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# The Extraordinary Deterrence of Private Antitrust Enforcement: A Reply to Werden

Robert H. Lande

*University of Baltimore School of Law, rlande@ubalt.edu*

Joshua P. Davis

*University of San Francisco, davisj@usfca.edu*

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*The extraordinary deterrence  
of private antitrust enforcement:  
A reply to Werden, Hammond,  
and Barnett*

BY ROBERT H. LANDE\* AND JOSHUA P. DAVIS\*\*

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In 2011, we documented an extraordinary but usually overlooked fact: private antitrust enforcement deters a significant amount of anti-competitive conduct. Indeed the article showed that private enforcement probably deters even more anticompetitive conduct than the almost universally admired anticartel enforcement program of the United States Department of Justice.

In a recent issue of *The Antitrust Bulletin*, Gregory J. Werden, Scott D. Hammond, and Belinda A. Barnett, members of the Justice Department staff, challenged our analysis, asserting that our comparison “is more misleading than informative.” However, their specific criticisms do not withstand scrutiny. In this reply, we explain why our original

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\* Venable Professor of Law, University of Baltimore School of Law, and Director, American Antitrust Institute.

\*\* Associate Dean for Faculty Scholarship and Professor of Law, University of San Francisco School of Law, and member of the Advisory Board of the American Antitrust Institute.

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conclusions survive the efforts of Werden, Hammond, and Barnett to debunk them.

KEY WORDS: *private antitrust litigation, private antitrust enforcement, deterrence, criminal antitrust enforcement, cartels, optimal deterrence, cartel deterrence, antitrust litigation, antitrust damages, antitrust class actions*

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Our 2011 article, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*,<sup>1</sup> documents an extraordinary but usually overlooked fact: Private antitrust enforcement deters a significant amount of anticompetitive conduct. The article shows that “there is evidence”<sup>2</sup> that private enforcement “probably”<sup>3</sup> deters even more anticompetitive conduct than the almost universally admired<sup>4</sup> anticartel enforcement program of the United States Department of Justice (DOJ).

Although our article’s comparison considers a large number of factors and requires seventy-one law review pages to develop its analysis and conclusions, some parts of the comparison it makes are relatively simple: The article totals the value of every DOJ anticartel sanction from 1990 to 2007, which equals \$7.737 billion.<sup>5</sup> The article compares this to the \$21.9 to \$23.9 billion in sanctions resulting from just forty large private antitrust cases that concluded during the same period.<sup>6</sup> On the basis of this and other evidence the article concludes that private enforcement

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<sup>1</sup> Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315 (2011), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id1565693](http://papers.ssrn.com/so13/papers.cfm?abstract_id1565693).

<sup>2</sup> *Id.* at 348.

<sup>3</sup> We included this qualifier. *Id.* at 315.

<sup>4</sup> As we stated, we “strongly” agree with this consensus “and are second to no one in our appreciation of the DOJ’s anti-cartel activity.” *Id.* at 316.

<sup>5</sup> The total includes corporate and individual fines, restitution payments, and an equivalent value for prison time and house arrest. *Id.* at 337.

<sup>6</sup> *Id.* at 338. The total includes payments made in these forty cases or clusters of related cases, but neither the value of the injunctive relief secured nor the amounts defendants paid in litigation expenses.

“probably” deters more anticompetitive activity than DOJ antitrust enforcement. The article also concludes that private enforcement deserves much more praise than it typically receives, not the scorn so frequently given to it by the antitrust field.

In a recent issue of *The Antitrust Bulletin*, Gregory J. Werden, Scott D. Hammond, and Belinda A. Barnett (WHB) challenge our analysis.<sup>7</sup> They assert that our comparison “is more misleading than informative.”<sup>8</sup> Although we understand and admire the instinct of these DOJ employees to proclaim the superiority of the remedies secured by the fine institution to which they have devoted many years of their lives, their specific criticisms fail to undermine our conclusions. In their article WHB offer six separate critiques of our analysis, which we now consider in turn.

First, one of the items we included in the DOJ’s deterrence total was the monetary equivalent of the 330.24 years that cartel defendants were sentenced to prison during the eighteen-year period we studied.<sup>9</sup> WHB complain that we use only \$2 million as the deterrence value (or disvalue) of a year in prison.<sup>10</sup> They assert this figure is too low, but never provide a higher figure they believe is acceptable.<sup>11</sup> Moreover, the only evidence they provide for their assertion that \$2 million per year is inadequate is their undocumented conclusion that “some” defendants spend more than this in legal fees attempting to stay out of prison and “some” would pay even more to escape prison outright.<sup>12</sup>

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<sup>7</sup> Gregory J. Werden, Scott D. Hammond, & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All The Tools and Sanctions*, 56 ANTITRUST BULL. 207, 227–33 (2011).

<sup>8</sup> *Id.* at 229.

<sup>9</sup> Lande & Davis, *supra* note 1, at 336.

<sup>10</sup> Werden, Hammond & Barnett, *supra* note 7, at 229.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* WHB never provide specifics. For example, do they have evidence that individual defendants frequently spend \$5 million in legal fees in an attempt to avoid a potential two-year prison sentence? Or that some individual defendants have paid \$10 million in legal fees when they face a five-year sentence? WHB present only assertions.

However, although our article analyzed a number of approximation techniques to arrive at the estimate that a year of prison is “worth” no more than \$2 million,<sup>13</sup> immediately after we did this—in the very next paragraph!—we tripled it to \$6 million because of our stated desire to be conservative and our belief that individual sanctions count more than corporate sanctions.<sup>14</sup> In other words, in the next paragraph we use \$6 million as the equivalent value of a year in prison. We accordingly added \$6 million—not \$2 million—times the number of years in prison to the corporate fines and other monetary sanctions to arrive at a total of \$7.737 billion for the deterrence value of DOJ enforcement. This is what we compare to the private total.<sup>15</sup>

WHB also fail to mention our “flip” figure. We show that only if one disvalues a year in prison as greater than \$43–\$48 million would DOJ anticartel enforcement deter more anticompetitive conduct than does private enforcement. (Actually, this number is based on the deterrent effect of just the forty private cases we analyzed<sup>16</sup>; we have since documented many hundreds of millions of additional dollars that private actors recovered during the same period.<sup>17</sup>)

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<sup>13</sup> Lande & Davis, *supra* note 1, at 335 n.72.

<sup>14</sup> *Id.* at 336.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 340. Further, we compared the private total to an Antitrust Division total that, as WHB concede, includes nonantitrust fines secured by the Antitrust Division. Werden, Hammond & Barnett, *supra* note 7, at 228 n.84. WHB surely have access to nonpublic data showing how much of what the Division reports publicly as “antitrust fines” in fact is related to other crimes that they uncovered during the course of antitrust investigations. WHB should reveal how much of the fines that we, when we performed our study using the data the Antitrust Division published, classified as DOJ antitrust fines, actually are nonantitrust fines. Because we included these nonantitrust fines, our analysis was too favorable toward finding a high amount of deterrent effects from DOJ antitrust activity.

Similarly, some of the prison time the publicly available Antitrust Division statistics attribute to antitrust offenses could have resulted from nonantitrust crimes, and not every prison sentence was served in full. We urge WHB to provide data that is as accurate as possible so we all could perform a fairer DOJ-private comparison.

<sup>17</sup> Robert H. Lande & Joshua P. Davis, *Summaries of Twenty Cases of Successful Private Antitrust Enforcement* (U.S.F. Law Research Paper, 2011),

We are as mystified by WHB's criticism of our article for allegedly using \$2 million as the value of a year in prison as we are curious as to whether they believe that a year in prison on average should be disvalued at more than \$43–\$48 million. After all, the issue is not the highest amount any defendant would pay to avoid prison. For a general comparison such as we are making, one should examine the value or disvalue of a year in prison to the *average* potential antitrust violator. WHB provide no data on this issue, however. For the reasons given in our article we believe that the figure we actually used in our analysis—\$6 million per year—is conservative and generous.<sup>18</sup> Certainly WHB have done nothing to demonstrate that the figure is too low.

Second, WHB complain that we do not value the stigma and lost future income that follow from serving time in prison.<sup>19</sup> We wish, however, they had provided data on this issue's significance or magnitude. If they had, we would have been glad to include it in our calculations.

In fact, we do have some preliminary, highly tentative evidence that at least some, and perhaps as many as half, of convicted price fixers go back to work in the same industry or even in the same firm, after they are released from prison.<sup>20</sup> We also have evidence that sometimes the corporate attitude is that the person who went to prison "took a bullet for the team" and for this reason should be rehired after his or her release from prison, perhaps even at a higher salary.<sup>21</sup> We also know, anecdotally, of situations such as that involving Alfred Taubman, in which there seems to be little or

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*available at* <http://ssrn.com/abstract=1961669> (study of twenty additional cases of successful private antitrust enforcement).

<sup>18</sup> Lande & Davis, *supra* note 1, at 335–36.

<sup>19</sup> Werden, Hammond & Barnett, *supra* note 7, at 229.

<sup>20</sup> See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement* 36 (July 30, 2012) (unpublished draft) (on file with the authors). See also John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 *CARDOZO L. REV.* 427, 440–42 (2012), *available at* [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1917657](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1917657).

<sup>21</sup> See Connor & Lande, *supra* note 20, at 440.

no stigma or loss of social status after release from prison for bid rigging.<sup>22</sup>

Maybe on average the future income and social status of convicted price fixers decrease significantly. But maybe not. However, even if their future income decreased by another \$1 million for each year of imprisonment—a figure we strongly doubt—the actual figure we used as the deterrence value of a year in prison—\$6 million—should still be more than high enough. Moreover, even if the deterrence value of prison were increased to make up for lost future wages and social status, we find it inconceivable that a year of prison would have a total disvalue to an individual of more than the \$43–\$48 million required to “flip” our calculations. Only if the yearly deterrence from prison (including lost future income and social status) on average exceeded \$43–\$48 million would DOJ anticartel enforcement be found to deter more anticompetitive conduct than these forty private cases. Do WHB believe this?

We urge WHB to perform a study of the issues they raise. We urge WHB to study the stigma issue—what actually happens to social status after price fixers are released from prison? We also urge WHB to ascertain how often price fixers go back to work for their old firms or for other firms in the same industry, and whether their salaries increased or decreased as a result of their imprisonment. Finally, we also urge DOJ to routinely include provisions in plea agreements barring convicted price fixers from ever working in the same industry in which they fixed prices.

Third, WHB state that our use of the standard optimal deterrence model (which assumes risk neutrality) for entire cartels is inappropriate because if the most risk-averse member of a cartel cracks, the cartel will crack.<sup>23</sup> For this reason the optimal deterrence target need only be the most risk-averse member of a cartel.

This observation is interesting and correct. But it seems likely that most cartelists are by nature risk seekers. After all, they form cartels even though this subjects them both to the risk of getting caught,

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<sup>22</sup> *Id.* at 438 n.45.

<sup>23</sup> See Werden, Hammond & Barnett, *supra* note 7, at 229–30.

tried, imprisoned, fined, and fired, and to the lower social status and future income that WHB assert are so significant. Accordingly, the appropriate focus of an optimal deterrence calculation actually should be on the most risk-averse member of a risk-seeking group of cartel members. Is this person or corporation net risk neutral, net a risk avoider, or still a net risk seeker? We do not know. Neither do WHB, and they provide no data that would help analyze this issue.

WHB similarly contend that discouraging a single individual at a single potential cartel member may suffice to prevent the illegal collusive conduct.<sup>24</sup> They also assert that criminal penalties may succeed if they prevent firms with a substantial market share from violating the antitrust laws, in part because it may suffice to discourage even a single potential cartel member from participating.<sup>25</sup>

This point, however, applies equally to both criminal penalties and to the civil liability that arises in private actions. It does not provide a reason to conclude one is more effective at deterrence than the other. Moreover, even if some members of some firms, or even some entire firms, decline to participate, the cartel nevertheless may still succeed in raising prices. After all, to be largely successful, a cartel need not consist of every firm in a market, much less every employee of every firm.

Fourth, they write: "Lande & Davis also are wrong to credit the entire deterrent effect of damage recoveries to plaintiffs' lawyers on the basis that the recovery would not have occurred without the efforts of plaintiffs' lawyers. In fact the Antitrust Division does a great deal of the work that results in damage recoveries."<sup>26</sup>

WHB would be right if we credited private plaintiffs with all the deterrent effects from these private cases. We did not. In fact, we explicitly stated that credit should be shared: The DOJ certainly should get partial credit for the private recoveries obtained in any cases the DOJ uncovered or helped to uncover, even if the private parties secured the bulk of the sanctions. Nevertheless, it would not be fair to give the DOJ complete credit for any resulting deterrence because if there had been no private

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<sup>24</sup> *Id.* at 229.

<sup>25</sup> *Id.* at 229–30.

<sup>26</sup> *Id.* at 230.

enforcement, this deterrence never would have arisen. Rather, the fairest thing would be to share credit for this deterrence between the public and private enforcers.<sup>27</sup>

We believe that ten of the forty private cases we studied (twenty-five percent) were follow-ons to DOJ enforcement efforts.<sup>28</sup> This percentage is similar to that obtained in the classic study by Kauper & Snyder, who found that no more than twenty percent of all private antitrust cases were follow-ons to DOJ cases.<sup>29</sup> Even if DOJ were given partial credit for twenty-five percent of the deterrence caused by the forty private cases we studied, our overall conclusion would not change significantly.

This is especially true because the contrary point obtains as well. Our case studies showed that private enforcement sometimes preceded—and thereby may have significantly assisted—DOJ enforcement.<sup>30</sup> Indeed, even the much-lauded DOJ leniency program benefits from the threat of private enforcement. As WHB acknowledge, “One inducement to apply for leniency, however, is the potential to significantly limit liability in damages suits.”<sup>31</sup> In other words, the threat of private enforcement helps to create the leverage necessary to induce antitrust violators to confess to the DOJ.

For all these reasons, the relationship between DOJ and private enforcement is symbiotic. And, as a result, crediting private enforce-

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<sup>27</sup> Lande & Davis, *supra* note 1, at 347.

<sup>28</sup> *Id.* at 346. For a discussion of our classification methodology, see *id.* and Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 897–99 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090661](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090661).

<sup>29</sup> See Edward A. Snyder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 578 n.137 (1991) (“Specifically we found, using the Georgetown Project data, that follow-on cases accounted for 11% of cases in the period 1973–1977 and 6% in the period 1978–1983. (These figures exclude Multi-District Litigation cases.) More relevant, follow-on cases accounted for 37% of horizontal restraint cases in the period 1973–1977 and 20% of the same in the period 1978–1983.”).

<sup>30</sup> For an analysis of these issues, see Lande & Davis, *supra* note 28, at 897–99.

<sup>31</sup> Werden, Hammond & Barnett, *supra* note 7, at 233.

ment for all the money it recovers would be inaccurate, as would crediting the DOJ for all of the penalties it is able to impose through criminal enforcement. Our comparison, then, is a rough proxy that may err somewhat in either direction. The “true” ratio of private deterrence to DOJ deterrence therefore might not be the simple result that followed from our data: (\$21.9–\$23.9 billion in private sanctions)/(\$7.737 billion in public sanctions<sup>32</sup>), which equals a ratio that is roughly 3 to 1 in favor of private deterrence. Whether the actual ratio is 2 to 1 or 4 to 1 is beside the point; our article’s point is that the ratio for all private cases—not just the forty that we studied—is “probably” greater than 1 to 1.

Fifth, WHB say we assert that private plaintiffs completely uncovered the conduct responsible for two of the thirteen cartel-based recoveries in our sample “with the government following the private plaintiffs’ lead or playing no role at all.”<sup>33</sup> WHB further state: “In fact the Antitrust Division did not ‘follow the private plaintiffs lead’ in prosecuting those cartels and any suggestion that the Antitrust Division ‘played no role at all’ is ridiculous.”<sup>34</sup>

However, WHB overlook the “or” in the first sentence they quote. We never said the government played no role in these two cases. We said only that the first evidence of collusion was uncovered by private parties. In fact, we explicitly stated in our case summaries—which they cite, so they must be aware of them—that the government played an important role in both cases. But WHB fight this “no role” straw man argument by showing that DOJ played an important role.<sup>35</sup> Our actual summaries of these cases give the government a great deal of credit.

When we decided whether DOJ or a private party took the “lead,” an important piece of evidence was whether DOJ or a private party uncovered the first evidence of collusion (although of course much

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<sup>32</sup> As noted earlier, this includes prison time valued at \$6 million per year, not \$2 million per year. See Lande & Davis, *supra* note 1, at 336.

<sup>33</sup> Werden, Hammond & Barnett, *supra* note 7, at 231.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 232–33.

more is necessary to prove liability). For example, our vitamins case analysis contained the caveat: “[M]any of the details of the Department of Justice investigation are non-public, and it is clear that both private counsel and the U.S. Department of Justice were on parallel tracks and discovered much of the critical evidence at around the same time, and that the investigation of each helped that of the other.”<sup>36</sup>

Our analysis of the vitamins case fairly relied on the report provided by David Boies, counsel for private plaintiffs. Boies reported that when his firm found the first evidence of a cartel in February 1997, “there was no pending federal investigation.”<sup>37</sup> WHB never state that Boies is incorrect or unreliable, but they do say that there had been an ongoing federal investigation before this.<sup>38</sup> However, we cited information that the DOJ investigation had stalled before private counsel provided them with important collusion evidence:

U.S. investigators first got wind of the vitamins cartel and Roche’s role in it in late 1996 from sources at [Archer Daniels Midland] cooperating with the DOJ in its investigation of the citric acid cartel . . . . As a result the FBI interviewed Dr. Kumo Sommer, the head of Roche’s vitamins division, in March 1997. “Sommer denied the existence of any vitamins cartel and the DOJ apparently decided to wind down its investigation for the meanwhile . . . . [However, in] late 1997 a partner of the law firm of Boies & Schiller . . .” presented the DOJ with evidence that a conspiracy was occurring.<sup>39</sup>

Moreover, in our vitamins case study we wrote: “We attempted to find a public account of the origin of the vitamins cases written by the Department of Justice Antitrust Division but could not. When we sent them the version contained in this document they would not com-

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<sup>36</sup> Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: Forty Individual Case Studies* 237 (U.S.F. Law Research Paper No. 2011-22, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1105523](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105523).

<sup>37</sup> DAVID BOIES, *COURTING JUSTICE* 231 (2004).

<sup>38</sup> See Werden, Hammond & Barnett, *supra* note 7, at 232.

<sup>39</sup> Lande & Davis, *supra* note 36, at 237, n.645 (quoting John M. Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence* 25–26 (Feb. 14, 2006) (draft), available at [www.antitrustinstitute.org](http://www.antitrustinstitute.org)).

ment on its accuracy or completeness.”<sup>40</sup> Further, on the crucial importance of the early private suit we cited the following:

At the May 21, 1999 press conference in Basel, Switzerland announcing the Roche guilty pleas, Hoffman-La Roche’s CEO, Franz Humer, explained how it was the early 1998 class action lawsuit (and not a government investigation) that prompted a new internal investigation that caused Roche to terminate its conspiratorial conduct and begin to cooperate with the government: “In 1997, responding to the settlement in the citric acid case and to the news of an investigation of the bulk vitamins industry, Roche initiated an internal inquiry of its own, which at the time did not turn up any evidence of wrongdoing. *A second internal inquiry prompted by class action lawsuits filed against Roche and other companies in early 1998 for alleged price-fixing in the bulk vitamins market revealed that further action was needed.* The inquiry was carried out in collaboration with U.S. experts. Internal measures were implemented without delay to ensure an immediate halt to any antitrust violations. The findings this second inquiry formed the basis for Roche’s decision to offer, on 1 March this year, its full cooperation in the US Justice Department investigation.”<sup>41</sup>

We therefore stand by our description of the vitamins cartel based on the evidence that was then—and is now—available.

On the subject of the second case that WHB complain about—involving a commercial explosives cartel—they say:

Lande and Davis credit the detection of one other cartel to plaintiffs’ lawyers. They report that an explosives cartel was discovered in the course of litigation of an unrelated case. They do not indicate when evidence of a cartel emerged, but they do indicate that the antitrust claims leading to significant damage recovery were filed in February and August 1996. But that was after the Division had secured guilty pleas from the conspirators, and evidence uncovered in the private litigation did not prompt the Division’s investigation.<sup>42</sup>

Concerning this case we wrote the following: “This litigation and the government investigation that followed apparently arose out of a 1992 private civil suit initiated by Thermex Energy Corporation . . . , a Texas manufacturer of commercial explosives, against Atlas Powder Company, owned by Imperial Chemical Industries P.L.C. of Britain

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<sup>40</sup> Lande & Davis, *supra* note 36, at 236, n.642.

<sup>41</sup> *Id.* at 240–41.

<sup>42</sup> Werden, Hammond & Barnett, *supra* note 7, at 232–33.

. . . .”<sup>43</sup> Our case summary certainly gave DOJ a large share of the credit for bringing this cartel to justice: “In September 1995, the Department of Justice secured guilty pleas and fines for two of the defendants in the Commercial Explosives litigation. . . .”<sup>44</sup>

If a secret DOJ investigation uncovered evidence of collusion before the 1992 unrelated private action began, then this case should indeed be removed from the list of cases in which private enforcers first discovered the evidence of collusion. But WHB have not provided this evidence. Nor have they even asserted that a DOJ investigation discovered evidence of collusion before the 1992 private case.

Finally, we note WHB implicitly concede that DOJ played no role at all in eleven of the thirteen cases in this group by disputing our factual analysis of only the vitamins and explosives cartels cases.

More generally, our article contained the caveats that “reasonable people could dispute who first discovered some of the violations that gave rise to the sample of 40 private cases” or which party actually took the lead and that we could use only imperfect publicly available data to perform our study.<sup>45</sup> It is only natural for DOJ and the private parties to see the facts differently—for both DOJ and the private parties to see ambiguous facts in a way that tends to give themselves more of the credit for uncovering and proving the violations at issue.<sup>46</sup> Indeed, they might not have always been aware of what the other lawyers were doing and so naturally assumed that they deserved the bulk of the credit.

Finally, WHB claim that after the Supreme Court’s 2007 decision in *Twombly*,<sup>47</sup> private plaintiffs will be much more reliant on the DOJ to uncover and prosecute antitrust violations.<sup>48</sup> This may well be true.

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<sup>43</sup> Lande & Davis, *supra* note 36, at 62.

<sup>44</sup> *Id.* at 63.

<sup>45</sup> See Lande & Davis, *supra* note 1, at 346.

<sup>46</sup> WHB’s complaint over credit for two of the forty cases we studied helps prove the proverb, “Success has many fathers while failure is an orphan.”

<sup>47</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>48</sup> See Werden, Hammond & Barnett, *supra* note 7, at 231.

But it would not affect the results of our study, which covered the period from 1990 to 2007. Moreover, once sufficient time has passed, the relative deterrent effects of private and DOJ antitrust enforcement should be reassessed not by speculation, but on the basis of evidence. Indeed, the antitrust world's general failure to base policy on evidence has caused great mischief. *Twombly* itself was based on an empirical premise that was both unsubstantiated and implausible—the assumption that the sorts of wealthy and powerful corporations that are the subject of antitrust lawsuits often settle even meritless claims for huge sums.<sup>49</sup>

In conclusion, Werden, Hammond and Barnett provide no reason to doubt our article's findings. Indeed, the article showed that private enforcement "probably" deters more anticompetitive activity than the DOJ's anticartel program after comparing the deterrence of *only forty* of the many private cases filed during an eighteen-year period with the deterrence from *every* DOJ cartel case filed during the same period. A fortiori, the deterrent effects from every private enforcement action might well have been many times as large as that from the DOJ anticartel program. Our latest case studies demonstrate that our initial study was conservative, as was our overall conclusion that private enforcement "probably" deters more conduct than DOJ private enforcement.<sup>50</sup>

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<sup>49</sup> For an analysis of the questionable policy basis of *Twombly*, see Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. 355, 356, 369–74 (2009), available at <http://ssrn.com/abstract=1542143>; see also Joshua P. Davis and Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 969, 978–81 (2010), available at <http://ssrn.com/abstract=1578459>. See also Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (rejecting the argument that class actions constitute a form of legalized blackmail).

<sup>50</sup> In a related point, WHB argue that private litigation against small cartels often is not viable. Werden, Hammond & Barnett, *supra* note 7 at 228, n.82. This is a fair point. And a reason to make private actions less costly and therefore viable in a broader range of cases. On the other hand, there are also a significant number of cases that the DOJ will not prosecute, either because of a limited DOJ budget, because they are not the kinds of traditional cartel cases that DOJ pursues, or because the odds of the DOJ prevailing are not

We stress that we did not perform this comparison to denigrate in any manner the excellent work performed by the Antitrust Division, of which we remain huge fans. Indeed, we would like to reemphasize that private enforcement and public enforcement on the whole work wonderfully well together and in harmony toward the goal of promoting the public interest.

Rather, we undertook our analysis to determine whether private enforcement is underappreciated and deserves a significant share of the credit for deterring anticompetitive conduct. Although we appreciate that WHB studied our article and we enjoy discussing the details of our analysis, we believe it now would be more productive to focus instead on designing ways for private and public enforcement to cooperate to better approximate an optimal level of deterrence for anticompetitive conduct.

#### ADDENDUM

The editor-in-chief of *The Antitrust Bulletin* showed the foregoing reply to Werden, Hammond & Barnett. Dr. Gregory Werden responded with the rejoinder that follows.<sup>51</sup> The editor-in-chief also allowed us to write the following brief response.

Gregory Werden's thoughtful rejoinder does just what one would hope from an exchange: It boils our friendly disagreement down to a couple of key points. The first is empirical and the second philosophical.

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sufficiently high. In fact, the extraordinary success rate of DOJ prosecutions suggests it is unwilling to take a significant risk of losing in litigation, which means a substantial amount of illegal conduct will go unpunished. For a discussion of these and related points see Lande & Davis, *supra* note 28, at 905-07.

In sum, DOJ criminal enforcement works better in some cases and private enforcement works better in others. This is further evidence that public and private enforcement complement one another, both working in the direction of the public good.

<sup>51</sup> Gregory J. Werden, *Cartel Deterrence Through Criminal Enforcement: A Rejoinder to Lande and Davis*, 58 ANTITRUST BULL. 191 (2013).

The empirical issue is whether deterrence caused by monetary sanctions imposed on corporations and individuals can be equated in some rough way with incarceration imposed on individuals. Our work shows that if this sort of calculation is possible, then the financial penalties achieved through private civil enforcement of the antitrust laws likely have a more significant deterrent effect than the criminal penalties obtained by the DOJ. Private civil awards have been so large that private enforcement has a larger deterrent effect even if one equates an implausibly large financial penalty—\$10 million, \$20 million, or even \$40 million on average—with a single year in prison. Of course, it is possible that the typical disvalue of time spent in prison by potential price fixers is infinite. So Werden implies. But that hardly seems likely. After all, people often fix prices despite the known risk of jail time. As an informal test of the possibility that many or most people infinitely disvalue prison, we invite the readers of this article to ask themselves a question: Suppose they were caught fixing prices and had to choose between one of two possible penalties—either forfeit all their wealth (including pensions and benefits) or spend one day in prison. We submit that most readers would decide to spend one day in prison. Or two days. Or three days. Or . . . . But at some point each reader would instead prefer to forfeit all his wealth. The tipping point would be different for each person, but we doubt many would in effect consider prison time to have an infinite disvalue.

We believe, moreover, the prospect of a large enough financial penalty would cause corporations to change their cultures and launch more effective internal compliance programs—including internal reward and punishment programs—that would minimize illegal conduct. Indeed, corporate culture might be a more important variable for predicting legal violations than whether a few individuals are incarcerated, especially if a corporation rehires individual price fixers after their release from prison (our preliminary data suggests this might not be rare<sup>52</sup>), effectively signaling that the price fixers are valued employees who “took a bullet for the team.” By contrast, a heavy financial sanction should give rational corporate management a strong incentive to find ways to encourage compliance with the law.

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<sup>52</sup> See *supra* notes 20 & 21 and accompanying text.

The second claim is more philosophical in nature. We contend that private enforcement probably<sup>53</sup> “does more” to deter anticompetitive behavior than DOJ criminal enforcement.<sup>54</sup> On this issue there is a real chance that we and Werden are just speaking past each other. Who is right may depend in part on value judgments about how best to understand causation. If the DOJ plays the most important role in *discovering* illegal cartels, but private *sanctions* provide most of the deterrent effects, who deserves more of the credit?

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<sup>53</sup> Werden quotes our conclusion, but without its important “probably” qualifier. He writes: “We nevertheless disputed the suggestion of Robert Lande and Joshua Davis that ‘private antitrust enforcement does more than [DOJ] criminal enforcement to deter anticompetitive behavior . . . .’” Werden, *supra* note 51, at 192. Crucially, we always attach a qualifier to our conclusion, such as “probably” or “there is evidence that.” Our articles present a considerable amount of evidence that our conclusion probably is correct, but because we can analyze only the imperfect data that is available, and recognize the ambiguities in how and when to allocate credit for deterrence, we qualify our conclusion appropriately.

<sup>54</sup> We are puzzled that Dr. Werden attempts to divert attention from our comparison by suggesting that we instead perform a different comparison, one involving DOJ’s other antitrust activity. *Id.* at 194 (“Lande and Davis prefer to compare the deterrent value of criminal sanctions in cartel cases to the deterrent value of private damage recoveries in all antitrust cases, but they ignore the impact of government enforcement outside the cartel area. There may be no satisfactory way to compare the deterrent effect of private damages actions with the deterrent effect of noncriminal government antitrust enforcement (for example, against mergers), but any comparison that simply ignores the contributions of government enforcement is indefensible.”). Our goal was only to show that private enforcement fares well against one important benchmark—DOJ criminal enforcement. We did not mean—or claim—to measure private enforcement against all DOJ enforcement. Moreover, we did offer a comparison of private enforcement only against cartels to DOJ enforcement only against cartels, and even this comparison found more deterrence from private enforcement. *See* Lande & Davis, *supra* note 1, at 339 n.85 (showing that just twenty-five private cartel cases produced sanctions of \$9.2 to \$10.6 billion, which was more than the total deterrence from every DOJ cartel case brought from 1990 to 2007, which totaled \$6.756 billion in sanctions). We did not attempt to compare private enforcement against mergers or monopolization to government enforcement in these areas for a host of reasons, including the difficulties in valuing the injunctions secured in private or government cases.

Werden suggests one way of addressing this issue. He claims that the "Antitrust Division's cartel enforcement would thrive without private enforcement, while damage recoveries in cartel cases would decline precipitously without the Division's criminal enforcement."<sup>55</sup> He also claims that for every case in our sample, "a private damages settlement was achieved only after the Antitrust Division secured at least one conviction."<sup>56</sup>

Maybe. We certainly dispute that every private case in our sample was simply a follow-on to a DOJ case.<sup>57</sup> But even if that were true, we believe it is crucial that the private cases secured settlements that very significantly added to the deterrent effects of the original DOJ cases.<sup>58</sup> Philosophically, we framed the issue of the deterrent effects of sanctions imposed as the right measure of "doing more." By this standard, private enforcement fares quite well.

We could argue about which is the right measure of "doing more." Perhaps we will in the future. For now, however, it seems safe to conclude that DOJ criminal enforcement is extraordinarily important, as is private enforcement, and the two have, as we have written,

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<sup>55</sup> Werden, *supra* note 51, at 194.

<sup>56</sup> *Id.*

<sup>57</sup> We believe that only ten of forty cases in our original survey were follow-on cases, a figure consistent with a twenty percent estimate by Kauper and Snyder. Kauper & Snyder, *supra* note 29. Moreover, many of the private cases we classified as follow-ons were broader than the original DOJ cases, and even if DOJ were given partial credit for twenty-five percent of the deterrence caused by the forty private cases we studied, our overall conclusion would not change significantly.

<sup>58</sup> Moreover, the conventional view within the antitrust field concerning the typical conduct of the plaintiffs' bar could help to magnify the relative deterrent effects of private enforcement. According to one branch of the conventional wisdom, plaintiffs' attorneys are an unethical, ravenous, and crazed pack of jackals who will go to any lengths—do anything, no matter how unfair—to attack defendants and strip them to the bone. Government enforcers, by contrast, are tough, but also honorable, responsible, and rational public servants whose activity is usually subject to intense public scrutiny. They have to fight fairly and ethically. For this reason government enforcement could, *ceteris paribus*, engender relatively less fear among corporations and therefore provide less deterrence.

a “symbiotic” relationship. Both are crucial and, even together, probably insufficient.<sup>59</sup> Both should be strengthened. And each should be mindful how it can best help the other. Little seems to turn on which one is the best.

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<sup>59</sup> See Connor & Lande, *supra* note 20, at 428.