



FACULTY OF LAW
University of Lund

A Master of European Affairs Legal Thesis

by Jonathan D. Messinger

“Would the incarceration of
hard core corporate wrongdoers
more effectively, proportionately and
dissuasively deter economic crime than
administrative sanctions currently employed
under the European competition law regime?”

of 20 Points

for Advisor Christopher Wong

A European Criminal Legal Study

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TABLE OF CONTENTS

PREFACE INCLUDING STYLISTIC CONSIDERATIONS	1
SUMMARY OF THESIS OBJECTIVES	3
RELEVANT ABBREVIATIONS FOR THIS PROJECT	7
INTRODUCTION: ECONOMIC CRIME PREVENTION.....	10
I. SHERMAN’S MARCH: ANTITRUST EVOLVES.....	12
II. EUROPEAN APPROACHES TO COMPETITION.....	15
COMPETITION PRIMER.....	15
REGULATION 1/2003	18
FINES NOT CRIMES.....	19
III. INTERNATIONAL, NATIONAL INTRA-EUROPEAN, ASIAN AND COMPANY “BEST PRACTICE” APPROACHES TO COMPETITION LAW REGULATION	20
3.1 INTERNATIONAL COOPERATION CRACKS CARTELS..	20
3.2 EUROPEAN NATIONAL COMPETITION SOLUTIONS.....	23
3.2.1 <i>THE NETHERLANDS: “SOFT”</i>	23
3.2.2 <i>GERMANY: “MIDDLE OF THE ROAD”</i>	25
3.2.3 <i>THE UK: “HARD”</i>	27
3.3 ASIAN COMPETITION DEVELOPMENTS	29
3.4 CORPORATE SELF-REGULATION.....	31
IV. LEARNING FROM THE LEGENDS: A MULTIDISCIPLINARY STUDY OF LEADING WESTERN ECONOMIC CRIMINAL SCHOLARS OVER THE CENTURIES	32
4.1 BECCARIA: EGALITARIAN JUSTICE?	32
4.2 BENTHAM: LAW AS PHILOSOPHICAL BATTLE	35
4.3 SUTHERLAND: “WHITE COLLAR” CRIME	39
4.4 POSNER: A POSTULATORY POWERHOUSE	42
4.5 BECKER: ECONOMIC CRIME THEORY	44
4.6 HENNING: SENTENCING CONSIDERATIONS	47
V. UNRAVELING ECONOMIC CRIME AT THE HIGHEST LEVELS OF EUROPEAN BUSINESS AND POLITICS: THE DISSOLUTION OF ELF ACQUITAINE AND ITS LINGERING STENCH	49
VI. EUROPEAN CRIMINAL COMPETENCE RECONSIDERED: ENVIRONMENTAL PROTECTION FIRST, BUT WHAT NEXT?	53
CONCLUSION: FUTURE ADJUSTMENTS IN COMPETITION LAW ARE NECESSARY	56
BIBLIOGRAPHY AND FURTHER READING	59
ACKNOWLEDGEMENTS	62

PREFACE INCLUDING STYLISTIC CONSIDERATIONS

The author of this thesis has been blessed with the extraordinary opportunity, from 17 Augusti 2005 through 3 Juni 2006, to collaborate with an extraordinary group of talented legal minds, both Professors and Students, at Juridicum, Lunds Universitet, Sverige.

The rigors of learning graduate-level European law, as a complete neophyte entering the Master of European Affairs Programme, have enriched my life in ways still unfolding, and I am ever grateful for the support, patience and “tough love” demonstrated by Master of European Affairs Coordinator Extraordinaire Sandra Forsén and the rest of the team here, from Director Hans Henrik Lidgard to Professor and Advisor Christoffer Wong to Writing Colleague, Confidante and Dear Friend Lina Fransson. Fellow MEA Mate and More Ekaterine Egutia provided crucial template and formatting help, perhaps figuratively as well as literally, for this project. (At the conclusion of this paper there is more space for recognition of many others upon whose wisdom and guidance I have heavily leaned during this magical year of learning and living.)

A comment at the outset of this project is required regarding my writing style, given that legal scholarship is characterized frequently by highly technical language at times doomed to offend the sensibilities of the layperson. For better and worse, my writing has been as much inspired by James Joyce as William Blackstone, and tends to meander into fields of colloquialisms, conjecture, even fantasy, all of which can well be argued are anathema to traditional legal writing. Those of you willing to indulge my admittedly unorthodox approach to solving legal problems may find the text that follows stimulating and informative. Enjoy our journey together. Others may wish to merely peruse most sections and skip ahead to the analysis of the European Court of Justice Judgment of 13 September 2005 in Case C-176/03, found in the final Chapter of this thesis, for the “rub.”

Prior to matriculating to Lund University, I have only completed one course in the field of international law. My Professor, a highly respected legal lecturer and writer, wrote at the conclusion of my final exam, after passing me with the lowest possible score available:

“Very poor. You will definitely fail the Bar if you answer questions in this manner!”

As a stubborn optimist who favors redemption over despair, I can report to you some additional information regarding this incident. On 1 May, 2006 the Commonwealth of Massachusetts alerted me that I passed the Bar exam. Two days later, the State of New York shared with me similar exciting news.

On 5 May 2006, one of the very first congratulatory messages arrived via electronic mail from Shanghai, where said international law Professor was guest lecturing:

“Dear Jonathan, Well deserved. What are your plans now?...Keep in touch...”

Learning is a lifelong commitment, especially as our World gets smaller every day. So in circles of law and life, ask not always about the circumference. Instead, enjoy your trip around the arc...

Peace and Love,

-Jonathan D. Messinger, Esquire

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SUMMARY OF THESIS OBJECTIVES

As this thesis is submitted and defended in Europe, a significant trial is winding down on the other side of the Atlantic. Former successive Chief Executive Officers of the Texas energy company Enron, Ken Lay and Jeff Skilling, are accused of massive corporate fraud.¹



Lay



Skilling

The United States government indicted both men for knowingly conspiring to manipulate earning reports prior to the company's tumble into what at the time, in December, 2001, was the largest corporate insolvency in history. Thousands of workers lost their jobs and their pensions provided for in large part by Enron stock, and the public outcry was overwhelming. The sentiment of most American citizens, already reeling from the recent physical and psychic devastation inflicted upon our citizenry during the September 11, 2001 attacks on New York City and Washington, D.C., was clear and severe, essentially: "Get those greedy bastards and bring them to justice!"

Wealthy corporate tycoons have always played a fascinating dual role in American society, simultaneously adored and envied, and this latest saga is proving no exception. The lead article in the New York Times' business section of May 9, 2006 notes, without hyperbole, "Closing arguments [begin] next week in a trial that could define an era of American business history."⁴

¹ US v. Skilling and Lay, 2006 WL 1155566.

² The Houston Chronicle both publishes these photographs and writes extensively about this trial and its permutations online at <http://www.chron.com/news/specials/enron>.

³ *Id.*

⁴ Alexei Barrionuevo and Kurt Eichenwald, "What Remains Unanswered in the Enron Trial," N.Y. Times, May 9, 2006. This article is available online at

The Enron trial has significant legal implications, which piqued my intellectual curiosity as a student of European competition law during my studies in Lund, and prompted several questions worthy of further study: First, why are EU leaders of corrupt companies merely fined and not jailed for hard core, egregious antitrust violations? Second, is Community law evolving in such a way that the EU will gain criminal competence at the “federal” level, instead of leaving penal enforcement to the Member States alone? Lastly, does the ECJ Judgment of 13 September 2005 in Case C-176/03,⁵ concerning the serious breach of environmental law, open the door for such competence in the immediate future?

In order to make such a large topic manageable with time limited, Advisor Christoffer Wong encouraged me to simplify my approach and focus upon three major issues. First, because the EU is an economic union, the liberalization of markets (including the four freedoms of goods, services, persons and establishment) is placed at a premium. Anticompetitive activity, an impediment to such progress, is thus generally disfavored. Second, because anticompetitive practices are damaging to the goals of the common market within Europe, the objective of law enforcement professionals should be to implement effective, dissuasive and proportionate means of eliminating such a scourge. Third, administrative sanctions against undertakings do not always achieve these ends. Executives in charge of multinational companies are often flush with revenue, and pay damages on the backs of their stakeholders, not from their own proverbial pockets, which arguably is neither effective, dissuasive or proportionate. New solutions may well be needed for the future. So is incarceration for the worst offenders such a solution?

<http://www.nytimes.com/2006/05/09/business/businessspecial3/09enron.html>.

⁵ Case C-176/03, Commission v. Council, Judgment of the Court of 13.9.2005, N.Y.R.

Not only had I at the outset of this thesis work never studied European competition law, I had similarly never studied its American antitrust counterpart, so this mission has provided an exciting dual opportunity, (1) personal enlightenment on this topic, and (2) a chance to share the information gathered with others who are interested in this field that may not have an extensive background in it either. The thesis is structured as follows:

An introduction to contemporary economic crime challenges is presented.

Chapter One investigates the grandfather of antitrust legislation, the U.S. Sherman Act of 1890, and its impact.

Chapter Two focuses upon the formulation and expansion of Sherman's European supranational competition counterparts, especially Articles 81 and 82 EC and Regulation 1/2003.

Chapter Three offers a brief overview sample of national competition law regimes in Europe, Asia and developing concepts of internal company "best practice" responsibilities.

Chapter Four takes a necessary step back, and delves into the history of economic criminal scholarship, emphasizing contributions from leading doctrinal contributors to modern European legal, philosophical, sociological and economic theoretical frameworks.

Chapter Five diagnoses a significant corporate scandal in modern Europe, to underscore the extent of the current problem.

Chapter Six provides some analysis of the ECJ Judgment of 13 September 2005 in Case C-176/03, which it can be argued vests criminal competence with the EU for the very first time, and creates some fascinating future applications in the competition law fields, among others.

My conclusion is that incarceration should be more actively considered as a weapon in the European competition law enforcement arsenal.

RELEVANT ABBREVIATIONS FOR THIS PROJECT

AAI	American Antitrust Institute
ADB	Asian Development Bank
ABS	Abus de Bien Sociaux (A French Corporate Délit, a Penal Offense)
ADP	Abuse of Dominant Position
ADM	Archer Daniels Midland Company
BP	Best Practices (Of Corporations)
BRIC	Brazil, Russia, India and China
CDU	Christlich Demokratische Union (German Christian Democratic Union)
CEO	Chief Executive Officer
CFA	Communaute Financiere Africaine (African Financial Community)
CFO	Chief Financial Officer
CIROC	Centre for Information and Research on Organised Crime
CT	Constitution for Europe
DG	Directorate General (of European or Member State Competition Authorities)
DOJ	Department of Justice of the United States
EAW	European Arrest Warrant
EC	European Community

ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
FTA	Fair Trading Act of 1973 from the United Kingdom (Replaced by the 2002 Enterprise Bill)
FTC	Fair Trade Commission of the United States
HEUNI	European Institute for Crime Prevention and Control in Helsinki, Finland
ICN	International Competition Network
ICPO	International Criminal Police Organization (Often Referred to as Interpol)
IECL	Institute of European and Comparative Law in Oxford, England
IPR	Intellectual Property Rights
JFTC	Japanese Fair Trade Commission
JHA	European Justice and Home Affairs (Also known as the “Third Pillar”)
JV	Joint Venture
M & A	Mergers & Acquisitions
MS	Member States of the European Union
NYR	Not Yet Reported (As in an ECJ Judgment)

OECD	Organization for Economic Cooperation and Development (Of the United Nations)
OFT	Office of Fair Trading in the United Kingdom
OJ	Official Journal (of the European Union)
OPEC	The Organization of Petroleum Exporting Countries
PACI	Principles for Combating Bribery
PFA	Price Fixing Agreement
RPM	Resale Price Maintenance
SEC	Securities and Exchange Commission of the United States
TraCCC	Transnational Crime and Corruption Center
TEU	Treaty on European Union (Commonly referred to as Maastrich)
TM	Trademark
UK	United Kingdom
UN	United Nations
USD	United States Dollars
USSC	United States Supreme Court
StGB	Strafgesetzbuch (German Law)
WEF	World Economic Forum
WTO	World Trade Organization

INTRODUCTION: ECONOMIC CRIME PREVENTION

“The detection, prosecution, and deterrence of cartel offenses is the highest priority...because of the breadth and magnitude of the harm that they inflict...[on] businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, *securing convictions and jail sentences against culpable executives...*”⁶

These United States (US) Department of Justice (DOJ) official statements from a 2005 policy speech are sentiments echoed Worldwide by all members of the International Competition Network (ICN), including the European Union (EU). Or are they?

On the contrary, as of this writing it is clear that many competition authorities disagree that incarceration is an appropriate remedy to deter individual company wrongdoers, even those who participate in what are known in Europe as “hard core” cartels. Article 23(5) of Regulation 1/2003, which governs contemporary European competition law enforcement, explicitly states that Commission decisions “shall not be of a criminal law nature.”⁷

⁶ Scott D. Hammond, Acting Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice. Speech before the American Bar Association 10.1.2005 entitled “An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program” (emphasis added). Available online at www.usdoj.gov/atr/public/speeches/207226.

⁷ OJ L1, 4.1.2003, pp. 1-25. (See especially Chapters V, “Powers of Investigation,” and VI, “Penalties.”) An online version of this important competition law document is available at http://europa.eu.int/servlet/portail/RenderServlet?search=DocNumber&lg=en&nb_docs=25&domain=Legislation&coll=&in_force=NO&an_doc=2003&nu_doc=1&type_doc=Regulation.

The definition of hard core cartel is subject to significant debate, such that one is tempted to recall the famous line from US Supreme Court Justice Potter Stewart, commenting on a different type of hard core material, “I know it when I see it.”⁸ Hard core cartel activities are often conducted in secret business meetings, which renders enforcement difficult. Legislation designed to combat this scourge must be powerful, yet flexible, especially as international cooperation between anticompetitive market forces expands with each passing day in this cutthroat global marketplace. The time is nigh for more analysis of what British legal scholar Christopher Harding terms the “supranational regulation of business conspiracy.”⁹ The thesis that follows is designed to offer a window to such trends, with an emphasis on European conduct.

Are fines authorized by Regulation 1/2003 truly effective, dissuasive and proportionate sanctions to punish hard core economic criminals? To answer such a controversial question, it is necessary to trace the history of Western economic crime enforcement over the recent Centuries. Let us begin with the first comprehensive anti-cartel legislation after the industrial revolution, the US Sherman Antitrust Act of 1890.¹⁰

⁸ Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

⁹ Christopher Harding, “Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy,” European Journal of Crime, Criminal Law and Criminal Justice, Vol. 12/4, 2004, pp. 275–300.

¹⁰ Sherman Antitrust Act, 15 U.S.C. 1 §§ 37 (1890).

I. SHERMAN'S MARCH: ANTITRUST EVOLVES

Conspiracy to fix prices has been a crime in the United States since 1890 under Article One of the pioneering antitrust laws crafted by Ohio Senator John Sherman:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.¹¹

Furthermore, since 1972 conspiracy to fix prices is classified as a felony instead of the lesser offense of misdemeanor:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony...punished by fine...or by imprisonment...or by both said punishments, in the discretion of the court.¹²

Sherman designed this landmark legislation during a time in United States' history when several monolith businesses, whose directors were known as the "robber barons;" such as U. S. Steel, J. P. Morgan Banking and Standard Oil, dominated their respective industries. Yet the first antitrust Supreme Court case was not the famous 1911 Standard Oil case¹³ that dissolved the monopoly grip

¹¹ Id at § 1.

¹² Id at § 2.

¹³ U.S. v. Standard Oil, 221 U.S. 1 (1911). See also Ron Chernow, Titan: The Life of John D. Rockefeller, Sr., Random House, New

held by John D. Rockefeller and associates on that then-and-now vital fossil fuel, but instead the E. C. Knight “sugar cartel” case.¹⁴ In this lesser-known decision from 1895, the Court decided 8-1 against dissolution of a 98% domestic sugar market monopoly (the Revere Company of Boston was the only distributor to resist a leveraged buyout by Knight Company). The majority concluded that sugar was a “necessary of life,” and allowed Knight to continue its dominant position, unabated.

Justice John Marshall Harlan provided the lone voice of dissent in Knight [he also supplied the only vote against the majority in Plessy v. Ferguson,¹⁵ a decision most foul one year after Knight which preserved racist, segregationist “separate but equal” laws in the Southern United States, repercussions of which are still being felt to this day]. Harlan argued in Knight:

Any combination...that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other states, or to be carried to other states—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the states; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers

York (1998); and Elizabeth Granitz and Benjamin Klein, “Monopolization by Raising Rivals’ Costs: The Standard Oil Case,” Journal of Law and Economics, Vol. 39, No. 1, April, 1996, pp. 1-47.

¹⁴ U.S. v. E.C. Knight Co., 156 U.S. 1 (1895). The full text of this decision is available online at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=156&page=1>.

¹⁵ Plessy v. Ferguson, 63 U.S. 537 (1896).

delegated by all, representing all,
acting for all.¹⁶

Thus Harlan cleared a path for more aggressive antitrust enforcement judgments, and over the decades that followed the Court created a specific class of anticompetitive behavior deemed *per se* illegal, to be found via direct, even circumstantial, evidence. Such behavior—price fixing, bid rigging, and market allocation schemes—would not be tolerated under any circumstances. In 1914, Sherman was supplemented by the Clayton Antitrust Act,¹⁷ drafted by Henry de Lamar Clayton of Alabama, legislation less hostile to labor unions than its predecessors (historically, corporations could choose to dissolve such organizations without retribution at law or equity). Clayton authorized treble punitive damage awards and injunctive relief sanctions. Both the US Department of Justice (DOJ), which handles criminal antitrust enforcement, and the Federal Trade Commission (FTC), its civil counterpart, take full advantage of this arsenal of tools in the prosecutorial and regulatory arenas, so much so that when taken in concert, Sherman and Clayton are often referred to as the “Magna Carta of free enterprise.”¹⁸

¹⁶ See footnote 14, emphasis added.

¹⁷ Sherman Antitrust Act, 15 U.S.C. §§ 12-27 (1911).

¹⁸ *U.S. v. Topco Assoc. Inc.*, 405 U.S. 596, 611 (1972). See also Daniel R. Karon, “Collusion Central: Helping Your Clients Deal with Price Fixers.” *Business Law Today*, published by the American Bar Association, Vol. 11, No. 3., January, 2002. Available online at <http://www.abanet.org/buslaw/blt/2002-01-02/karon.html>, and the FTC “Policy Statement on Monetary Equitable Remedies in Competition Cases,” available online at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.

II. EUROPEAN APPROACHES TO COMPETITION

COMPETITION PRIMER

What is the purpose of competition law in Europe? Title VI of the Treaty Establishing the European Community (EC) provides us the answer, with its “Common Rules on Competition, Taxation and Approximation of Laws.”¹⁹ The European Union (EU) is the World’s largest trading area,²⁰ and is rooted in Articles 2 and 3 EC, which express the importance of the common market. Commercial fair dealing is regarded as so fundamental to European integrative principles that a concluding provision was installed in Article 3(2) EC to “promote equality, between men and women.”²¹ This suggests an inextricable link between the freedoms of contract and individual human rights, a highly evolved and in many ways a uniquely European construct. Further evidence of this theme is found in the free movement of goods, persons, services and capital provisions, Articles 23-60 EC. For example, Article 27(b) encourages, “developments in conditions of competition within the Community insofar as they lead to an improvement in the competitive capacity of undertakings.”

¹⁹ Ch. 1 “Rules on Competition,” Sec. 1, “Rules Applying to Undertakings,” Art. 81 and Art. 82 EC, are especially pertinent to our discussion.

²⁰ T. C. Hartley, The Foundations of European Community Law, p. 5, Oxford University Press, Oxford (2003).

²¹ Art. 3(2) EC I would argue is more than an expression of patronizing, patriarchal guilt. It is a formal admission that commercial and personal interests are impossible to separate in industrialized societies.

Lund University Professor Hans Henrik Lidgard theorizes that four anticompetitive forces are generally problematic in Europe,²² summarized as:

- (1) collusive agreements which deny market/product access, harm consumers and lead to price increases;
- (2) market dominant position exploitation to the detriment of competitors and the purchasing public;
- (3) anticompetitive implications stemming from company merger and acquisition activity; and
- (4) market manipulation by State actors.

The European Community defines five activities that rise to a hard core level of infringement. Delineated in Article 81(1) EC, businesses who choose to:

- (1) directly or indirectly fix purchase or selling prices or any other trading condition;
- (2) limit or control production, markets, technical development, or investment;
- (3) share markets or sources of supply;

²² Hans Henrik Lidgard, "Competition Classics: Material and Cases on European Competition Law and Practices (Part I)." See pp. 11-14. of this Master of European Affairs Law course material from the University of Lund, Sweden.

(4) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

(5) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

are likely to arouse suspicion and trigger a Competition Authority investigation. Though the preceding list is not exhaustive and quite broad in scope, it does set the tone for proscribed behavior at or among “undertakings,” a EU term of art for business entities no matter how financed.²³ Smaller undertakings are generally exempt from competition authority investigation, as their activities are to be considered *de minimis*.²⁴

Amsterdam antitrust attorney Hans E. Urlus explains the term hard core cartel activity to his clients in a succinct and comprehensible way. A synopsis of his explanation is that horizontal agreements (those between separate undertakings) that fix prices, limit production, share markets or sources of supply, and vertical agreements (those among a single undertaking at different levels of the supply chain) that fix resale prices or confer territorial protection are *verboden*.²⁵ The European Commission is “legally empowered to require undertakings to immediately cease infringing anti-competitive behavior and may impose on them behavioral or structural remedies

²³ Case C-41/90, Hofner and Elser v. Macroton GmbH [1991] ECR I-1979, para. 21.

²⁴ Under EC law, undertakings that control less than 10% of the market for horizontal agreements and 5% for vertical, respectively, are considered too small to warrant competition investigations.

²⁵ Hans E. Urlus, “European Competition Law: A High Level Review of Issues Relevant to the Distribution of Goods in the EU,” published online June 2005 at <http://www.gtlaw.com/pub/alerts/2005/0605>.

which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.”²⁶

REGULATION 1/2003

Council Regulation 1/2003²⁷ is a significant recent change in European antitrust law enforcement. It has streamlined cooperation between the Directorate General (DG) for Competition and the now 25 Member States. Article 3 requires all EU member national competition authorities to bring any “agreements, decisions by associations of undertakings or concerted practices affecting trade” between them into direct compliance with Articles 81 and 82 EC, yet allows Member States to design laws that are even more strict if they so choose. In addition, Articles 81 and 82 EC are to be directly applicable in National Courts within the EU.²⁸

Investigative powers are enhanced by Articles 20-22 of Regulation 1/2003 as well, only limited by the stipulation under Article 20, Section 8 that “coercive measures are neither arbitrary nor excessive having regard to the subject matter of the inspection.”²⁹ Premises searches of individual corporate actors and the requirement that officers and employees appear and give statements are emphasized throughout Chapter 5 of Regulation 1/2003. Tactics such as “dawn raids,” wherein competition authority investigators use the element of surprise to secure “smoking gun” material is encouraged, and search and seizure yields have expanded exponentially in the digital age as increasing quantities of computer forensic evidence is gathered from data removed from company hard drives.³⁰

²⁶ “Anti-Cartel Enforcement Template,” a EU publication completed 16.9.2005, available online at <http://europa.eu.int/comm/competition/international/multilateral/template.pdf>, at p. 15.

²⁷ OJ L1, 4.1.2003, pp. 1-25.

²⁸ Id at Ch. 1, “Principles,” Art. 3(1).

²⁹ Id at Ch. 5, “Powers of Investigation,” Art. 20(8).

³⁰ The ICN is just now beginning to publish more information on this topic. See the online “manual” available at

FINES NOT CRIMES

Fines are the most common mechanism for enforcing competition law in the European Union, and can be quite “steep” when compared to other Worldwide regimes. Regulation 1/2003 authorizes penalties against undertakings of up to 10% of their annual total turnover, regardless of specific area affected by the anticompetitive activity.³¹ Such penalties are growing in severity with each passing year. The pecuniary penalties imposed against pharmaceutical giant Hoffman-La Roche (462 million Euros) and computer technology leader Microsoft (497 million Euros in addition to periodic penalty payments) are but two recent examples. Yet it must again be emphasized that criminal sanctions are expressly banned under Regulation 1/2003. Refer to Chapter 6 “Penalties” at Article 23(5), which reads, in its entirety:

Decisions taken pursuant to paragraphs 1 and 2 [of the penalty section] *shall not be of a criminal law nature.*

<http://www.internationalcompetitionnetwork.org/capetown2006/DigitalEvidenceGathering.pdf> for additional information and references for further study of this key topic.

³¹ OJ L1, 4.1.2003, pp. 1-25. See Art. 23 and 24, emphasis added.

III. INTERNATIONAL, NATIONAL INTRA-EUROPEAN, ASIAN AND COMPANY “BEST PRACTICE” APPROACHES TO COMPETITION LAW REGULATION

3.1 INTERNATIONAL COOPERATION CRACKS CARTELS



32

European Member State Authorities are taking cartel containment cues from the EU, who in turn borrow much of their strategy from the US. Note the 2004 DOJ assertion that:

The “hallmarks of a successful anti-cartel enforcement program are (i) the availability and imposition of severe sanctions for those found to be engaging in cartel conduct; (ii) effective legal investigative tools; (iii) a high risk of detection; and (iv) transparency and predictability throughout the enforcement program.”³³

³² The flag depicted here is the symbol of the United States Mission to the European Union. More information on this organization is available online, where this flag is published, at http://useu.usmission.gov/About_The_EU/About_The_EU.asp. The European flags depicted later in this Chapter are published online on the European Union: Delegation of the European Commission to the USA website. For more information, see <http://www.eurunion.org/states/MSFlags.htm>.

³³ Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, “The Basics of a Successful Anti-Cartel Enforcement,” a speech delivered to the Seoul Competition Forum in the Republic of Korea on 20.4.2004. This document is

The US Sherman Act utilizes its powerful “long arm jurisdiction” to catch any “intended and substantial effect[s] in the United States”³⁴ of antitrust conduct, creating what has come to be known as the “Effects Doctrine.” Europe uses a comparable system, called the “Implementation Test,” established under the “Wood Pulp” case³⁵ precedent by the ECJ. What is most significant about this parallel transatlantic cooperation is that both the EU and US are openly declaring that trade is no longer confined to traditional national boundaries in and among continents. In the chart below, compiled by the US DOJ/FTC,³⁶ take note that every one of the largest cartel fines in Sherman Act history are international in character:

available online at
<http://www.usdoj.gov/atr/public/speeches/203626.htm>.

³⁴ Hartford Fire Insurance Co. v. California, 113 U.S. 2891, 2909 (1993).

³⁵ A. Ahl. Osak. v. Comm., 1988 E.C.R. 5193 (“Wood Pulp I”).

³⁶ See joint US DOJ/FTC policy message from April 2005 entitled “Antitrust Enforcement Guidelines for International Operations,” available online at <http://www.usdoj.gov/atr/public/guidelines/internat.htm> for this chart and additional information about international cartel enforcement strategies.

ANTITRUST DIVISION				
Sherman Act Violations Yielding a Fine of \$10 Million or More				
Defendant (FY)	Product	Fine (\$ Millions USD)	Geographic Scope	Country
F. Hoffmann- La Roche, Ltd. (1999)	Vitamins	\$500	International	Switzerland
BASF AG (1999)	Vitamins	\$225	International	Germany
Infineon Technologies AG (2004)	DRAM	\$160	International	Germany
SGL Carbon AG (1999)	Graphite Electrodes	\$135	International	Germany
Mitsubishi Corp. (2001)	Graphite Electrodes	\$134	International	Japan
UCAR International, Inc. (1998)	Graphite Electrodes	\$110	International	U.S.
Archer Daniels Midland Co. (1996)	Lysine & Citric Acid	\$100	International	U.S.
Takeda Chemical Industries, Ltd. (1999)	Vitamins	\$72	International	Japan

3.2 EUROPEAN NATIONAL COMPETITION SOLUTIONS

Now that European Union Member States are aligning their national competition laws more directly with their umbrella supranational counterpart, it is not a surprise that divergent approaches are taken. Some nations prefer a “soft” approach to regulating antitrust, some choose a “middle of the road” stance, while others take the “hard” line. Thus it may prove helpful to survey several national European systems for comparative purposes, one of which falls into each of those categories. Thus legislative reviews of The Netherlands (soft), Germany (middle) and The UK (hard) follow.

3.2.1 THE NETHERLANDS: “SOFT”



The Netherlands is a country with a reputation for being notoriously soft on economic crime, reluctant to introduce competition rules with any level of “bite” until 1998. Netherlands Competition Directorate General (DG) A. William Kist explained in a recent 2002 speech before the Japanese Fair Trade Commission (JFTC) that stronger cartel enforcement is likely to create some significant new challenges:

The gravest problem lies in the cumulative applicability of both criminal and administrative sanctions. As you will remember, some member states have already introduced criminal sanctions; others are considering it [revised UK legislation cartel enforcement legislation, known as the Enterprise Bill and widely

considered Europe's most stringent, was being drafted at the time Director Kist made these comments]. This poses a serious threat to the effectiveness of leniency programs in interstate cases. Since the granting of immunity from criminal sanctions under national laws is the prerogative of the Office of the Public Prosecutor and not of the competition authority, the very risk of criminal sanctions in one country will severely discourage undertakings from applying for immunity at a competition authority. In that country, or, for that matter, any EC country.³⁷

Director Kist's concerns are legitimate and well-framed here, because the leniency program installed by the EU Commission³⁸ provides "fishing expedition" opportunities for competition infringement investigators, and companies are reluctant to subject themselves to criminal scrutiny in one jurisdiction by admitting to facts in another, as double jeopardy exposure issues have yet to be fully solved under EC competition policy.

³⁷ A. William Kist, Director-General of the Netherlands Competition Authority, "Antitrust Enforcement: Deterrence and Leniency in an Enlarged European Union," a speech on 4.11.2003 in Tokyo, Japan to the Japanese Fair Trade Commission, available online at <http://www.jftc.go.jp/cprc/english/kistspeech-e.pdf>.

³⁸ See "Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases," OJ 2002 C-45/3.

3.2.2 GERMANY: “MIDDLE OF THE ROAD”



Important Sections of the German penal code concerning economic crime begin at Strafgesetzbuch (StGB) § 266, concerning “breach of trust.”³⁹ StGB § 266 (1) reads:

Whoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to obligate another, or violates the duty to safeguard the property interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes detriment to the person, whose property interests he was responsible for, shall be punished with imprisonment for not more than five years or a fine.⁴⁰

³⁹ For more information on German competition law translated to English, check online at <http://www.iuscomp.org/gla>. Thanks to MEA colleague Björn Siever for research assistance with German legislation.

⁴⁰ StGB, Ch. 26, § Sec. 301. “Application for Criminal Prosecution [for competition law violations].”

Chapters 22-26 of StGB concern various manifestations of corporate criminal activity, including the aforementioned breach of trust and various permutations of fraud and embezzlement. Most convictions in these penal categories yield fines and/or maximum prison sentences of 3-5 years. The lengthiest sentences that can be imposed appear to be 10 years, for either “falsifying identification documents” as part of a “gang” under § 267 or being implicated in a § 283a “especially serious case of bankruptcy.” Competition law provisions are also worthy of note here, as there is a potentially stronger provision found in the Chapter 26 §§ 298-302 Competition Law Sections. A prosecution can be undertaken *ex officio* if a case is of “special public interest.”

However, at least anecdotally, there appears to be an enforcement gap between the StGB laws “on the books” and how and when they are applied. According to DOJ Deputy Assistant Attorney General James M. Griffin, one German executive paid \$10 million USD from company funds, not personal assets, to escape a prison term,⁴¹ and none other than former German Chancellor Helmut Kohl himself paid 300,000 marks to avoid doing hard time on a campaign finance corruption charge. (For a detailed timeline of this outrageous and far-reaching Kohl scandal, and the likely involvement of many high-ranking officials from both the German and French governments, please read Chapter 5 of this thesis.)

⁴¹James M. Griffin Deputy Assistant Attorney General, US Department of Justice Antitrust Division, speech given in San Francisco 12.9.2003 entitled, “A Summary Overview of the Antitrust Division’s Criminal Enforcement Division,” and available online at <http://www.usdoj.gov/atr/public/speeches/201477.htm>.

3.2.3 THE UK: “HARD”



The UK, perhaps because of the Tony Blair-George Bush alliance (politics), a seemingly incongruous healthy trade surplus and gigantic money laundering problem (economic/legal considerations), or merely its proximity to its western transatlantic, former colonial underling and current ally the US (geographic/historic reasons), decided to design and implement the most stringent cartel enforcement program in all of Europe, known as the Enterprise Act, which entered into force 20 June 2002. This legislation serves to, *inter alia*:

- (1) formally join the aggressive US “war” on corporate cartels Worldwide;
- (2) criminalize a larger variety of cartel behavior than others in the EU;
- (3) close loopholes and update a 1972 UK-US extradition treaty; and
- (4) vigorously enforce the European Arrest Warrant (EAW), which came into force 1.1.2004.⁴²

As part of this upgrade, the UK also streamlined the Office of Fair Trade (OFT), and modernized their website, a now very informative and user-friendly www.oft.gov.uk.

The Enterprise Act also allows “Stop Orders” to be issued against companies who are not delivering promised goods and services to consumers. Hard core cartel

⁴² Please read colleague Lina Fransson’s 2006 thesis on this topic.

ringleaders can be sent to prison for up to five years, and insolvency reforms are installed that shift the administrative burden away from the OFT so that cases may be resolved more quickly.⁴³

Consequently, a two-part, but rather obvious question now hangs in the air. Will such consumer protection and economic crime deterrent approaches spread from the UK to other EU Member States? Or to the EU itself?

⁴³ Julian M. Joshua, "Extradition: Cartels, Criminalization and Extradition." Competition Law Insight, September 2003. Available online at <http://www.howrey.com/docs/ExtraditionCompLawInsight.pdf>.

3.3 ASIAN COMPETITION DEVELOPMENTS

According to the Asian Development Bank (ADB), member Nations are selecting various paths to competition law enforcement.⁴⁴ The Japanese Fair Trade Commission (JFTC) has enforced competition law violations since 1947. Japan does criminalize significant commercial cartel activity, but more in theory than in practice. (Not a single hard core economic crime perpetrator has yet to be imprisoned for violating the Anti-Monopoly Act, as sentences for each of the thirteen individuals convicted over the past 55 years have all been suspended.)⁴⁵ In addition, fines meted out, once currency converted, are a small fraction of their counterparts in Europe and the US. Note however that Japan, as of this writing, has one of the most robust economies on Earth. Does this suggest there are potential benefits to a return to laissez faire approaches that historically characterize European commerce?

Continental Asian trading partners have, for the most part, less robust competition law enforcement mechanisms than their East island neighbor.⁴⁶ India has the “Monopolies and Restrictive Trade Practices Act” of 1969 and has revamped its competition laws in 2002. The Peoples Republic of China implemented the “Anti-Unfair Competition Law” in 1993. Thailand has had competition laws in place since 1979, and Vietnam installed

⁴⁴ “Asian Development Outlook 2005: Promoting Competition for Long-Term Development.” See Table 3.1 of this Asian Development Bank report, available online at

<http://www.adb.org/documents/books/ado/2005/part030300.asp>.

⁴⁵ “Competition Law and Enforcement in Japan: Is Criminal Enforcement Working,” an Organization of Economic Development Policy Brief from September 2004. Available online at <http://www.oecd.org/dataoecd/22/18/33723798.pdf>.

⁴⁶ One way to think of Japanese competition enforcement and related matters may be to visualize an “East-West Mirror,” as if island nation power Japan is the Britain of Asia and Britain is the Japan of Europe.

competition laws in 2004. Other States have been more reticent. Korea for example, has resisted national competition law legislation consistently since 1964, and Malaysia has none at all, save some sectoral regulations.

3.4 CORPORATE SELF-REGULATION

The “best practice” (BP) movement by corporations themselves is worthy of mention in a competition law enforcement context. Such initiatives are internally driven efforts to reign in company corruption, and are motivated by a variety of interconnected factors, such as improving bottom line and promoting a good company image for the media and the purchasing public at large. For example, the non-governmental organization World Economic Forum (WEF) touts more than 100 multinational undertakings from 43 countries on 6 continents that have signed Principles for Countering Bribery (PACI) pledges.⁴⁷ In this system, business leaders declare a zero tolerance policy towards bribery and agree to install or enhance practical and effective implementation programs. Such self-imposed corporate governance measures are laudable perhaps not for their magnanimity, but as a cold, hard recognition that bottom line can be affected by bad publicity as stakeholders become increasingly conscious of activities by company actors.

⁴⁷ The World Economic Forum has created a “Partnership Against Corruption.” Review details of this initiative and a chart of Principles for Countering Bribery (PACI) signatories online at <http://www.weforum.org/site/homepublic.nsf/Content/Partnering+Against+Corruption%5Csignatories>.

IV. LEARNING FROM THE LEGENDS: A MULTIDISCIPLINARY STUDY OF LEADING WESTERN ECONOMIC CRIMINAL SCHOLARS OVER THE CENTURIES

4.1 BECCARIA: EGALITARIAN JUSTICE?



Cesare Bonesana, Marchese Beccaria of Milano published his essay “*Dei delitti e delle pene*”⁴⁹ (Of Crimes and Punishments) in 1764, and the study of criminal law was turned upside down. This groundbreaking 48-part opus is packed with ideas that have shaped revolutions from France to the Americas to the Caribbean to Russia, and has influenced virtually all Western law enforcement strategies over the last 242 years. Scholars of economic criminal activity may wish to direct their attention to Chapter 21, “Of the punishment of the Nobles.” Becarria comments in this section of his work:

I assert that the punishment of a nobleman should in no way differ from that of the lowest member of society. The wisest and most industrious among us should obtain the greatest honors, and his dignity shall descend to his posterity. The fortunate and happy may hope for greater honors, but let him not therefore be less afraid

48 This digitized etching of Cesare Bonesana, Marchese Beccaria is published online at http://www.constitution.org/cb/crim_pun.htm.

⁴⁹ Cesare Bonesana, Marchese Beccaria. “*Dei delitti e delle pene*.” First published in Milano (1764). The edition cited above is translated from an earlier French translation by Edward D. Ingraham and is known as the Second American Edition of “Crime and Punishment.” The text was published by Philadelphian Philip H. Nicklin and printed by A. Walker in 1819.

than others of violating those conditions on which he is exalted...punishments are to be estimated, not by the sensibility of the criminal, but by the injury done to society, which injury is augmented by the high rank of the offender.⁵⁰

Fast forward to Europe and much of the industrialized World today. Business elites are the new Nobles, and Beccaria's egalitarian ethics ring true as ever. The recent jailing of French ELF Aquitaine CEO Loik Le Floch-Prigent for the bribing of government oil officials,⁵¹ British Sotheby's Chairman Alfred Taubman for art auction conspiracy,⁵² and the ongoing prosecution of Dutch foodservice company Ahold CEO Cees van der Hoeven⁵³ are but a small sample of many prominent recent corporate scandals. Beccaria's wisdom remains salient, because hard core company wrongdoing creates deep wounds which reverberate throughout all tiers of society, far beyond what a petty thief can accomplish. The pickpocket may be thrown in the "slammer," while the high paid executive merely absorbs administrative fines for misdeeds, often paid for by company shareholders.

Beccaria, if he expected the modern World to heed his prophetic warning, must be turning over in his grave. Treaty on European Union (TEU) founding fathers Helmut Kohl (the longest-serving German leader since Bismarck) and François Mitterand (the longest-serving President in French history) may not have fully escaped corporate corruption scandals themselves (please read Chapter 5 of this thesis for a further explanation of these allegations).

⁵⁰ Id at Chapter 21.

⁵¹ See article on this story online at http://www.dw-world.de/popups/popup_printcontent/0,,811008,00.html and read more about this in Chapter 5 of this thesis.

⁵² US v. Taubman. 297 F 3d 161 (2nd Cir. 2002).

⁵³ See report from 6.3.2006 at http://www.expatica.com/source/site_article.asp?subchannel_id=19&story_id=28878&name=The+Dutch+news+in+March+2006.

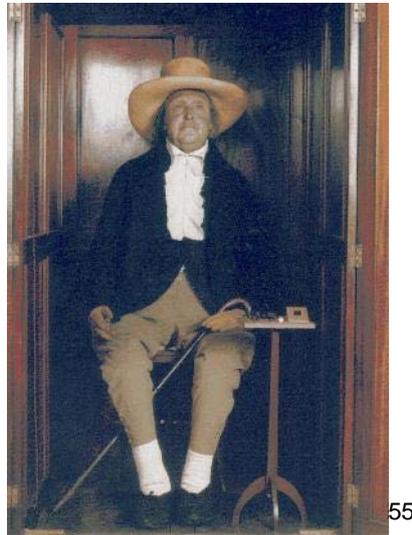
Beccaria, were he alive to comment on such a repugnant state of affairs, might ask:

Where is the justice when elites from the two economically strongest nations within continental Europe manipulate their power to the detriment of the masses?

If we also mention corporate corruption charges leveled against fellow man of Milano, recently outgoing Prime Minister of Italy, Silvio Berlusconi, then sadly leaders of 50% of the “original six” European nations⁵⁴ have allegedly engaged in significant anticompetitive activity.

⁵⁴ West Germany, France, Italy, Belgium, The Netherlands and Luxembourg. These nations formed the European Coal and Steel Community (ECSC), effective 23.7.1952 (“Treaty of Paris”) and later the European Economic Community (EEC), effective 25.3.1957 (“Treaty of Rome”), which have matured into the European Community (EC) of today.

4.2 BENTHAM: LAW AS PHILOSOPHICAL BATTLE



Arguably no philosopher since Aristotle has had a greater impact on legal philosophy than Jeremy Bentham. A florid thinker who usually wrote 12-14 hours every day, he expanded the “enlightened pursuit of pleasure” paradigms of Greek philosopher Epicurus and fellow British predecessors Thomas Hobbes and John Locke. Together with his mentee, John Stuart Mill, Bentham is most well-known today as the creator of utilitarianism, a concept which rates human behavior on a “felicific calculus,” or pleasure scale, and measures intensity, duration and extent of pain and pleasure, ultimately to promote the most happiness for the greatest number of people in society.⁵⁶

55 Death becomes him? The “Auto Icon” of Jeremy Bentham, who requested in his will that his remains be preserved (save his head which supposedly he asked be shrunken, stored separately from his body and replaced with a wax replica. He still holds court at the Regent’s Meeting Room at University College, London, a school he bequeathed princely royalties to because of his avowed secular streak which heightened his disdain for his Oxford alma mater. See <http://healthfully.org/id4.html> for additional information on the life and times of Bentham, as well as the photograph republished here.

⁵⁶ See <http://www.utilitarianism.com/bentham.htm> for a succinct overview of Bentham’s contributions to legal philosophy. More

Obviously, the utilitarian paradigm creates a clash between individual desires and rules that govern behavior, both moral and legal. Bentham, an Oxford educated lawyer, wrote extensively about what we might call today in legal scholarship the “rights-duties” distinction. Why should not one be empowered to maximize (a word, along with minimize, international and codification, invented by Bentham) one’s personal pleasure, especially when such maximization would collectively benefit all of society? Moreover, is not community merely a different way of describing a collection of individuals, each of whom possess human dignity and individual liberty?

The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what? — the sum of the interests of the several members who compose it.⁵⁷

Such an idea was downright radical in Bentham’s England. So too was his dismissal of John Locke’s “natural rights” theory—later expanded by Thomas Jefferson—that life and liberty were inalienable, as “nonsense on stilts.” But Bentham saved most of his antipathy for the British Legal Code itself, which he labeled the “Demon of Chicane,” and its biggest proponent, fellow unsuccessful lawyer, Oxford graduate and eventual master scholar, William Blackstone of Commentaries of the Laws of England fame.

information about the life and times of Bentham is available online through the Internet Encyclopedia of Philosophy website at <http://www.iep.utm.edu/b/bentham.htm>.

⁵⁷ Jeremy Bentham, Introduction to the Principles of Morals and Legislation. Clarendon Press, Oxford (1907), Ch. I, “Of the Principles of Utility,” Sec. iv. [Bentham’s classic book was first published in 1789 and is thought to have help inspire the French Revolution, which started that same year.] An online version of the text is available through the Library of Economics and Liberty at <http://www.econlib.org/library/Bentham/bnthPML.html>.

The chasm between the visions of the quirky Bentham, an unabashed hedonist who decried British common laws as merely protectorates for the oppressive estate system:

Law, which is by its very nature a restriction of liberty and painful to those whose freedom is restricted, is a prima facie evil. It is only so far as control by the state is limited that the individual is free;⁵⁸

and Blackstone, a faithful Parliamentarian and Royal apologist who once notoriously commented:

That the King can do no wrong is a necessary and fundamental principle of the English Consitution,⁵⁹

has served to shape the common law-civil law dichotomy that characterizes laws of today in both Europe and the World. Bentham influenced the Napoleonic Code of France,⁶⁰ whereas Blackstone inspired the laws of colonial subjects eventually to achieve independence from England, such as the United States and Australia.

One of Bentham's many seemingly paradoxical beliefs was that punishment should inflict greater pain than pleasure to most effectively deter criminal acts, yet he

⁵⁸ Id.

⁵⁹ Blackstone divided his vast legal chronicles into four main sections, "The Rights of Persons," "The Rights of Things," "Of Private Wrongs," and "Of Public Wrongs." Yale University has compiled a thorough retrospective of Blackstone's work, known as the "Avalon Project," available online at <http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm>. See also http://quotes.liberty-tree.ca/quote/william_blackstone_quote_9436.

⁶⁰ Bentham was made an honorary citizen of France via his association with Mirabeau, but came to disfavor the violent tactics of the Jacobin regime which took power following the Revolution in 1792.

abhorred both physical torture and the death penalty.⁶¹ Bentham designed a more humane prison than those available in his day, called “Panopticon,” for his friend Catherine the Great of Russia,⁶² based upon the concept that guards should be unseen throughout a penitentiary compound. Punishment should not be retributive, but prisoners could be subjected to hard labor of varying degrees of difficulty based upon the severity of their offense. Many British, French, Russian and American prisons still follow Bentham’s model.

Bentham also recognized and consistently railed against the often too cozy interplay between the Church of England and the social elites of Britain. What did he call such interactions? Ever inventive, he labeled such involvement “corruption,”⁶³ a term still used with frequency today. As rampant capitalism overwhelms many secular modern societies, money is the God most worshipped, and altars can be found at stock exchanges and in company boardrooms from Geneva to New York to Tokyo.

⁶¹ See Richard A. Posner, “Blackstone and Bentham. 1776: The Revolution in Social Thought,” *Journal of Law and Economics*, Vol. 19, No. 3, October, 1976, pp. 569-606.

⁶² See John T. Alexander, Catherine the Great: Life and Legend. Oxford University Press, Oxford (1989).

⁶³ A concept suggested by Robert Clark in the article “Jeremy Bentham,” published in *The Literary Encyclopedia* 15.9.2002, and available online at <http://www.utilitarian.net/bentham/about/20020915.htm>. Clark recommends reviewing Bentham works Elements of the Art of Packing (1810), Church of Englandism (1817), Not Paul but Jesus (1823), and Book of Fallacies (1824) to more closely follow the trail of this theory.

4.3 SUTHERLAND: “WHITE COLLAR” CRIME



Another major breakthrough in economic criminal scholarship comes from Edwin H. Sutherland, who coined the term “white collar” crime in a speech to the American Sociological Society in 1939.⁶⁵ Sutherland was dissatisfied with favored pathological deviant explanations for illicit acts of his era, and sought new solutions to this problem.

Sutherland described white collar crime as “committed by a person of respectability and high social status in the course of his occupation,”⁶⁶ a definition that changes the way traditional elements of the criminal transgressions themselves are addressed. A crime historically was charged when a defendant’s *mens rea* (“guilty mind”) converged with his *actus reus* (“bad act”), in turn resulting in harm causally linked from the defendant to the victim. But new strains of offenses, which came to prominence in late-19th Century American jurisprudence, deviate from this mold. “Strict liability offenses,” such as

64 This photograph of Edwin H. Sutherland was posted by University of Missouri – St. Louis Sociology Professor Robert O. Keel on 20.1.2006. Available online at <http://www.umsl.edu/~rkeel/200/learnin.html>.

⁶⁵ The Cornell University Law School Journal “Wex” has a comprehensive survey of the study of white collar crime, available online at http://www.law.cornell.edu/wex/index.php/White-collar_crime#White-Collar_Crime:_an_overview.

⁶⁶ This quote is excerpted from p. 9 of Sutherland’s 1949 monograph, “The White Collar Criminal.” More related information is available online at <http://law.families.com/white-collar-crime-history-of-an-idea-ecj>.

the intentional selling of harmful consumer goods, remove the *mens rea* requirement. On the other hand, “inchoate” offenses, those that involve substantial malicious intent, are objectionable even though the *actus reus* is incomplete. White collar crimes can fall into either of these more complex subsets of offense. For example, recall our earlier discussion, in Chapter One, above, of the Sherman Antitrust Act. Violators are most frequently trapped by a conspiracy indictment, an inchoate crime. This enhances a Prosecutor’s ability to obtain either a conviction against Defendant A or against alleged co-conspirator Defendant B by offering the bait of a reduced penalty for Defendant A in exchange for damning testimony against Defendant B.

Sutherland designed a criminology principle termed “differential association,”⁶⁷ consisting of nine parts. To summarize:

- (1) criminal behavior is learned, not inherited;
- (2) by direct communication with other criminals;
- (3) media and entertainment influences, such as newspapers and motion pictures, have little influence on criminals-in-training;
- (4) criminal mentors teach burgeoning criminals techniques and rationalization methods;
- (5) that certain legal codes are unfavorable;

⁶⁷ Florida State University has some good resources available online—including a more detailed explanation of “differential association” theory—regarding the work of Sutherland at <http://www.criminology.fsu.edu/crimtheory/sutherland.html>.

(6) and law breaking definitions are cemented by “isolation from anticriminal patterns;”

(7) otherwise known as “differential association,” which varies in “frequency, duration, priority, and intensity;”

(8) that learning criminal behavior is consistent with other patterns of learning; and ultimately

(9) though criminal behavior expresses general needs and values, it is not solely driven by such desires, because the honest man can work just as the dishonest man can steal.

When Sutherland’s differential association construct is applied specifically to the study of corporate criminals, it is of great interest not merely for the executive bad apple herself, but additionally as applied to the distinct legal personality of the company entity. The business-employee split creates a host of fascinating theoretical discussion points and further implicates the connection between economic considerations and the law.

4.4 POSNER: A POSTULATORY POWERHOUSE



68

US Appeals Court Judge and prolific legal scholar Richard A. Posner has, throughout his career, asked many great questions about white collar crime,⁶⁹ some of which extend beyond the scope of my thesis work. However, it is worthwhile to mention in passing several of his many famous queries, paraphrased as:

(1) Might not it be more cost-effective to have the corporation punish its own reprobate than the judicial system?

(2) Why not break a contract if it is economically advantageous to a party?

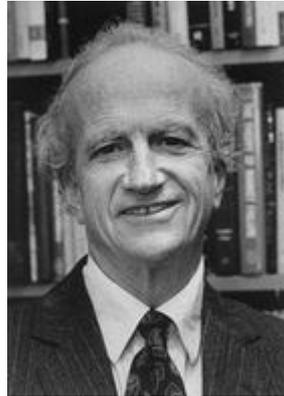
⁶⁸ This photo is available, along with Judge Posner's curriculum vitae and a listing of his many books and articles on the law, online at the University of Chicago Law School, where Posner is a Senior Lecturer. See <http://www.law.uchicago.edu/faculty/posner-r/>.

⁶⁹ A great read on contemporary law and economics thinking is the joint venture between Chicago School veterans Posner and Gary S. Becker, the latter of which who's theories are profiled below in our discussion. Please check out <http://www.becker-posner-blog.com/>, online, for more information. Most of Posner's energy lately appears to be funneled into his stark opposition to capital punishment and the futility of US so-called "drug-wars," the latter of which he derides as "quixotic."

(3) Who says the possibility of jail has a deterrent effect?

(4) What is the true line of demarcation between tort law and criminal law?

4.5 BECKER: ECONOMIC CRIME THEORY



⁷⁰

Gary S. Becker won the Nobel Prize in the Economic Sciences in 1992, and led the “Crime and Punishment” section of his acceptance speech with the following anecdote:

I began to think about crime in the 1960s after driving to Columbia University for an oral examination of a student in economic theory. I was late and had to decide quickly whether to put the car in a parking lot or risk getting a ticket for parking illegally on the street. I calculated the likelihood of getting a ticket, the size of the penalty, and the cost of putting the car in a lot. I decided it paid to take the risk and park on the street. (I did not get a ticket.)⁷¹

⁷⁰ Photo of Gary S. Becker, published online by the Library of Economics and Liberty at

<http://www.econlib.org/library/Enc/bios/Becker.html>.

⁷¹ This Nobel Prize lecture from 9.12.1992 is available online at <http://nobelprize.org/economics/laureates/1992/becker-lecture.html>.

Becker was stimulated by this revelation into researching and producing the classic essay, "Crime and Punishment: An Economic Approach." The central breakthrough idea put forward by Becker therein is that criminals, what he terms "risk-preferring individuals," are workers in an industry under-examined by economists. Traditional cost-benefit equations are ineffective because "total public spending on lighting crime" may not be reduced simultaneously "while keeping the mathematically expected punishment unchanged, by offsetting a cut in expenditures on catching criminals with a sufficient increase in the punishment to those convicted."⁷² Risk-preferring individuals are instead deterred from committing crimes by a higher probability of conviction than by severe punishments.

Becker may well have directly influenced European thinking about competition law enforcement, because he notes that generally "social welfare is increased if fines are used whenever feasible." Fines are an appropriate alternative to incarceration because they are financially efficient, serving the dual purpose of punishing the criminal and reimbursing the State. Furthermore, the overall "economic and social environment created by public policies, including expenditures on police, punishments for different crimes, and opportunities for employment, schooling, and training programs"⁷³ should be included in the crime and punishment calculus.

Another hypothetical also befuddled Becker, what one might label the "Robin Hood" problem. Why is theft socially harmful and not merely a redistribution of resources, especially given that the transaction more often than not flows from the coffers of the rich to the sacks of the poor? He solved this apparent inconsistency by recognizing petty thieves expend mental and physical resources planning and executing their crimes,⁷⁴ as well as pecuniary resources purchasing (or the substitute act of stealing) "tools of the trade," such as weapons or burglar's

⁷² Id at 177.

⁷³ Id at 179-181.

⁷⁴ See footnote 70.

tools. Criminologists influenced by Becker have called this forced redistribution of wealth phenomenon “rent-seeking,” but Becker carries the concept even further, and applies his criminal economy theory to antitrust rent seeking. Becker disciple Gordon Tullock calls this phenomenon the “collusive pursuit of restrictions on competition that transfer consumer surplus into producer surplus.”⁷⁵

The US Sentencing Commission has been known to use Becker harm measurement math to prepare prison terms for Federal statute violators, while the EU uses his formulas to advocate the “optimal use of fines.”

⁷⁵ James E. Alt and Kenneth A. Shepsle, Perspectives on Positive Political Economy, pp. 195-211, section entitled “Gordon Tullock and the Costs of Special Privilege,” Cambridge University Press, Cambridge (1990).

4.6 HENNING: SENTENCING CONSIDERATIONS



Wayne State University Criminologist Peter J. Henning, much like Posner before him, is asking some tough questions. In an article to be published not long after this thesis is submitted,⁷⁷ he reviews recent US corporate crime sentences and asks if they are “too harsh.” Bernard Ebbers, former CEO of WorldCom received a 25-year prison term; Patrick Bennett, former CFO of Bennett Funding Group, received 22 years; Steven Hoffenberg, former CEO of Towers Financial Corporation, 20 years; John Rigas, former CEO of Adelphia Communications, 15 years.⁷⁸

⁷⁶ Photograph of Wayne State University Criminology Professor is published online at http://www.law.wayne.edu/faculty/profiles/henning_peter.html. Go to this site for more information on his work.

⁷⁷ Professor Henning is soon to publish the article “White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers [Former CEO of telecommunications company WorldCom, sentenced recently to a 25-year prison term] Too Harsh?”

⁷⁸ These examples are noted by Professor Henning. See United States v. Ebbers, Case No. S3 02 Cr. 1144 (BSJ) (S.D.N.Y. Mar. 2, 2004); Bennett v. United States, 2004 WL 2711064 (S.D.N.Y. 2004); United States v. Hoffenberg, 1997 WL 96563 (S.D.N.Y. 1997); Roben Farzad, “Jail Terms For Two at Top Of Adelphia,” New York Times at C1 (21.6.2005).

The work of Professor Henning and his successors will certainly impact future discussions about the incarceration of hard core European economic criminals if and when such a remedy is more readily applied.

V. UNRAVELING ECONOMIC CRIME AT THE HIGHEST LEVELS OF EUROPEAN BUSINESS AND POLITICS: THE DISSOLUTION OF ELF ACQUITAINE AND ITS LINGERING STENCH

Although there are many to choose from, one recent economic crime scandal is worthy of careful consideration because of its wide-ranging impact on European business and politics is the case against German arms dealer Karlheinz Schreiber. The spider web of high level corruption and death weaved around this sordid tale is as shocking as it is revolting.⁷⁹

- 1991 – Herr Schreiber attempts to sell 36 Thyssen "Fuchs" tanks in Saudi Arabia, and solicits Christian Democratic Union (CDU) Treasurer Walther Leisler Kiep to help get Chancellor Helmut Kohl to greenlight the deal. "Palms are greased" during a secret meeting between Schreiber and Kiep in Switzerland, during which a briefcase containing approximately \$500,000 Euros is delivered from Schreiber to Kiep and CDU Accountant Horst Weyrauch. Before long, the tank deal is approved by the German government.
- 1995 – German Prosecutors commence an investigation of Schreiber.
- 1997 – French Investigators uncover a

⁷⁹ The 1991-2000 portion of this timeline is adapted from a Business Week article, available online at http://www.businessweek.com/2000/00_07/b3668165.htm. See also <http://www.dw-world.de/dw/article/0,,1928042,00.html?maca=en-rss-en-all-1124-rdf>, as this story continues to unfold. Special thanks to colleague Björn Siever for his assistance researching this story.

major Elf Aquitaine bribery scheme, and several East German oil business leaders and politicians affiliated with the CDU are implicated.

- 1999 – Schreiber flees the EU for Canada, and successfully evades extradition back to Germany.
- 1999 – On the other side of the Atlantic, Kiep is arrested, but the half million Euros are still missing.
- 2000 – Kohl begrudgingly admits to breaking campaign finance laws, noting that he has accepted more than one million Euros of tainted money during the latter years of his tenure at the helm of both Germany itself and the CDU in the latter 1990s.
- 2000 – Several prominent CDU officials resign, and CDU Accountant Wolfgang Hullen commits suicide, admitting to abundant embezzlement in his suicide note.
- 2000 – An even more damning allegation surfaces, that former French President François Mitterrand directed more than \$15 million Euros of Elf-Aquitaine (at the time a state-owned entity) to help Kohl with a re-election bid.
- 2001 – Kohl's wife Hannalore commits suicide, purportedly by overdosing on sleeping pills to end extended suffering from a mysterious ailment.

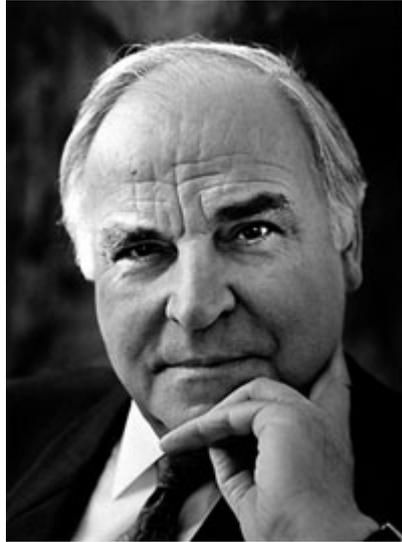
No autopsy is performed and she is promptly buried.⁸⁰

2001 – Kohl's financial advisor Diethelm Höner dies after a "fall down a flight of stairs" at his villa in Cannes. French investigators note that the body of the deceased is not in a position compatible with such a demise and security cameras which perpetually monitored his premises were surprisingly shut off during the fatal accident.⁸¹

2001 – In Bonn, Kohl pays a 300,000 mark fine to end the criminal investigation into his involvement in CDU illegal campaign funding and escapes with no criminal record.

⁸⁰ For more information regarding the suicide of Hannelore Kohl, see online entries at <http://encyclopedia.thefreedictionary.com/Hannelore+Kohl> and <http://www.nndb.com/people/328/000023259>, which provide additional links.

⁸¹ See additional information regarding this mystery online at <http://www.europeanfoundation.org/docs/123id.htm>.



82

Who Knew?



83

How Much?



84

When?

⁸² Photo of Kohl published online at <http://www.dhm.de/lemo/html/biografien/KohlHelmut>.

⁸³ Photo published as part of larger story, "Managers Sentenced to Jail in Elf Corruption Trial," 13.11.2003 edition of Deutsche Welle, available online at <http://www.dw-world.de/dw/article/0,,1028135,00.html>.

⁸⁴ Photo of Mitterrand published online, linked to article described above.

VI. EUROPEAN CRIMINAL COMPETENCE RECONSIDERED: ENVIRONMENTAL PROTECTION FIRST, BUT WHAT NEXT?

Justice and Home Affairs (JHA)—known also as the “Third Pillar” of the EU—framework decisions are not usually accorded “direct effect” applicability to the Member States, and failure to transpose them cannot be remedied by methods such as 226 EC infringement actions. Furthermore, ECJ jurisdiction to give preliminary rulings in accordance with Article 35 EU is not binding, because said jurisdiction is subject to acceptance by the Member States. Thus, in Decision 2003/80/JHA,⁸⁵ the Commission seeks competence under the “First Pillar” for harmonization purposes.

This Decision implicates environmental policy objectives, fleshed out in Articles 174-176 EC, as well as criteria for shaping said policy and procedures for adopting relevant measures to be financed and implemented by the Member States. Of particular import here is that *Member States are expressly authorized to introduce even more stringent measures*, so long as such measures are not incompatible with the EC Treaty in other respects.

For example, when Article 251 EC is properly applied the European Commission already allows proposals that the Directive more robustly apply Community laws to protect the environment, namely though establishing a minimum grouping of Community criminal offenses for intentional or seriously negligent conduct that degrades the natural World. Under Article 4, it is the Member States who are to design, while meticulously following the ECJ formula of effective, proportionate and dissuasive⁸⁶ penal sanctions. Notably, individuals can be stripped of entitlement benefits, and even “deprived of their

⁸⁵ See also “Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law,” OJ C 180 E p. 238 (2001).

⁸⁶ See Case 50/76 ECR 137 (1977), (“Amsterdam Bulb”), and her progeny.

liberty” (incarcerated) if such remedies survive scrutiny under all three prongs of the effective, proportionate and dissuasive test.⁸⁷

The Commission argued in 2003/80/JHA that the Council should refrain from adopting new environmental protections via criminal law. The rationale offered was that Community law primacy is established under Article 47 EU, and the Community has the power under the Treaty of Rome to require Member States to punish certain environmentally destructive behavior with penal sanctions. Advocate General Colomer noted in his C-176/03 Opinion that there is no express Community competence to impose criminal penalties, save a possible exception for direct threats to community legal order, and that does not apply here.

Yet a seismic shift in European criminal law competence may now be underway. The ECJ annulled the Council Decision, *so the EC has the power to require Member States to impose criminal penalties to protect the environment!* Such a development has far-reaching implications for company managers who, for example, discharge toxic waste into fragile ecosystems. What makes this case especially powerful is its potential additional applications. Future serious polluters now have their liberty in jeopardy. Might hard core economic criminals be the next target of European law enforcement officials? There can be little doubt that the door is now ajar for the imposition of prison sentences against individual company wrongdoers, as long as the effective, proportionate and dissuasive trio don’t slam it shut.

The incarceration of corporate criminals fits within European past, present and future economic union objectives. The “outing” of corporate bad guys by locking them in jail is an effective punishment, because it is likely to lower earning capacities and status achieved initially through ill-begotten means. Moreover, such a penalty is

⁸⁷ N.B. that the Framework Decision bears more than a passing likeness to a 2001 Proposal for a Directive on the protection of environment through criminal law.

dissuasive. Fines alone, usually drained from the savings of a collective of undertaking stakeholders (who may well be innocent of wrongdoing), are simply too weak a deterrent to prevent the next wave of high-flying corporate crooks to replace Enron and Elf Aquitaine executives, or Kohl and Mitterand politicians poised to dominate the newspapers headlines, online blogs and the new media of tomorrow.

The “proportionality” debate regarding the potential imprisonment of hard core cartel leaders throughout the EU is likely to rage long and loud, but in the final analysis, incarceration is certainly not too harsh a punishment if wielded with care. Cheating the free market is far from a victimless crime. On the contrary, it is a direct frontal assault upon the fundamental freedoms European citizens depend upon to fulfill the Third Pillar promised triumvirate of stability, growth and security.

CONCLUSION: FUTURE ADJUSTMENTS IN COMPETITION LAW ARE NECESSARY



⁸⁸

Recently retired US Federal Reserve Bank Chairman Alan Greenspan⁸⁹ not long ago described the complex current state of affairs in economic crime enforcement as follows:

The world of antitrust is reminiscent of Alice's Wonderland. Everything seemingly is, yet apparently isn't, simultaneously. It is a world in which competition is lauded as the basic axiom and guiding principle, yet "too much" competition is condemned as "cutthroat." It is a world in which actions designed to limit competition are branded as criminal when taken by businessmen, yet praised as "enlightened" when initiated by the government. It is a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict - after the fact.

⁸⁸ See report by public television broadcast journalist Jim Lehrer, "The Most Powerful Guy You've Never Heard Of," published first on 20.12.2000 and available online at <http://www.pbs.org/newshour/extra/features/july-dec00/greenspan.html>.

⁸⁹ See "US Raises Interest Rates as Greenspan Retires," as reported by Reuters on 1.2.2006 and available online at <http://www.abc.net.au/news/newsitems/200602/s1559370.htm>

In view of the confusion, contradictions, and legalistic hairsplitting which characterize the realm of antitrust, I submit that the entire antitrust system must be opened for review. It is necessary to ascertain and to estimate: (a) the historical roots of the antitrust laws, and (b) the economic theories upon which these laws were based.⁹⁰

Greenspan is a contemporary legal philosopher in the Beccaria-Bentham mold,⁹¹ a creative thinker with the courage to label a pervasive and insidious economic criminal problem without fear of retribution from societal elites. Just as American antitrust laws require a reasoned overhaul, so too does European competition legislation. Nations around the World, such as Brazil, Russia, India and China (BRIC) are strengthening their economic might, and though the United States has enjoyed significant periods of prosperity since World War II, and Europe has also strengthened its position, there are absolutely no guarantees of indefinite stability, growth and security without the unequivocal protection of open and fair market access. The incarceration of hard core cartel criminals is but one effective, dissuasive and proportionate way to achieve this critical objective.

⁹⁰ Alan Greenspan, "Antitrust," a 1998 speech available online at <http://www.polyconomics.com/searchbase/06-12-98.html>.

⁹¹ See Chapter 4 of this thesis, *supra*.

ADDENDUM

The above thesis was successfully defended at Lunds Universitet Juridicum in Sweden on 24 May 2006.

The very next day, Ken Lay and Jeff Skilling were found guilty of conspiracy and fraud in Houston, Texas.

In another truth is stranger than fiction twist, Ken Lay died early in the morning of 5 July 2006 at one of his homes adjacent to a Colorado ski resort.⁹²

⁹² See http://money.cnn.com/2006/05/25/news/newsmakers/enron_verdict/index.htm and http://www.metro.co.uk/fame/interviews/article.html?in_article_id=19467&in_page_id=11 for additional information on the fallout from this case.

BIBLIOGRAPHY AND FURTHER READING

Baumol, William J., and Ordover, Janusz A. "Antitrust and Economic Efficiency: A Conference Sponsored by the Hoover Institution," Journal of Law and Economics, Vol. 28, No. 2, May, pp. 247-265 (1985).

Becker, Gary S. "A Theory of Competition Among Pressure Groups for Political Influence," Quarterly Journal of Economics, 98, pp. 371-400 (1983).

Bentham, Jeremy. The Works of Jeremy Bentham, edited by John Browning, London (1838-1843), Reprinted in New York (1962).

Brown, Darryl K. "The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement." Ohio State Journal of Criminal Law, Volume 1:521 (2002) pp. 521-549.

Cardilli, Camilla M. "Regulation without Borders: The Impact of Sarbanes-Oxley on European Companies," 27 Fordham International Law Journal, 785 January (2004).

Dau-Schmidt, Kenneth G. "An Economic Analysis of the Criminal Law as a Preference-Shaping Policy," Duke Law Journal, Vol. 1, Feb., pp. 1-38 (1990).

Cooter, Robert and Ulen, Thomas. Law and Economics, Addison-Wesley, Reading, Massachusetts (2000).

Downes, David. "The Macho Penal Economy: Mass Incarceration in the United States from a European Perspective." Punishment & Society, 3(1), 61-80 (2001).

Elzinga, Kenneth G. and Breit, William. The Antitrust Penalties: A Study in Law and Economics. Yale University Press, New Haven (1976).

Fisse, Brent and Braithwaite, John. Corporations, Crime and Accountability, Cambridge University Press, Cambridge (1993).

Gerber, David. Law and Competition in Twentieth-Century Europe: Protecting Prometheus. Oxford University Press, Oxford (2001).

Ginsburg, Douglas H. Comparing Antitrust Enforcement in the United States and Europe, Oxford University Press, Oxford (2005).

Hansman, H. and Kraakman, R. "The End of History for Corporate Law," 89, Georgia Law Journal, 439 (2001).

Kahan, Dan M. "The Secret Ambition of Deterrence," 113 Harvard Law Review 413, December (1999).

Karpoff, Jonathan M. and Lott, John R. "The Reputational Penalty Firms Bear from Committing Criminal Fraud," Journal of Law and Economics, Vol. 36, No. 2, October, pp. 757-802 (1993).

Katz, Avery Wiener; Editor. Foundations of the Economic Approach to Law, Oxford University Press, Oxford (1998).

Khanna, V. S.: "Corporate Criminal Liability: What Purpose Does It Serve?" Harvard Law Review, Vol. 109, No. 7, May, pp. 1477-1534 (1996).

Odudu, Okeoghene. The Boundaries of EC Competition Law: The Scope of Article 81. Oxford University Press, Oxford (2006).

Philipson, Tomas J. and Posner, Richard A. "The Economic Epidemiology of Crime," Journal of Law and Economics, Vol. 39, No. 2, October, pp. 405-433 (1996).

Posner, Richard A. Economic Analysis of Law, Aspen Law and Business, New York (1998).

Posner, Richard A. "An Economic Theory of the Criminal Law," 85 Columbia Law Review 1193, October (1985).

Rhodes, M. and Van Apledoorn, B. "Capital Unbound? The Transformation of European Corporate Governance," Journal of European Public Policy, 5, 3, pp.406-427 (2000).

Ruggiero, Vincenzo. Organized and Corporate Crime in Europe: Offers that Can't Be Refused, Dartmouth Publishing Company, Aldershot (1996).

Weisburd, David, Waring, Elin and Chayet, Ellen. White-Collar Crime and Criminal Careers, Cambridge University Press, Cambridge (2001).

Whitmer, James Q. Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe. Oxford University Press, Oxford (2003).

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⁹³ A reference to the 1930 Hoagy Carmichael and Stuart Gorrell song "Georgia on My Mind," which Ray Charles took to the top of the US charts in 1960.

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-Jonathan D. Messinger, Esquire

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