to "agreements or practices . . . which [are] so plainly anticompetitive that they [would be] deemed unreasonable . . . ."[231] Further, insofar as the rule of reason is utilized to analyze cases where there is doubt of

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[227] *See supra* note 226.

[228] *President's Proposal, supra* note 3, at 713. The proposed statutory language would amend § 4 of the Clayton Act to read in important part as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover [threefold the] *actual* damages by him sustained, *simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, such interest to be adjusted by the court if it finds that the award of all or part of such interest is unjust in the circumstances,* and the cost of suit, including a reasonable attorney's fee; *provided, that damages attributable to agreements or practices the nature or necessary effect of which is so plainly anticompetitive that they are deemed unreasonable and therefore illegal without elaborate study in each individual case as to the precise harm they have caused or the business justification for their use shall be trebled.*

Id. at 713 (emphasis in original). The proposal would also similarly amend § 4(a)(2) of the Clayton Act pertaining to state *parens patriae* suits and amend § 4(a) of the Clayton Act to provide for interest on the actual damages obtained in government suits. *Id.*

[229] The proposal has a much narrower precursor in the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at 15 U.S.C. §§ 4001-4021 (1982)), which limits certain exporters to single damage liability, 15 U.S.C. § 4016(b)(1).

[230] *See, e.g.*, Coase, *supra* note 56, at 27; *see supra* notes 55-65 and accompanying text.

[231] *President's Proposal, supra* note 3, at 713; *see supra* note 228.

the competing advantages and disadvantages, the "single damage" approach would reduce the overdeterrence possibility by making such conduct less risky. In terms of the "evils" identified by Elzinga and Breit, both "perverse incentives" and the "misinformation" effect would be reduced as the size of the pot of gold shrinks, although neither would be eliminated, and the problems of "reparations costs" would remain.[232]

The Administration proposal may be criticized even if one accepts its goals: drawing a line between per se antitrust offenses, which continue to generate treble damage liability, and rule of reason violations, which will subject the offender to lesser sanctions, may not be appropriate. Conduct subject to "reasonableness" analysis is not necessarily less heinous than actions which are reviewed under a per se standard. Rather, the rule of reason is frequently utilized to address conduct with which the courts are unfamiliar. Such conduct may be as pernicious as recognized per se violations. Indeed the conduct now recognized as per se illegal—including price-fixing—was at one time analyzed under a reasonableness standard.[233] On the other hand, at least one commentator has argued that the Administration's proposal limit treble damages: further, even conduct which is now categorized as per se illegal should not necessarily trigger treble damage liability.[234]

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[232] Another considerably different justification has been offered for a limitation of the treble damage rule. Donald I. Baker, former head of the Antitrust Division, argues that the availability of automatic treble damages "seems to have had a number of distorting effects in antitrust jurisprudence." Baker, *supra* note 180, at 20. His point is that the draconian nature of the treble damage remedy has led to rules which might not otherwise be appropriate. These include (1) the narrow rules of "standing" to assert antitrust damage suits, primarily the *Illinois Brick* limitation of damage recovery to "direct purchasers"; (2) the judicial extension of antitrust immunities to conduct which arguably is not exempt from antitrust scrutiny; and (3) the statutory creation of immunities by Congress. *Id.* at 20. In sum, the Baker position is that some limitation on treble damage recovery would in fact free antitrust law to be broader in its reach and perhaps broader in the numbers of persons who will have some claim to damage recovery under the statutes.

Although there is undoubtedly some basis to Mr. Baker's position, it seems overdrawn. For example, it is doubtful if antitrust "standing" doctrine is any more amorphous or restrictive than analogous doctrines in other areas. Thus, constitutional "standing" is notoriously confused, *see generally* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 68-83 (1978), and first year law students are traditionally bedeviled by Palsgraf v. Long Island Railroad Co., 248 N.Y. 339 (1928). Secondly, the creation of judicial or legislative antitrust immunities, however troublesome, can scarcely be attributed to the treble damages remedy alone. Numerous other explanations ranging from purely political considerations to the difficulties of integrating the antitrust laws into areas with more pervasive federal regulations are conceivable and no doubt better explain particular immunities.

[233] *See generally* M. HANDLER, ANTITRUST IN PERSPECTIVE (1957).

[234] *E.g.*, Baker, *supra* note 180, at 20-21. Mr. Baker, while approving of some limitations on treble damages, is skeptical of the line drawn by the Administration proposal: the dividing line

While one could argue about the wisdom of where precisely the Administration proposes to draw a line between treble damage and single damage liability offenses in terms of the policy goals the proposal apparently seeks to achieve, a more fundamental concern is whether *any* limitation on treble damage recovery is appropriate. Previous parts of this article have cast doubt on concerns over whether fairness to defendants or inefficiency is a reason to limit (or abolish) the treble damage action.[235] The Reagan Administration proposal offers an opportunity to present the case for treble damages in a more positive fashion.

Essentially, any justification for the treble damage action must rest on two bases. At a minimum, it must be grounded on fairness, but that concern must first concentrate on the victims of antitrust violations rather than those who perpetrate harms. It is true that any particular prevailing plaintiff may theoretically be overcompensated, but there is reason to doubt that this will frequently occur due to the large gap between actual harm and provable harm.[236] The treble damage recovery is a means of righting that balance by compensating the plaintiff for damages not adequately accounted for in the damages equation.

In any event, a second fairness justification, although abstract, must be considered. While ideally the legal system would do perfect justice in each individual case, it has long been recognized that less precisely balanced justice is essential for the functioning of the judicial process. Just as rules such as the statutes of frauds and statutes of limitations are permitted to work injustices in individual situations in the belief that they will lead generally to more just results over the multitude of cases, so also may it be necessary in antitrust to decide whether applicable remedies can be as finely tuned as some commentators would suggest. It is here that the question of fairness to the class of antitrust victims comes into play. If, as this article has argued, the

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between "per se" offenses and rule of reason cases is too uncertain for him. Rather, Baker would make single damages the general rule and treble damages available only for one class of cases: "a covert agreement among competitors to fix prices or allocate customers, territories, or markets." *Id.* at 21. For Baker, the critical point is to limit treble damages to the most reprehensible of antitrust conduct. *Id.* Baker would also build in a disincentive for plaintiffs seeking treble damages—he would make such persons liable to defendant for the costs of suit, including a reasonable attorney fee, if they did not prevail. *Id.* This risk would not be faced by a plaintiff who sought only actual damages. *Id.*

Courts have also struggled with the process of distinguishing per se from rule of reason violations. *See* Baker, *supra* note 180, at 21 & n.23 and cases cited therein.

[235] *See supra* notes 43-224 and accompanying text.

[236] *See supra* notes 213-16 and accompanying text.

systemic tendency of damage and standing rules is to undercompensate, treble damages may be one way to right the balance somewhat by shifting back onto violators the true costs of their conduct. While one can question the accuracy of the multiplier selected by Congress, few of the arguments against treble damages even attempt to put broader justice concerns into focus. The result is, in the name of fairness to defendants, a systematic bias against antitrust victims.

In the process of compensating victims, treble damages also achieve the second goal of creating a significant deterrent effect for potential violators. That deterrent effect cannot be underestimated. Historically, there has been a very limited number of meaningful civil or criminal monetary penalties imposed on antitrust offenders.[237] Further, the rarity of actually putting antitrust violators in prison is well recognized.[238] This is especially true in rule of reason cases, where the government has traditionally hesitated even to seek criminal sanctions.[239] Although there are a few celebrated cases of equitable remedies, e.g., dissolution of monopolies, the relief obtained by the government in the typical antitrust suit is merely a consent decree.[240] As a result, the treble damage remedy has been the major sanction actually imposed throughout the history of the Sherman Act.[241]

It is, of course, true that the size of a deterrent varies with the degree to which one wants to deter the conduct in question. And it is equally true that antitrust does not view all anticompetitive conduct as equally heinous. Some violations fall closer to core antitrust values than others, and some offer virtues which, if not sufficient to redeem the conduct in question, at least mitigate its rigors. That fact, coupled with the fear of deterring beneficial conduct which would probably be held legal but which is close enough to the line to be avoided by risk-averse companies, might warrant some modification of the treble

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[237] Until the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 1(c) (1982), the maximum criminal monetary penalty was $50,000. Even today, the penalty is only $1,000,000 for a corporation and $100,000 for other persons. 15 U.S.C. §§ 1-3. Obviously, the maximum penalty may well be less than the harm caused by even relatively minor anticompetitive activities. And it has been stated that the fines actually imposed, which frequently do not reach the statutory maximum, have been "little more than license fees when compared with the benefits realizable from price-fixing." Baker & Reeves, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 619 (1977); *see also*, Liman, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 630 (1977).

[238] *See, e.g.*, Baker & Reeves, *supra* note 237, at 623 & n.16.

[239] *Id.* at 623-24.

[240] *See* Sullivan, *supra* note 122, at 826 n.11.

[241] Berger & Bernstein, *supra* note 30, at 848-49; DuVal (I), *supra* note 24, at 1025.

damage action, whether along the lines proposed by Areeda and Turner, or by the Reagan Administration.

The problem with any modification of the treble damage action is twofold. First, legal rules as applied often vary significantly from legal rules as announced. The very unwillingness of the judiciary to utilize the more severe sanctions now available for antitrust violations hardly offers a basis for believing that any modification of the mandatory treble damage rule would be used sparingly. Instead, there is every reason to believe that discretion would be used to broadly exempt defendants from treble damages.[242] Such a result is to be anticipated directly from the Areeda-Turner approach, which would grant discretion (unconfined by any as-yet-articulated principles). The tendency, however, would also be present in the Administration's proposal. The per se categories are scarcely so unyielding that judges could not often shift cases from per se illegal to rule of reason illegal if it would avoid the "punitive" impact of treble damages.

The second problem with any modification is more fundamental and is not easily avoidable by manipulation of the Administration's proposal. It is simply the inevitable deterrent effect on innovative suits. It is common ground to every attack on treble damages that the more "innocent" the conduct, the less appropriate are treble damages. But it is obvious that it is precisely with respect to conduct not presently recognized as illegal that greater incentives are needed if suits are to be brought.

This is not to argue that the state of antitrust today requires massive readjustments to be worked by private actions. Nor is it to encourage great numbers of new cases. The point is simply that the obstacles to private suits are formidable, despite the treble damage reward. Even under the prevalent favorable remedial scheme, antitrust practitioners are few in number in view of the economic importance of the discipline and prospective clients are frequently unwilling or unable to finance the complex litigation that typifies the antitrust suit, even the "small one." The possibilities of attorneys' fees and treble damages make practicable actions which would otherwise not

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[242] Two cases which illustrate the pliancy of per se categories are Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979) and National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). The former case involved apparently per se conduct which was ultimately recognized as being subject to the rule of reason. The latter case is apparently a rule of reason decision, but the analysis is so straightforward that the determination of illegality was more readily reached than in some per se decisions.

be brought. If we are to take antitrust law seriously, it may be necessary to provide such incentives for enforcement.

Ironically enough, the very package of which the treble damage limitation is a part constitutes Reagan Administration proposals designed to free American competitive innovations.[243] But the common ground of all proposals to limit treble damages is to deter antitrust innovations by virtue of removing the incentive to bring suits under new theories or even under new applications of old theories. The thrust is conservative in the worst sense of the word: it must be rooted in a belief that antitrust law and analysis has reached a stage of such refined development that changes are to be discouraged because they will, individually or on balance, make things worse, not better. Defending the status quo is one thing; freezing it is another. Especially in a time when substantive doctrines are being cut back by the federal enforcement agencies and by the courts, it seems ill-advised to remove, under some now unrecognized legal, economic, or social theory, the incentives for private plaintiffs to establish in court the illegality under the Sherman Act of conduct that, for whatever reason, our society and legal system now tolerate.

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[243] The Reagan Administration proposal has been described as "part of an international trade bill designed to improve the competitiveness of U.S. firms in international markets." *President's Proposal*, *supra* note 3, at 713.