accepted as sufficient proof.\textsuperscript{58} It seems likely, especially in view of the fact that the \textit{KVOS} case may well be an exceptional one, decided on jurisdiction to avoid settling a controversial question on the merits,\textsuperscript{59} that the Supreme Court will sustain in general the more liberal attitude toward proof in private injunction suits — reserving always the right to use the flexible standards to restrict jurisdiction over particular sorts of private injunction which have taken on public importance. The Court thus appears to have worked out an instrument which, although it may leave litigants in particular cases somewhat in the dark as to their prospects of gaining admittance to the federal courts, is well adapted to supporting the Congressional policy toward federal jurisdiction.

\textbf{FIFTY YEARS OF SHERMAN ACT ENFORCEMENT}

Almost fifty years after the passage of the Sherman Act, the President has reported to Congress that protection furnished by the anti-trust laws is so negligible that it renders the system of free private enterprise still virtually untried.\textsuperscript{1} In some industries price policies have been controlled by a few large corporations; in others, trade associations have lent a comparable rigidity to trade practices and terms of sale.\textsuperscript{2} The anti-trust laws, for a number of reasons, have failed utterly in application. Yet it is again the opinion of many critics, after the temporary experiment with N.R.A., that rigorous enforcement of the Sherman Act, if it can possibly be achieved, is vital to the preservation of the national economy.\textsuperscript{3} The purpose of this Comment is not

\textsuperscript{58} General Shoe Corp. v. Rosen, 29 F. Supp. 102 (S. D. W. Va. 1939); Calvert Distilling Co. v. Brandon, 24 F. Supp. 857 (W. D. S. C. 1938); Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co., 95 F. (2d) 711 (C. C. A. 10th, 1938), cert. denied, 305 U. S. 607 (1938). \textit{Cf.} James Heddon's Sons v. Callender, 28 F. Supp. 643, 645 (D. Minn. 1939), where the court, although citing the burden of proof rule, accepted plaintiff's allegation of the jurisdictional amount because "no proof of want of jurisdiction has been offered by the defendant."


\textsuperscript{1} N. Y. Times, Apr. 30, 1938, p. 2, col. 8.

\textsuperscript{2} On concentration of control, see Berle & Means, \textit{The Modern Corporation and Private Property} (1932) 18; Tippett & Livermore, \textit{Business Organization and Control} (1932) 472; Senator O'Mahoney in N. Y. Times, Oct. 12, 1938, p. 30. On trade associations, see Seager & Gulick, \textit{Trust and Corporation Problems} (1st ed. 1929) 304.

\textsuperscript{3} The New Deal shift in policy from industrial cooperation under governmental regulation to the enforcement of competition was anticipated in \textit{The New Deal: Second Time Round}, \textit{Fortune}, Feb. 1938, p. 59; announced by President Roosevelt in his Message to Congress, cited \textit{supra} note 1; realized in the present active enforcement program and monopoly investigation. For the opinion of one economist, see testimony of Leon Henderson before the investigating committee, N. Y. Times, Dec. 4, 1938, p. 1, col. 3.
to weigh the economic soundness of this view, but rather, upon the assumption that anti-trust enforcement is desirable, to investigate and analyze the failures of such enforcement in the past, and to suggest improvements in the future.

Any anti-trust program, to escape defeat, must first face the confusion arising over the definition of monopoly. It is not easy to determine at what point "industrial efficiency" becomes "industrial empire building", or an "orderly market" becomes "controlled." Upon this basic uncertainty a case history has evolved which further obfuscates the tenuous line of conduct separating enterprisers from monopolists. In the early days of the Sherman Act, the power derived from any combination was deemed to constitute a menace *per se* which Congress intended to proscribe, without any consideration of the benefits which might accrue to the public. It was not long, however, before this literal interpretation of the Act was abandoned as too stringent a circumscription of the enterpriser to serve the public interest. There gradually emerged the present sophistication of the early rule by which the dividing line has been shifted toward monopoly and the area enlarged in which the enterpriser is permitted to operate. Restraints of trade are no longer condemned by rule of thumb, but today will be tolerated, though they stabilize competition, provided the stabilization does not impinge "unreasonably" upon the public interest.

Theoretically the public interest will be sufficiently prejudiced by either intent to restrain or restraint as a necessary result, but actually intent appears in some instances to be the sole criterion.

4. These are the phrases used by the President and Department of Justice. See note 1, supra, col. 4; Department of Justice Public Statement, released Aug. 28, 1938, p. 9; Jackson and Dumbauld, *Monopolies and the Courts* (1938) 86 U. of Pa. L. Rev. 231, 237; Arnold, *Antitrust Laws, Their Past and Future*, speech delivered over WJSV, Columbia Broadcasting System, Aug. 19, 1938.


8. Maple Flooring Association v. United States, 268 U. S. 563 (1925); United States v. Reading Co., 226 U. S. 324 (1912). The same alternatives may be expressed in other ways: either illegal purpose or illegal means will be sufficient to invalidate. Bedford Co. v. Stone Cutters' Ass'n, 274 U. S. 37 (1927); United States v. Railway Em-
size raising a mere presumption of intent which must be further confirmed by conduct.\textsuperscript{9} No express agreement, overt act, or attempt to execute an unlawful purpose need be established,\textsuperscript{10} and circumstantial evidence from which conspiracy can be inferred is deemed sufficient,\textsuperscript{11} but these alleviations in the burden of proof do not in any respect facilitate the basic problem of definition after the proof is in.

The enforcement agency, in choosing its method of attack, must achieve two occasionally contradictory results. On the one hand, that method should be adopted which will terminate a particular abuse by a particular defendant and which will frighten into line potential defendants engaged in similar practices. But since it has still not been determined with a reasonable degree of certainty what patterns of behavior are within and without the scope of the Act, the Department of Justice must also select those cases for prosecution and employ those methods of enforcement, which will afford the judiciary the greatest opportunity to mark out permissible paths in which business men may walk. Resort to criminal prosecution, for example, may have considerable intimidatory effect, but its contribution to a workable definition of monopoly has been slight indeed. It will be against the background of this dual standard that each method of enforcement — criminal prosecution, equity decree, and suit for triple damages — will be examined in turn.

Criminal prosecution was intended to discourage violations by threat of fine and imprisonment,\textsuperscript{12} with an occasional spectacular example as a general warning to others who might be tempted to offend. However, to obtain the threat it has been necessary to assume the exacting burden of pleading and proof that marks a criminal trial. The anomaly of a doubtful crime\textsuperscript{13} assures the

\begin{itemize}
\item 11. The courts recognize that proof of conspiracy by direct testimony and express agreement is usually beyond the realm of possibility. Interstate Circuit, Inc. v. United States (1939) 6 U. S. L. WEEK 803; United States v. Ry. Employees' Dep't, 283 Fed. 479 (N. D. Ill. 1922).
\item 12. A $5,000 fine and a year's imprisonment is the maximum penalty for which the first three sections of the Sherman Act each provide. 26 STAT. 209 (1890), 15 U. S. C. §§ 1, 2, 3 (1934).
\item 13. The statute "creates a crime . . . and gives no specific definition of the crime created." See United States v. Freight Association, 166 U. S. 290, 353 (1897) (Mr. Jus-
prompt application of the technical devices which have always been invoked for the protection of the accused and the discomfiture of the prosecution. The indictment must be a model of careful draftsmanship with sufficient clarity and detail to inform the defendant beyond any peradventure of the particular infraction charged, and convince the court that the facts, if proven, would constitute a violation of the law.\textsuperscript{14} Doubts as to the meaning of the indictment will be resolved against the Government.\textsuperscript{15} Although it is enough to state an agreement, without any overt acts or any degree of successful execution,\textsuperscript{16} this requirement may be very strictly construed.\textsuperscript{17} The prosecution is not required to state every detail of time, place and instrumentality,\textsuperscript{18} but careless omissions and oversights may prove decisive. The slightest duplicity in any count may leave the defendant uninformed.\textsuperscript{10} An indictment may be fatally defective which fails to charge individual defendants as officers or agents in active control of an accused corporation, for other officials will be presumed responsible in the absence of any statement to the contrary.\textsuperscript{20}

tice White's dissent). Consequently indictments in the language of the Statute were insufficient. See United States v. Patterson, 55 Fed. 605, 638 (D. Mass. 1893); In re Greene, 52 Fed. 104, 111 (C. C. S. D. Ohio 1892). The courts have found definition troublesome. See Continental Candy Corp. v. California & Hawaiian Sugar Rfg. Co., 270 Fed. 302, 304 (N. D. Cal. 1920); REPPY, NATIONAL CONFERENCE ON THE RELATION OF LAW AND BUSINESS (1931) 112 (dissents in 44% of the Supreme Court antitrust cases by 1931).


\textsuperscript{15} United States v. Patten, 187 Fed. 664 (C. C. S. D. N. Y. 1911), rev'd on other grounds, 226 U. S. 525 (1913).


\textsuperscript{17} A "plan adopted" for concerted action is deemed sufficient, but a "concerted plan" is inadequate. United States v. Piowaty & Sons, 251 Fed. 375 (D. Mass. 1917).


The Statute of Limitations is one of several protective devices which may be used upon occasion to shield the accused. He is also protected against removal from his own jurisdiction for trial unless probable cause can be shown to indicate guilt. Incriminating testimony given in obedience to a subpoena and under oath will render him immune to criminal prosecution, if he claims the privilege in advance. The presence of a single grand juror who is not qualified to act, or a single official who should not properly have attended the grand jury investigation will void the indictment. The proof must establish his guilt beyond a reasonable doubt to overcome the presumption of innocence, and facts equally consistent with innocence or guilt will not be sufficient to sustain a conviction. Circumstantial evidence will be inadequate unless it excludes every hypothesis but guilt.


27. See note 26, supra. Suspicious circumstances are not enough, and business regularity will be presumed. United States v. Buchalter, 88 F. (2d) 625 (C. C. A. 2d, 1937); United States v. Great Western Sugar Co., 39 F. (2d) 152 (D. Neb. 1930).

28. Nash v. United States, 229 U. S. 373 (1913) (charge failed to withdraw certain means alleged to have been employed by defendants from the consideration of the jury).

to extend further the contest on appeal. Real issues are usually lost in these various rituals of criminal procedure whenever an attempt is made to apply the sanctions.\textsuperscript{20} One of the strongest cases on record for criminal penalties was reversed when the appellate court discovered an uncertainty in the indictment.\textsuperscript{31} Although the Government has been successful in slightly over half of its criminal prosecutions, the bulk of the cases won have been without contest. Convictions actually obtained are outnumbered by those lost upon the pleadings.\textsuperscript{32} Fines totalling $3,746,131,\textsuperscript{33} and prison terms usually under a year have been imposed in 19 cases with 118 individuals affected.\textsuperscript{34} There have been few criminal prosecutions against large enterprise.\textsuperscript{35} The tendency has been to use these sanctions principally against labor, smaller business and the rackets.

The tremendous burden and infinitesimal return characteristic of a spectacular criminal prosecution has been reemphasized by the recent suit against the oil companies at Madison, Wisconsin.\textsuperscript{36} The Department of Justice conducted a field investigation for a solid year before instituting grand jury


\\[\text{31. The second and third counts alluded respectively to the firms mentioned in the first count as competitors during the three years prior to the indictment, and those mentioned therein as competitors before the statutory period began to run, when actually the first count had merely listed the competitors of the accused in a single group without further specification. See Patterson v. United States, 222 Fed. 599 (C. C. A. 6th, 1915), rev'd, United States v. Patterson, 201 Fed. 697 (S. D. Ohio 1912). The court itself made the segregation at a later point in its opinion. Id. at 627. See Tauscher, Policy and Ethics in Business (1st ed. 1931) 130; Seager & Gulick, op. cit. supra note 2, at 446.}\]

\\[\text{32. 107 victories to 95 defeats gives the Government a slender margin. Defendants have plead guilty or nolo contendere in 74 instances, about equally divided. 23 convictions have been obtained, while 31 have been lost upon demurrer, quashed indictments, special pleas, and unsuccessful proceedings for removal. Of the remaining cases lost, 29 were nolle prossed, 11 dismissed, 19 resulted in acquittal, and 5 jury verdicts were reversed or set aside. For a compilation of the cases, see Haldick, Criminal Prosecutions under the Anti-Trust Act (1939).}\]

\\[\text{33. There have been 92 fines in all. Excluding one case in which the maximum set by the Sherman Act did not apply because defendants were indicted also under another law, the largest is $360,000 plus $25,000 for costs assessed in United States v. Socony-Vacuum Oil Co., Inc., when defendants pleaded nolo contendere on June 2, 1938. Department of Justice Public Statement, Released Aug. 28, 1938, p. 10.}\]

\\[\text{34. Sentences in excess of the maximum are accounted for by violations of more than one section of the Sherman Act, each of which constitutes a separate offense. United States v. Buchalter, 88 F. (2d) 625 (C. C. A. 2d, 1937). Another explanation is indictment under several different acts. See United States v. Gramlich in The Federal Antitrust Laws (1938) 263.}\]

\\[\text{35. No more than 22 in all, with the prosecution successful in 9. The total fine assessed against the 283 corporate and individual defendants involved was $1,269,800, an average of $4,387. The only two sentences imposed were suspended or reversed. See The Federal Antitrust Laws (1938) 127, 191.}\]

\\[\text{36. The statistics on the Madison case which follow were secured from the Department of Justice.}\]
proceedings. Then for seven months the grand jury heard 138 witnesses compile a record of 13,584 pages, including 17,801 separate items selected and photostated from 17 1/4 tons of documents received under subpoena. Pleas in abatement were filed against the first indictments and two more were returned in substitution. The trial started on October 4, 1937, and lasted until January 22, 1938. Whether or not the 27 corporate and 46 individual defendants were guilty of fixing the price of gasoline was soon forgotten in the maze of technical banter passing back and forth between the court, prosecutors, and 112 defense attorneys, as 75 witnesses were examined in turn. The jury listened to 11,000 pages of record, watched the actors perform the various mysteries, and decided eight hours after receiving the case for deliberation on each defendant separately, that the 16 corporations and 30 individuals who remained were all guilty. Thereupon the court took under consideration previously made motions to dismiss, upon which decision had been deferred, sustained the verdict as to 12 corporations and five individuals on July 10, granted three corporations and 15 individuals a new trial, and dismissed one corporation and ten individuals notwithstanding the verdict.87 Thus after almost four years’ labor and the expenditure of about $200,000 the prosecution had obtained a $65,000 fine divided among the 17 defendants who remained after the original 73 had provided $2,500,000 for defense.

The maximum penalties are clearly insufficient to constitute a substantial deterrent, but although this deficiency might be corrected by legislation, there is no way to overcome the mountainous endeavor required to secure a criminal conviction. As long as the offense remains uncertain, the accused will continue to enjoy the solicitude of the courts88 and the protection of technical requirements intended to forestall the improvident application of serious criminal penalties.89 Criminal prosecution might be made effective if restraints of trade could be defined and enumerated in a criminal code. But the countless technical devices for mitigating the severity of the criminal sanction make it impossible to measure the various shades of business conduct against the

37. United States v. Standard Oil Co., 23 F. Supp. 937 (W. D. Wis. 1938). For an account of the weaknesses which this case reveals in enforcement by criminal prosecution, see Dep’t of Justice Public Statement, released Aug. 28, 1938 (inadequate penalties, corporation held without officials, burden of trial).

38. Civil suit for injunction or dissolution is preferred as less severe. See United States v. Winslow, 195 Fed. 578, 584 (D. Mass. 1912), aff’d, 227 U. S. 202 (1913). To couple the stigma of criminality with vague requirements of the Sherman Law is not considered fair play. See FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) 222; Kreider, A Brief History of the Growth of Anti-Trust Legislation in the United States (1934) 7 So. Calif. L. Rev. 144, 179. Yet it may not be feasible precisely to define the crime. See SWENSON, NATIONAL GOVERNMENT AND BUSINESS (1924) § 577; MERRITT, WHAT THE ANTI-TRUST LAWS SHOULD BE (1930) 147 ANNALS 195, 198.

39. These requirements were devised originally to protect against conviction for trivial capital offenses. See United States v. Patterson, 201 Fed. 697, 720 (S. D. Ohio 1912), rev’d on other grounds, Patterson v. United States, 222 Fed. 599 (C. C. A. 6th, 1915).
vague standards of the Sherman Law. Consequently no remedy more inappropriate for the purpose could have been chosen, because it carries additional burdens for the enforcement agency to overcome and requires the existence of that very line between legitimate business operations and restraints of trade that it was intended gradually to define. The criminal prosecution has little utility under the present system. It could, however, prove invaluable for the enforcement of a definite order issued by an appropriate governmental commission if a system were devised for the administrative policing of industry.\textsuperscript{40}

The Sherman Act may also be enforced by civil suit for injunction, dissolution, or triple damages,\textsuperscript{41} but since the Act is primarily a criminal statute, these later remedies are dependent upon its criminal sections for a statement of the offense.\textsuperscript{42} In some cases a similar degree of proof has been required,\textsuperscript{43} but a criminal conviction is conclusive in subsequent civil litigation,\textsuperscript{44} and acquittal on a criminal charge does not constitute an affirmative finding of innocence that will bar proof of civil guilt by a fair preponderance of the evidence.\textsuperscript{45} In civil suits the courts are prone to make light of technical objections to form,\textsuperscript{46} and before a petition will be dismissed without a hearing, it must be clear that no cause of action exists.\textsuperscript{47}

As might be expected, it has been far easier to obtain a decree than a conviction.\textsuperscript{48} Of the 233 suits brought in equity, only 59 have been lost

\textsuperscript{40} See p. 301, infra.


\textsuperscript{42} United States v. Patterson, 201 Fed. 697, 714 (S. D. Ohio 1912); United States v. Swift, 188 Fed. 92, 96 (N. D. Ill. 1911). Equity was an "afterthought" in the enactment of the law. See Freund, Standards of American Legislation (1917) 223.


\textsuperscript{47} United States v. Railway Employees' Dep't A. F. L., 286 Fed. 228 (N. D. Ill. 1923). Defenses in civil actions must be cast in the form of answers or motions to dismiss; demurrers, pleas, and exceptions for insufficiency are abolished. Federal Rules of Civil Procedure (1938) Rule 7. The liberality allowed the pleader in equity is set forth by Mr. Justice Holmes in Swift & Co. v. United States, 196 U. S. 375 (1905).

\textsuperscript{48} The civil remedy has been more effective than the penal. See Keezer and May, The Public Control of Business (1930) 20; Jones, The Trust Problem in the United States (1921) 496. But see Bates, The Story of the Supreme Court (1st ed. 1936) 230.
by the Government. However, delay in the institution of suit from ten to twenty years after consolidation in several important instances has added materially to the burden of proof. In the meantime, combinations have been permitted to mellow with years until the distinction between industrial progress and restraint of trade, which may once have been apparent, is all but obliterated. In this respect there has been no escape from the consequences of the crucial period when most of the trusts were forming, when the Department of Justice was less competent and undermanned, the Supreme Court unsympathetic, and enforcement half-hearted. The result has been hard cases which may or may not have made bad law. At any rate the courts have been reluctant to disturb a highly effective industrial machine when it appeared that earlier conditions could not possibly be restored and the attempt would unduly prejudice both public and private interests.

Even when courts have been willing to undertake reform, delay has made it difficult to restrain or dissolve consolidations that have matured before the corrective has been applied. Standard Oil provides the best example of the carrying power that will sustain an established combination in spite of formal dissolution. The habit of cooperation had developed over a long history and could not be suddenly dispelled by mere judicial abracadabra. Although the decree was scrupulously observed, specialization and division of territories persisted until economic factors attendant upon the war and

49. The following represents the gap in years between the start of combination in a few important industries and the institution of suit: Powder: 35, Oil: 24, Tobacco: 17, Shoe Machinery: 12, Glucose: 11, Steel: 10, Farm Machinery: 10, Anthracite Coal: 16. See Laidler, Concentration in American Industry (1931); The Federal Antitrust Laws (1938).

50. Mr. Justice White found it difficult to choose the correct analysis of the facts from “a jungle of conflicting testimony covering a period of forty years.” See Standard Oil Co. v. United States, 221 U. S. 1, 48 (1911); United States v. Eastman Kodak Co., 226 Fed. 62, 65 (W. D. N. Y. 1915).


53. Although the Government has obtained 14 decrees of dissolution by contest and two more by consent, few have been able to overcome this initial handicap.


55. Standard Oil Company was organized in 1870, and the trust in 1882, which was ineffectively dissolved ten years later. Stocking, The Oil Industry and the Competitive System (1925) 21, 43. When the holding company was formed in 1899, “the trust had simply hung out a new sign.” Jones, op. cit. supra note 48, at 57.

upon the increase in crude oil production gradually drove the segments apart. Because there were no similar extrinsic factors to lend support, the decree against American Tobacco Company has been even less successful. No expansion in the growth and consumption of tobacco could ensue to offset the dominance of the successor companies or to encourage the development of independents. The competitive field had been swept clean by the time the decree was entered, and has since remained barren.

Experience under these two decrees raises not only the question of physical separation but also the problem of ownership. Distribution of stock in the divided subsidiaries among the stockholders of the parent company left the same individuals in control and was no solution at all. Variations in subsequent decrees were designed to accomplish a real division of ownership by a limitation upon the amount of voting stock in separated companies that might be held by defendant shareholders in the trust, or by a requirement that properties be sold outright for cash to independents in which officers and stockholders of the defendant held no substantial interest.

In some instances a complete prohibition against the sale or distribution of stocks in subsidiary companies to shareholders in the principal corporation has been the rule. The original decree in United States v. International

57. See Seager & Gulick, op. cit. supra note 2, at 128; Stocking, op. cit. supra note 55, at 62, 104-14; (1938) 48 Yale L. J. 332, 336.
59. New concerns have found it impossible to gain a substantial foothold. See Seager & Gulick, op. cit. supra note 2, at 185, 191; Report of the Commissioner of Corporation on the Tobacco Industry (1915) Part III, p. 11. The growth of R. J. Reynolds from 1% of the cigarette business in 1913 to 50% in 1924 is some evidence of competition among the successor companies themselves. See Seager & Gulick, supra, at 185.
60. See note 54, supra, at 199; note 58, supra, at 422, 426. The American Tobacco decree reduced the voting power of the 29 individual defendants from about 56% in the combine to 35% in the successor companies by giving preferred stocks full voting rights, and enjoined for three years any increase in their holdings secured from individuals outside the circle of 29. Id. at 427, 430; Seager & Gulick, op. cit. supra note 2, at 123, 175; Jones, op. cit. supra note 48, at 449, 462, 494; Stocking, op. cit. supra note 55, at 48, 53.
61. The 27 individual defendants were permitted to receive only half the stock to which they were entitled in voting shares, and could not increase their holdings for a period of three years. United States v. Du Pont de Nemours & Co., 1 D. & J. 195, 200, 204 (1912).
62. Sale of plants was to be made "to a person or persons, including corporations, not controlled by or affiliated with the Corn Products Refining Co., or any of its officers, directors, agents or affiliated corporations, and if such purchaser be a corporation, none of the defendants, and no officer, director or stockholder of the Corn Products Refining Co. or affiliated corporations shall have any substantial interest in the stock or other securities of such purchaser." See 108 Chron. 1392 (1919 Part 2).
63. See the decree in United States v. Reading Co., 273 Fed. 848, 854 (E. D. Pa. 1921), modified and aff'd, Continental Co. v. United States, 259 U. S. 156 (1922). Dissolution by transfer to its own stockholders by Union Pacific of shares held in Southern
Harvester Company met the problem most directly by providing for a division of business and assets "among at least three substantially equal, separate, and independent corporations, with wholly separate owners and stockholders." However, in spite of all this precaution, the decrees in question were still unable to break down the restraints which had been permitted to solidify, or to restore the degree of competition intended. Even when the decree is more successful in achieving its purpose, the result is not quickly and easily attained. Although "the meat monopoly has been broken", the Packer decree was not finally confirmed until 1932 after twelve years of litigation, and sixteen years had elapsed in all before substantial compliance could be achieved. Complex problems of economics and administration involved in the disposition of large grocery and stockyard interests held it in abeyance.

No reasonable bid has yet been received for the Swift subsidiary engaged in prohibited grocery merchandising.

Although the difficulty in framing a decree that cannot be circumvented is important, the current preference for criminal over civil prosecution is also attributable to the second trial required to enforce compliance after the decree has been obtained. To prove contempt it must be established with the degree of certainty required in criminal cases that the act is prohibited by the decree.

Pacific was not approved. United States v. Union Pacific R. R. Co., 226 U. S. 470 (1913). The decree was finally satisfied by distributing to its stockholders shares in the Baltimore & Ohio which had been received from the Pennsylvania for most of the Southern Pacific, the rest going to individuals who held no stock in Union Pacific. 1 D. & J. 217 (1913).

D. & J. 338 (1914). However, the Government subsequently consented to a more equivocal modification which reads: "in such manner and into such number of parts of separate and distinct ownership as may be necessary to restore competitive conditions and bring about a new situation in harmony with law." 1 D. & J. 340 (1914). The final consent decree entered in 1918 provided for the sale of three lines of harvesting machinery, and limited the defendant to a single agent in any town. See Causes of High Prices of Farm Implements (Fed. Trade Comm. 1918) 710. The F. T. C. predicted failure. Id. at 653-680.

64. See Laidler, Concentration in American Industry (1931) 307 (Du Pont); Jenks and Clark, The Trust Problem (1929) 46 (Corn Products Refining); Comment (1932) 41 Yale L. J. 439, 444 (Reading); note 73, infra (International Harvester). The decree against Union Pacific was probably successful.


66. For a history of the litigation, see United States v. Swift & Co., 286 U. S. 106 (1932); Comment (1932) 42 Yale L. J. 81.

67. Facts as to the present status of the decree were obtained from the Department of Justice. For the situation at an earlier date, see Report on the Packer Consent Decree (Fed. Trade Comm. 1925).

68. Numerous stays were granted to excuse the failure of trustees completely to dispose of prohibited interests in stockyards and unrelated lines when the market did not warrant a hasty disposition. The Swift stockyards were not entirely sold before 1931, and Armour's not until five years later.
and constitutes a violation of the Sherman Law.\textsuperscript{70} Injunctions are in disfavor because they tend to legalize monopoly by the removal of incidental evils,\textsuperscript{71} and cannot readily be enforced since the evidence that was by chance available for proof in the first instance will probably never again be permitted to exist.\textsuperscript{72} Although dissolution involves physical changes that can be more readily observed than transformations in conduct, the Government faced somewhat the same situation when it attempted to prove the Harvester Decree had not restored competitive conditions. A recent study has found International Harvester still dominant in farm machinery by 55\%;\textsuperscript{73} but the Government was unable at the time of suit to sustain the burden of proof, and further relief was denied.\textsuperscript{74} However, if suit had been instituted against International Harvester when it was formed in 1902 instead of 1912, and a decree obtained in 1904 instead of 1918, success would have been more likely.\textsuperscript{75} Instead, there was no challenge until the respective spheres of enterprise and monopoly were sufficiently blended and confused to repel enforcement. If it were not for this ex post facto characteristic of the remedy, equity might well have been a cogent weapon in the service of the law, but no corrective can be applied to good effect after transgression has progressed too far. If the incidence of enforcement were upon business practices which lead to restraints of trade rather than upon the accomplished monopoly, the suit in equity would not have to contend with a problem of definition heightened by the inertia of the status quo. Its limited success may be attributed, therefore, to the present scheme of enforcement in general, and not to any inherent defect in the remedy itself which makes it inappropriate for the purpose.

\textsuperscript{70} United States v. Southern Wholesale Grocers' Ass'n, 207 Fed. 434 (N. D. Ala. 1913). Only 6 proceedings in contempt have been instituted. 15 individuals have been fined $11,500, 5 have been sentenced to a term of 3 months to 3 years, Debs "and others" received 3 to 6 months, and one a suspended sentence.

\textsuperscript{71} United States v. Eastman Kodak Co., 230 Fed. 522 (W. D. N. Y. 1916). The early decrees against Aluminum Company of America and Swift & Company were compromises with monopoly which did not penetrate beyond the superstructure. See 1 D. & J. 341, 63. For the results see Comment (1937) 37 Col. L. Rev. 269 (Aluminum); Report on the Meat Packing Industry (Fed. Trade Comm. 1919); Comment (1932) 42 Yale L. J. 81.


\textsuperscript{73} Agricultural Equipment and Machinery Industry (Fed. Trade Comm. 1938) 1023, 1037.

\textsuperscript{74} United States v. International Harvester Company, 274 U. S. 693 (1927). The action was brought under clause (e) of the 1920 consent decree which authorized the Government to petition for further relief in the event competitive conditions were not restored. Id. at 697.

\textsuperscript{75} The supplementary petition was filed in 1923 and finally dismissed in 1927. For a history of the litigation see note 74, supra; The Federal Antitrust Laws (1938) 129.
Section Seven, the triple damage clause of the Sherman Act, was designed to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement. The effectiveness of the triple damage remedy depended upon the frequency with which prospective monopolists would be harried by small competitors who were given the power to institute suit and exact penalties for violation of the Act. However, an examination of the reported cases discloses that business men have not been at all anxious to exercise their privilege. There have been 103 suits in all since 1890. This figure, when measured against the hundreds of thousands of men in business, and the extent of corporate consolidation that has been effected by certain of their number, assumes a comparatively futile insignificance.

The reluctance of the ordinary business man to bring suit upon a violation of the anti-trust laws may be explained by the gamble which it involves and the probability that litigation once started will be protracted, costly, and followed perhaps by retaliation. The normal confusion as to what constitutes an offense beyond the pale of enterprise is just the beginning. It is not enough to allege and prove a conspiracy that would suffice for a valid criminal indictment and conviction. The claimant must also establish that by reason of the unlawful combination he himself has suffered injury. Although evidence required to establish violation, injury and damages will be readily available in certain instances, the proof may fall short at violation without injury to business or property. Or it may be the plaintiff can show only

76. 26 Stat. 210 (1890); 15 U. S. C. § 15 (1934). "It is well known that the main purpose of the Anti-Trust Act was to protect the public from monopolies and restraint of trade and the individual right of action was but incidental and subordinate." See Glenn Coal Co. v. Dickinson Fuel Co., 72 F. (2d) 885, 889 (C. C. A. 4th, 1934). The Federal Government recently made use of the remedy directly for the first time. Dep't of Justice Public Statement, released Feb. 20, 1939. The only precedent is a successful suit by a municipality. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390 (1906).

77. Only six of these were instituted before 1907, while 46 of them have been started during the last twelve years. During the intervening decades, 1907-1916 and 1916-1926, there were 25 and 26 respectively. The number, then, has been increasing but not to any considerable extent. The average per year since the Sherman Law was first enacted is about two, compared with approximately four since 1926.


81. Gerli v. Silk Ass'n of America, 36 F. (2d) 959 (S. D. N. Y. 1929) (loss of corporate office and salary, and damage to general credit and reputation are not injuries to business or property within the meaning of §7); American Sea Green Slate Co. v. O'Halloran, 229 Fed. 77 (C. C. A. 2d, 1915) (assuming violation, not shown to be the proximate cause of damage).
injury without violation in case intent or a connection with interstate commerce is not provable. The further stumbling block of speculation when damages cannot be precisely ascertained has been avoided by defining speculative damages as not clearly attributable to a cause rather than uncertain only in amount. Whether triple damages are punitive in nature has been disputed, but pleading requirements at any rate have assumed the same protective character that is typical of criminal prosecutions. Not only must the complaint allege violation, injury and proximate cause, but it must do so with enough specification to warn the defendant of the particular offense and convince the court that a cause of action has been stated, since the remedy is drastic and must be strictly construed. The degree of particularity is intermediate between the requirements of a criminal indictment and equitable bill. Protective devices also reminiscent of criminal prosecution are available to bar recovery. Although it is apparently no longer possible


to plead claimant's earlier participation in the restraint as a defense,\textsuperscript{80} the
accused may insist upon a jury\textsuperscript{60} and use the Statute of Limitations as a plea
in bar.\textsuperscript{91} Requirements of pleading and proof are occasionally eclipsed by
the hazards of normal trial procedure which may withhold a victory almost
won.\textsuperscript{92} Under the circumstances it is not at all surprising that prospective
litigants hesitate to take the risk.

Those who dared to venture forth have been awarded damages aggregating
$1,270,147.51 in 12 suits out of the total 103.\textsuperscript{93} The record is improved by
38 additional suits that were ruled upon favorably by the courts but not
finally determined, and which were probably settled out of court. Assuming
this to be so, the claimant has been to some degree successful in 50 suits
out of 103. The totals are not impressive, and the number in which triple
damages have been actually awarded is so small that for every four years
since 1890 there would be on the average exactly one. Five of these awards
aggregating $799,711.65 have been made during the last twelve years. The
largest of these was awarded in a suit against the Associated Bill Posters
of the United States and Canada, but since the combination had already been
enjoined, the assessment of damages was something of an anti-climax, espe-
cially since the decree was entered in 1916, the suit for triple damages brought
in 1919, and $352,967.67 finally awarded in 1930.\textsuperscript{94} The same situation is

\textsuperscript{89.} Plaintiff’s conduct prior to the time cause of action accrues is immaterial. Conn.
Importing Co. v. Frankfort Distilleries, Inc., 101 F. (2d) 79 (C.C.A. 2d, 1939). The
following were distinguished as inapplicable to a situation in which the cause of action
arises after plaintiff’s connection with the conspiracy has been severed: Eastman Kodak
Co. v. Blackmore, 277 Fed. 694 (C. C. A. 2d, 1921); Bluefields S. S. Co., Ltd. v. United

\textsuperscript{90.} Fleitmann v. Welsbach Co., 240 U. S. 27 (1916). Private injunction and triple
damages cannot both be obtained in the same suit. National Foundry Co. v. Alabama
Pipe Co., 7 F. Supp. 823 (E. D. N. Y. 1934); Decorative Stone Co. v. Building Trades

\textsuperscript{91.} Seaboard Terminals Corp. v. Standard Oil Co., 24 F. Supp. 1018 (S. D. N. Y.
1938); Glenn Coal Co. v. Dickinson Fuel Co., 72 F. (2d) 885 (C. C. A. 4th, 1934).

\textsuperscript{92.} Three million dollars were lost when it was decided excerpts from the opinion
of the appellate court remanding a case for new trial, read in the presence of the jury,
might have influenced the verdict. See Bauch Mach. Tool Co. v. Aluminum Co. of
66 (1917) has been often cited as the longest triple damage litigation (1903-1917), the
Aluminum suit required 16 years at a cost to all concerned of hundreds of thousands of

\textsuperscript{93.} An additional $12,756,245.66 has been awarded by eleven jury verdicts which
were not sustained. Deducting a single exceptional verdict for eight million, there still
remains a sum substantially in excess of the amount actually awarded and confirmed. On
only three occasions did the alleged conspirators emerge unscathed from the jury room.
Apparently a snug harbor awaits the claimant if he can survive the voyage. But see
Young, \textit{Who Shall Administer the Anti-Trust Laws?} (1930) 147 ANNALS 171.

Most recent manifestation of the jury’s beneficence is the $711,932.55 awarded the
Apex Hosiery Company. See N. Y. Times, April 4, 1939, p. 1, col. 5.

\textsuperscript{94.} W. H. Rankin Co. v. Associated Bill Posters, 42 F. (2d) 152 (C. C. A. 2d, 1930).
presented in the Eastman Kodak case, although the success of the decree obtained is rendered circumspect by an extremely litigious record. In any event the $23,743.98 finally awarded after twelve years of litigation could not possibly have deterred a corporate defendant with an earned surplus of $3,335,419 in 1927, the year of the award. The award of $108,500 against American Can with an earned surplus of $7,627,620 was also mathematically insignificant, but in that case the publicity afforded by disclosure that the defendant was playing favorites in face of public announcements to the contrary must have impaired the standing of American Can with all the customers against whom it had discriminated and compelled a return to fair trade practices. In the remaining cases, the damages awarded were in themselves a considerable deterrent without the aid of extraneous circumstances.

However, three successful suits every twelve years constitute no material assistance to the Government. The outcome of this abortive undertaking to enforce the laws by private action returns again unerringly to the crux of the anti-trust labyrinth. Until the offense is more precisely defined, enforcement will be mediocre. The individual, who might do much to enforce the law, is reluctant to act because he is uncertain whether or not an offense has actually been committed. The weakness of private suit for triple damages, like criminal prosecution, is rooted in its demand for that reasonable certainty in the law which it was intended itself gradually to supply.

The distinction between monopolists and enterprisers has not been clarified by fifty years' administration of the anti-trust laws. The only evidence of success in this direction has been the increasing popularity of consent decrees, explained by a general preference to accept the inevitable when

96. The petition was filed in 1913, and the decree of dissolution finally entered in 1921 with supplementary decrees following in 1926, 1929, and 1935. See The Federal Anti-Trust Laws (1938) 141.
97. Moody's Industrials (1928) 2421.
100. $195,000 against defendants with an earned surplus of $158,780. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555 (1931); Moody's Industrials (1932) 107,2321. $120,000 against an earned surplus of $710,929 in 1923, and a deficit of $45,879 in 1929, the last years in which defendant was listed. Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corporation, 57 F. (2d) 96 (C. C. A. 1st, 1932); Moody's Industrials (1931) 2978.
102. Consent decrees now outnumber contested suits in equity, 117 to 116. A comparison by decades from 1910, with the prior twenty years as the first period, indicates that this numerical superiority has been progressive. Consent: 4, 37, 65, 11. Contest: 24, 20, 10, 3.
previous decisions in similar cases indicate that defense would be unavailing.\textsuperscript{103} However, the present numerical superiority of consent decrees over contested suits in equity might also be explained by anxiety to escape the ordeal of a vigorous prosecution with its attendant expense, publicity, delay, and business disorganization.\textsuperscript{104} This tendency eases the burden of law enforcement, but it may be that consent precludes further relief in case the decree proves insufficient.\textsuperscript{105} However, in spite of this limited accomplishment in the past, it is the duty of the Government to enforce the law as enacted, and the present vigorous program indicates a will to perform. Within the usual formula of enforcement, with suspicion, threat, and punishment the factors on which the Government continues to rely, the Department of Justice is determined to use the methods available to best advantage. The criminal prosecution is preferred as the most drastic remedy of all, with equity in a subordinate role, and consent reserved for immediate relief when it does not appear that punishment can be readily imposed.\textsuperscript{106} To facilitate the burden of proof, emphasis is placed upon economic consequences rather than upon intent as the essential criterion for the segregation of monopolists from enterprisers in an attempt to shift the dividing line back to the position it occupied in the beginning when all restraints were illegal and monopoly was outlawed by rule of thumb.\textsuperscript{107} To avoid another defect that hampers law enforcement,

\textsuperscript{103} See Donovan, \textit{Consent Decrees in the Enforcement of Federal Anti-Trust Laws} (1933) 46 Harv. L. Rev. 885. Striking examples are the recent agreements of Ford and Chrysler to accept consent decrees in the event the prosecution of General Motors is successful, and a similar earlier agreement by Remington-Rand to accept any decree which might be entered against International Business Machines. See Dept. of Justice Public Statement, released Nov. 7, 1938; \textit{The Federal Anti-Trust Laws} (1938) 246. Note 102, \textit{supra}, is a further indication that consent springs from contest at an earlier period.

\textsuperscript{104} See Donovan, \textit{Consent Decrees in the Enforcement of Federal Anti-Trust Laws} (1933) 46 Harv. L. Rev. 885, 911.

\textsuperscript{105} It is not clear whether the Court decided in \textit{United States v. International Harvester}, 274 U. S. 693 (1927) that the Government was bound by the consent decree so long as the other contracting party complied, or simply that the decree was sufficient to restore competitive conditions. Compare note 104, \textit{supra}, at 897 and note 73, \textit{supra}, at 163 with Comment (1937) 37 Col. L. Rev. 269, 279. The same question must be confronted in the current suit against Aluminum Co. of America.

\textsuperscript{106} Arnold, \textit{Fair and Effective Use of Present Anti-Trust Procedure} (1938) 47 Yale L. J. 1294. "I do not deny that by amendment changes might not be wrought upon the civil procedure which would make me modify my present position." \textit{Id.} at 1299. Sufficient changes may be effected by the O'Mahoney Bill, recently introduced in the Senate: (1) Violation by company constitutes violation by any officer who authorized illegal act, and knowledge presumes authorization; (2) officer forfeits twice his total compensation for the period of the violation; (3) company forfeits twice its total net income for the same period. See 84 Cong. Rec., June 29, 1939, at 11,483.

\textsuperscript{107} Enforcement is concerned with economics consequences, not state of mind. See Arnold, \textit{Fair and Effective Use of Present Anti-Trust Procedure} (1938) 47 Yale L. J. 1294, 1297.
requests have been made for more men and larger appropriations so that all complaints can be investigated and all cases brought to trial.\textsuperscript{108}

But the present enforcement machinery produces wasteful litigation which may defer the answer to pressing economic questions from three to twelve years after suit has actually begun.\textsuperscript{109} Moreover, it seems both impractical and unwise to attempt a return to the days when all size and power were deemed to constitute illegal restraints of trade. The Government might more readily achieve success if the present formula of enforcement centering upon the punishment of monopoly were replaced by another that would concentrate instead upon the conduct of enterprise. This recommendation is in accord with the steady current of legislation and criticism since the laws were first enacted, which recognizes that monopoly is the product of unsavory business morals, and can more readily be checked during the incipient stage than destroyed upon its maturity.\textsuperscript{110} The Clayton and Federal Trade Commission Acts were intended to advance the moment of application sufficiently to direct the impact of the laws against competitive practices which did not assure fair play and therefore encouraged restraints of trade.\textsuperscript{111} Current proposals represent a further development of this emphasis upon business ethics as the essence of the monopoly problem.\textsuperscript{112} They would require the submission of plans for merger and business cooperation in advance of execution for a commission for the determination of legality.\textsuperscript{113} Some pro-

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\textsuperscript{108} "You can't police a country as large as America with a corporal's guard."

\textsuperscript{109} See ROELFJEING, \textit{BUSINESS AND GOVERNMENT} (3d ed., 1938) 153; Young, \textit{Who Shall Administer the Anti-Trust Laws?} (1930) 147 Annals 171, 176, 177. The following litigations are a few of the most important and prolonged. American Sugar Refining: 12; Reading, and International Harvester: 10; U. S. Steel, and United Shoe Machinery: 9; Eastman Kodak: 8; Corn Products Refining: 6; DuPont, and Standard Oil: 5; American Tobacco: 4.

\textsuperscript{110} See THEODORE ROOSEVELT: \textit{AN AUTOBIOGRAPHY} (1913) 617–620; Donovan, \textit{The Need for a Commerce Court} (1930) 147 Annals 138. After serving their purpose, illegal practices are abandoned and the powerful organization which they have created cannot be touched. See United States v. U. S. Steel Corp., 251 U. S. 417, 444, 451 (1920); United States v. American Can Co., 230 Fed. 859, 902 (D. Md. 1916).


\textsuperscript{112} See Dickinson, \textit{Anti-Trust Laws and the Self-Regulation of Industry} (1932) 18 A. B. A. J. 600; Merritt, \textit{What the Anti-Trust Laws Should Be} (1930) 147 Annals 195, 201.

\textsuperscript{113} See Butler, \textit{Needed Changes in Anti-Trust Law} (1930), 147 Annals 189, 191; Legis. (1932) 45 Harv. L. Rev. 566. A special court has been recommended, instead of a commission. See Donovan, \textit{The Need for a Commerce Court} (1930) 147 Annals 138, 143; Young, \textit{Who Shall Administer the Anti-Trust Laws?} (1930) 147 Annals 171, 177.
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posals would confine the commission to advisory opinions;114 others would authorize the issuance of licenses for immunity against triple damages and criminal prosecution as long as the licensee complies with the terms of his approved plan of operation.115 By this procedure there would be assured a prompt examination of industrial structure in economic terms116 when something can still be done about it, and an incentive would be offered cooperation among business men and the Government in a mutual undertaking to eradicate the sources of trade restraints.117 The present monopoly investigation will examine various proposals to heighten the effectiveness of the laws. Although the details cannot be foreseen, it is most likely that a similar plan for the administrative policing of industry will emerge.

So fundamental a change in the theory and incidence of anti-trust enforcement would probably nevertheless retain the methods that have been considered above. There would be no need of further alteration, because the fault has been not so much with the remedies themselves as it has been with the general scheme under which they have necessarily been applied. Criminal prosecution and suit for triple damages were not fitted to bring order out of confusion. Equity could not operate successfully after the fact. But if these devices were appended to administrative machinery for anti-trust enforcement, the difficulties which have hampered their operation in the past would be dissolved. The orders of a commission would sufficiently distinguish the conduct of enterpriser and monopolist to enhance the success of suits for triple damages and facilitate criminal convictions in those cases where the orders were disobeyed. Since administrators would act at an early stage in the development of trade restraints, the effectiveness of the bill in equity would be increased. The precision and the timeliness which have been lacking would be supplied. The methods of enforcement have been unable clearly to draw the line of conduct which the anti-trust laws require, but once a standard is provided by an administrative system designed to apply the law to particular situations, criminal prosecution, the bill in equity and the suit for triple damages should be competent to enforce compliance.

114. See Legis. (1932) 45 Harv. L. Rev. 566, 568. At one time this service was performed by the Department of Justice. See Donovan, Some Practical Aspects of the Sherman Law (1929) 3 Tex. L. Q. 343, 330. "That practice is now generally discredited." Dept. of Justice Press Release, July 20, 1938, p. 3.


117. The criminal prosecution would be relegated to a secondary role. See Butler, supra note 113, at 191, 193; Merritt, supra note 115, at 198. The spectacular anti-trust suit may be a thing of the past. See Jackson, supra note 101; Donovan, supra note 103, at 913.