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Response

Replicating the Success of Antitrust Amnesty

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In his Note, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*,[1] Stephen Fraser takes up the timely topic of how to replicate the success of the Department of Justice (DOJ) Antitrust Division's amnesty program in other areas of corporate criminal law. In particular, he advocates adopting an amnesty program based on the Antitrust Division's Corporate Leniency Policy[2] for violations of the Foreign Corrupt Practices Act (FCPA), which criminalizes the bribing of foreign officials to win contracts or retain business.[3]

Fraser recognizes the utility of taking amnesty programs that work well for one type of criminal violation and applying them to another type of criminal violation. The fundamental insight of the paper is solid. When trying to expose self-concealing conspiracies, enforcement agencies should look to other programs that have successfully exposed other criminal conspiracies. Because uncertainty about government leniency policy can deter self-reporting of FCPA violations,[4] Fraser is wise to advocate the

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1. Stephen A. Fraser, *Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty*, 90 TEXAS L. REV. 1009 (2012).

2. *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEXAS L. REV. 1159, 1186 (2008) (noting that the amnesty initiative has been "highly successful").

3. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78ff (2006).

4. Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 155 (2010).

development of a more predictable FCPA program.[5] But greater clarity alone will not replicate the success of the antitrust amnesty program.

This Response will proceed in four parts. Part One briefly reviews the DOJ's antitrust amnesty program. Part Two notes the differences between price fixing and bribing a foreign official. Part Three explores how these differences may complicate efforts to adopt the antitrust model of leniency to root out other business crimes, including bribing foreign decision-makers. Finally, Part Four suggests avenues of future research. Given the space limitations of Responses, each of these discussions will necessarily be abbreviated.

I. The Antitrust Amnesty Program as a Model for FCPA Leniency

Section One of the Sherman Act[6] criminalizes cartelization. Unfortunately, price-fixing conspiracies are notoriously difficult to uncover. To address this problem, the Antitrust Division of the Department of Justice created an amnesty program in which the first qualified firm in a cartel that exposes its illegal activity is granted immunity from criminal prosecution.

Fraser provides an excellent overview of the antitrust amnesty program. He notes that in the first ten years of the DOJ's antitrust amnesty program, only four companies received amnesty.[7] An increase in the maximum fines for price fixing in 1987 brought in another seven amnesty applications before the Antitrust Division overhauled its amnesty program in 1993.[8] The 1993 revision of the leniency policy significantly reduced antitrust prosecutors' discretion by making amnesty "automatic" in some circumstances and more predictable in others.[9] This revised antitrust amnesty program has proven wildly successful. The program is the "most effective generator of cartel cases and is believed to be the most successful program in U.S. history for detecting large commercial crimes."[10]

The current antitrust amnesty program, called the Corporate Leniency Policy, succeeds in large part because it creates distrust among cartel

5. Fraser notes that "[t]here is no clear pattern as to why certain discounts are greater than others and how a company's cooperation is valued in this determination." Fraser, *supra* note 1, at 1022.

6. 15 U.S.C. §§ 1–17 (2006).

7. Fraser, *supra* note 1, at 1015.

8. Press Release, Dep't of Justice, Antitrust Chief Announces Two Policy Changes (Aug. 10, 1993), *available at* http://www.justice.gov/atr/public/press_releases/1993/211653.htm. Fraser describes antitrust enforcement before 1993 as "lackluster." Fraser, *supra* note 1, at 1015. The problem is perhaps better conceptualized as a lackluster response to the amnesty program then in effect.

9. Christopher R. Leslie, *Antitrust Amnesty, Game Theory and Cartel Stability*, 31 J. CORP. L. 453, 465–66 (2006).

10. Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 799 (2001).

participants.[11] The program generates distrust in two separate, but related, ways. First, the lure of amnesty creates distrust *across* firms in a cartel.[12] Because price fixing is covert, members of a cartel are generally better off not confessing their crime, which will otherwise be difficult for outsiders to discover. When price-fixing coconspirators trust each other not to confess, a stable equilibrium of mutual non-confession should govern.[13] The antitrust amnesty program sows the seeds of distrust by rewarding confession and by increasing the cost of having one's trust betrayed by a cartel partner through stiff criminal penalties.[14] The penalties for price fixing include a maximum prison sentence of ten years and potentially hundreds of millions of dollars in criminal fines. If a cartel member distrusts one or more of its partners, then confession becomes an attractive option because the first confessor—and only the first confessor—receives complete amnesty from criminal prosecution and penalties.[15] Subsequent confessors receive only discounts off of their criminal fines, with the discounts declining based on the order in which they confess.[16] This means that once a price-fixing firm believes that its cartel is about to be—or has already been—exposed, it has a significant incentive to confess. As I have argued previously:

> The rewards structure of the government's program creates a race to confess. Given the rewards for being first, "the [Antitrust] Division frequently encounters situations where a company approaches the government within days, and in some cases less than one business day, after one of its co-conspirators has secured its position as first in line for amnesty. Of course, only the first company to qualify receives amnesty." Knowing this, each cartel member may distrust the other cartel members since each has a strong incentive to confess first. While the government's amnesty program creates a race structure, the trigger that starts the race is distrust. Once the trust breaks down,

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11. Leslie, *supra* note 9, at 454; *see also* Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEXAS L. REV. 515, 622 (2004) [hereinafter Leslie, *Trust, Distrust, and Antitrust*] ("Although antitrust law is not generally thought of as a method of sowing the seeds of distrust, it often succeeds by doing just that."); *id.* at 630 (explaining how antitrust law can prevent trust-building reputational effects). [MTR: For what it's worth, I like having both as hereinafter forms to prevent confusion, but either way works.]

12. Leslie, *Trust, Distrust, and Antitrust*, *supra* note 11, at 643–46.

13. Leslie, *supra* note 9, at 469.

14. *Id.* at 473–77.

15. Press Release, Dep't of Justice, Antitrust Chief Announces Two Policy Changes (Aug. 10, 1993), *available at* http://www.justice.gov/atr/public/press_releases/1993/211653.htm. The first firm to confess is liable for single damages for its overcharges in subsequent private antitrust litigation. It is, however, exempt from joint and several liability and treble damages. For a reader-friendly overview of these and other benefits of corporate amnesty, see Lawrence Kill, Anderson Kill & Olick, Presentation to Harvard Club: Brushing up on Antitrust Basics 27 (May 17, 2007), available at http://www.federationofcredit.com/base/document/Topic-WhitePaper-Metrics,%20KPIs,%20Scorecards%5CAntitrustSeminar51707.pdf.

16. Press Release, Dep't of Justice, *supra* note 15.

> whoever gets to the government first and confesses gets amnesty. This can create an unbearable pressure to race to confess. Distrust is key.[17]

Second, the antitrust amnesty program is structured to create distrust *within* each firm that participates in a cartel.[18] Individual employees within each cartel firm generally benefit from the additional profits acquired through price fixing.[19] So long as individuals perceive a cartel as stable and successfully concealed, they have little incentive to expose the cartel. Through the implementation of its amnesty program, the Antitrust Division creates this incentive, again by creating distrust among employees within price-fixing firms. Although the first firm to confess saves all of its employees from imprisonment, later-confessing firms will have to "carve out" some of their employees from the firm's plea bargain with the government, and these individuals can expect to serve prison time.[20] Each individual must worry that someone in one of the other cartel firms may confess and expose the employees of other price-fixing firms to years of imprisonment.

Similarly, the antitrust amnesty program gives each price-fixing firm reason to distrust both its own employees and its coconspirators' employees.[21] In addition to its Corporate Leniency Policy, the Antitrust Division also maintains an Individual Leniency Policy, which automatically grants immunity from criminal prosecution to the first individual who exposes a yet-undiscovered cartel.[22] An individual worried that the cartel may be exposed by another cartel member knows that the only way he can guarantee he will serve no prison time is to get to the prosecutors' office first.

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17. Leslie, *Trust, Distrust, and Antitrust*, *supra* note 11, at 640 (quoting Gary R. Spratling, *The Race for Amnesty in International Antitrust—If You Don't Come in First, the Rewards for Second Place Are No Small Consolation*, 16 INT'L ENFORCEMENT L. REP. 710, 712 (2000) (footnotes omitted)).

18. Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1692 (2008) [hereinafter Leslie, *Faithless Agents*]. *See also id.* at 1644–45 (suggesting that antitrust authorities should focus on individuals, who are subject to imprisonment); Leslie, *Trust, Distrust, and Antitrust*, *supra* note 11, at 649–50 (describing DOJ's ability to prevent immigration of individuals as encouraging distrust towards foreign coconspirators).

19. Leslie, *Faithless Agents*, *supra* note 18, at 1649.

20. Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Address to the 15th Annual National Institute on White Collar Crime: When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom? (Mar. 8, 2001), *available at* http://www.justice.gov/atr/public/speeches/7647.htm.

21. *See* Leslie, *Faithless Agents*, *supra* note 18, at 1690–94 (noting that antitrust policies designed to encourage faithless agents will lead firms to reduce the number of cartel agents, to guard information, and to suspect coconspirator's employees).

22. Press Release, U.S. Dep't of Justice, U.S. Leniency Policy for Individuals (Aug. 10, 1994), *available at* http://www.justice.gov/atr/public/guidelines/0092.pdf.

The executives within a price-fixing firm need to worry that one of their employees may seek individual leniency and, thereby, expose the firm (and its executives) to criminal penalties.

So the antitrust amnesty program both creates distrust and harnesses the power of existing distrust among price-fixing coconspirators. Antitrust law magnifies the costs of having one's trust betrayed. For those involved in price-fixing activity, the prospect of antitrust amnesty gives a powerful reason both to confess and to worry that one's partners might be similarly tempted to confess in order to avoid criminal penalties.

II. The Differences between Price-Fixing Conspiracies and Corrupt Practices

The crimes of price fixing and bribery share some commonalities. For example, both price-fixing conspiracies and violations of the FCPA are white-collar crimes that are hard to detect.[23] Bribery is generally self concealing because there is nothing suspicious about a foreign government or company awarding a contract to an American company. Fraser is correct to consider that in order to uncover more bribery and other corrupt practices, government officials should look for inspiration from the most successful corporate leniency program, the antitrust amnesty program.

But despite the commonalities between cartels and corruption, fundamental differences remain. First, cartelization is a horizontal conspiracy (i.e., among competitors) and bribery is a vertical conspiracy (i.e., between entities that buy and/or sell from each other). Bidding manipulation illustrates the importance of this distinction. Both antitrust law and the FCPA criminalize types of bid rigging. Antitrust law criminalizes bid rigging when rival firms conspire to suppress their competitive bidding in order to make the conspiracy's target pay more for an input or service. Similarly, some forms of corruption can be characterized as a variant of bid manipulation in which one bidder bribes the decision-makers to secure the contract based on the bribe, not solely on the merits of the bid.

While both of these misdeeds distort the bidding process, the underlying structure of the crimes is quite different. In the antitrust context, illegal bid rigging takes the form of multiple bidders conspiring together against the buyer such that the person awarding the contract is the victim. In the FCPA context, the person awarding the contract is a coconspirator. The victims of an FCPA violation are the honest bidders who fail to win the contract (and arguably the entity whose agent sold it out in exchange for a bribe). This

23. *See* Leslie, *Faithless Agents*, *supra* note 18, at 1625–26 (suggesting that price-fixing is a self-concealing offense); Tor Krever, *Curbing Corruption?: The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 92 (2007) (reporting difficulty in acquiring empirical data of incidence of bribery).

distinction between a horizontal and a vertical conspiracy may affect the federal government's ability to convert the antitrust amnesty program into an FCPA amnesty program.[24]

Second, the underlying relationships among conspirators in price fixing and bribery are dissimilar. In the absence of a price-fixing conspiracy, cartel members are natural adversaries who distrust each other. These are firms that compete against each other for sales, often in a zero-sum game in which each firm's profits come at the expense of its competitors. Successful cartels need to overcome the natural distrust among competitors, as each cartel participant must trust its coconspirators not to cheat and not to expose the cartel. With respect to cheating, each cartel member has a short-term incentive to charge less than the cartel price and sell more than its cartel allotment.[25] Because cartels historically are fraught with cheating, successful cartels have developed many mechanisms to attempt to overcome the natural distrust among cartel members.[26] Sometimes these trust-facilitating devices work and sometimes they do not, resulting in the cartel dissolving into a price war that resembles a competitive market.[27]

Unlike cartelization, the crimes targeted by the FCPA involve natural allies. In the absence of corruption, the briber and the bribed would still have an otherwise legal working business relationship. The would-be briber still wants to win contracts from the would-be bribed, who needs to purchase goods and services. In short, there is no natural, inherent distrust among bribery coconspirators.

Third, the scale of participation is generally an order of magnitude different between cartelization and corruption. This difference is important because distrust is easier to create within groups comprising several separate entities.[28] This partly explains why stable cartelization is more likely in

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24. *See infra* Part III.

25. Leslie, *Trust, Distrust, and Antitrust*, *supra* note 11, at 524–28. *See also* Herbert Hovenkamp & Christopher R. Leslie, *The Firm as Cartel Manager*, 64 VAND. L. REV. 813 (2011) (discussing problems that cartels face in setting price and output).

26. *See generally* Leslie, *Trust, Distrust, and Antitrust*, *supra* note 11, at 562–600 (delineating various cartel trust-facilitating devices).

27. In game theory jargon, the firm that continues to charge the cartel price while its cartel partners are cheating is referred to as "the sucker," because its coconspirators are profiting from its misplaced trust. Depending on the numbers, the sucker can be worse off participating in the cartel than engaging in cut-throat competition. Because no firm wants to be the sucker, distrust can sometimes unravel an otherwise stable cartel if one conspirator incorrectly suspects one of its cartel partners of cheating and, as a defensive measure (albeit one that may be ill-conceived), consequently reduces its price. This price reduction can cause the other cartel partners (who had been abiding by the cartel agreement) to reduce their prices. For an overview of game theory, see generally Don Ross, *Game Theory*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), http://plato.stanford.edu/archives/fall2011/entries/game-theory/.

28. Leslie, *Trust, Distrust, and Antitrust*, *supra* note 11, at 564–65.

concentrated markets with relatively few players.[29] Most cartels involve several separate entities. In contrast, bribery involves fewer entities, generally the bribing entity and the bribed entity. Even large-scale corruption need only involve a handful of people. The greater number of people involved in many cartels may make it easier to generate distrust among cartel members than among bribery conspirators.[30]

III. How the Differences Between Price Fixing and Bribery Affect the Ability to Adapt the Antitrust Amnesty Program for Violations of the Foreign Corrupt Practices Act

The differences between cartelization and corruption have important implications for the effectiveness of an amnesty program. Fraser argues that "given the antitrust experience, an FCPA amnesty policy would likely encourage greater self-reporting, with the attendant benefits to both the DOJ and the business community."[31] This is not necessarily true because antitrust conspiracies are distinctive and the incentive to self-report is greater for participants in an antitrust conspiracy than for those in a bribery conspiracy. The Corporate Leniency Policy is so successful for a reason: price-fixing conspiracies lend themselves to exposure through distrust. This raises the issue of whether the fundamental differences between price fixing and bribery reduce the opportunities to create confession-inducing distrust among violators of the FCPA. If so, this means that an FCPA amnesty program based on the antitrust model may not be as successful in exposing corruption.

I suspect that the differences between price fixing and corruption may make it difficult to replicate the success of the antitrust amnesty program because it is harder to create a race to the prosecutors' office among bribery coconspirators. Without the ability to create a race to the prosecutors' office among members of a conspiracy, an amnesty program for the FCPA would appear to be less likely to have the same success as the antitrust amnesty program. Fraser notes that "[c]ompanies now question whether to cooperate in an investigation or to decline to report violative conduct."[32] Part of the reason for this hesitancy is the lack of a pressure to race to the prosecutors' office to report an FCPA violation. The fact that the participants in bribery schemes are natural allies also undermines the ability of an amnesty program to create and harness distrust.

As noted in Part Two, the members of a price-fixing cartel are by nature adversarial because they are competitors in the marketplace. As rivals, they often have an inherent tendency to distrust each other. In contrast, the

29. Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 44 (2006).

30. *See* Leslie, *Trust, Distrust, and Antitrust*, *supra* note 11, at 564.

31. Fraser, *supra* note 1, at 1029.

32. *Id.* at 1022.

participants in illegal bribery are natural allies, not adversaries. These are business partners that seek to create an ongoing business relationship and—but for the bribery—their relationship would be perfectly legal. The participants in bribery schemes may come to their criminal enterprise with a pre-existing degree of trust that does not exist among cartel members. Fraser acknowledges that "[a]n amnesty policy . . . responds directly to the trust that develops among corporate employees and that inhibits disclosure of the fullest extent of violations of the FCPA."[33] But it is not clear how the amnesty policy can create distrust when the participants in the FCPA violation have developed trusting relationships.

This distinction between natural adversaries and natural allies may also drive the relative incentives of conspirators to confess. Cartel members come to their conspiracy with a reserve of distrust. The antitrust amnesty program exploits this existing suspicion by creating an additional reason to distrust one's cartel partners: the knowledge that there are potential rewards for betrayal and punishment for loyalty to the cartel. Each member of the cartel also has an underlying incentive to hurt his coconspirators because each cartel partner is also his competitor in the marketplace. The confessor in the antitrust conspiracy receives not only the benefit of amnesty, but also the benefit of injuring her competitor, who will be liable for criminal penalties and treble damages in the likely event of follow-on private lawsuits. In contrast, the briber is not better off betraying the bribed because this will hurt the briber's ability to get contracts from that entity in the future. In sum, participants in bribery schemes would not seem as inclined to betray their partners in crime.

As noted, cartels often involve several separate entities. Bribery generally involves fewer entities. The higher numbers of conspirators in a price-fixing conspiracy helps the antitrust amnesty program convert distrust into confession. A conspiracy with many participants has more potential weak links. The more people who could panic and expose the conspiracy in exchange for amnesty, the less stable is the conspiracy and the greater the incentive for every member to preemptively confess.

Having more participants in a conspiracy increases the federal government's ability to create distrust[34] and initiate a race to the prosecutors' office because after the first confessor gets amnesty, each subsequent confessor gets a declining discount off its criminal fine based on the order of confession.[35] This creates a pressure to confess quickly—even if the conspiracy has already been exposed. It is this declining sequential discount that creates the pressure to get to the prosecutors' office as quickly as

33. *Id.* at 1036.

34. *See supra* note 30.

35. Press Release, Dep't of Justice, *supra* note 15.

possible. The conspirators race against each other because he last firm in the race receives no discount at all. This mechanism of declining discounts is not suited for the FCPA context. If there are only two entities involved—the briber and the bribed—there is little reason to confess once one believes that the other party has already confessed. By definition, there is nobody to race against at that point. Also, one of the two entities—the bribed foreign decision maker—has no incentive to race to confess an FCPA violation in order to avoid imprisonment because the FCPA does not make a criminal out of the foreign recipient of a bribe. In sum, compared to most price-fixing conspiracies, bribery may generally involve too few participants to create the necessary race dynamic that makes antitrust amnesty successful.

Fraser suggests that an FCPA amnesty program will induce individuals within a corrupt firm to expose the crime in exchange for amnesty.[36] This dynamic depends on two components. First, the individual must perceive a meaningful probability that the crime will be discovered independently.[37] If an individual believes that his participation in a crime will go unnoticed and unprosecuted, then that individual has a strong incentive to remain quiet. The antitrust amnesty program succeeds by convincing cartel participants that cartel exposure may be imminent and that their interests would be best served by confessing quickly.[38] It is the distrust *across* price-fixing firms that helps create distrust *within* a single price-fixing firm.

The employee within a corrupt firm, however, is generally unlikely to believe that exposure is imminent. Any person receiving a bribe is better off concealing the fact. Knowing that the recipients of its bribes should remain silent, the bribing firm has little reason to expose its crime in order to be the first confessor. In contrast to price-fixing conspiracies, there is no perceived risk that employees in a competing firm are about to expose a criminal violation. As a result, individuals involved in bribery seem less likely report an FCPA violation unless they perceive that law enforcement officials are apt to uncover the corruption on their own.[39]

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36. Fraser asserts that the prisoners dilemma "exists among a corporation's employees, the corporation itself, and foreign officials." Fraser, *supra* note 1, at 1035. This assumes that the DOJ has leverage over foreign officials, but it remains unclear what precisely this leverage is.

37. Tarun & Tomczak, *supra* note 4, at 181–82.

38. Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Address to the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 1 (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.pdf ("[T]he Antitrust Division utilizes all available investigatory tools to create a significant risk and fear of detection and prosecution for violators of U.S. antitrust laws.").

39. Tarun & Tomczak, *supra* note 4 at 197 ("An important factor for some corporate decision makers in deciding whether to self-report an internally-discovered FCPA violation is the perceived likelihood that, with the corporation having already detected the underlying misconduct, law enforcement agencies will learn of the wrongdoing absent corporate self-reporting.").

Furthermore, independent discovery of FCPA violations appears unlikely. The crime is naturally self-concealing. Although "the federal securities laws may require corporations to publicly disclose FCPA violations,"[40] a firm that has violated the FCPA is already breaking the law. It is unlikely that white-collar criminals will feel a great compulsion to abide by securities laws when they are willing to violate anti-corruption laws. Also, discovery by foreign law enforcement officials is doubtful because most other countries do not take bribery and corruption seriously.[41] And the bribed foreign parties have little incentive to expose their receipt of bribes to U.S. officials.

The second component relevant to whether the promise of amnesty will induce an individual to expose an FCPA violation is that the penalty must be meaningfully worse for an individual who did not expose the violation than for an individual who did. Antitrust authorities have explained that "individual accountability through the imposition of jail sentences is the single greatest deterrent."[42] Individuals engaged in price fixing know that imprisonment is now a common punishment.[43] Fraser argues that "in terms of reduced jail sentences or avoidance of a jail sentence altogether, amnesty policies provide individuals with great incentives to report their concerns." But this is only true if the individual thinks that the violation is going to be exposed and that those who did not confess first will receive imprisonment. In the context of price fixing, a meaningful probability of imprisonment is a powerful motivator for cooperation.

The threat of prison is not as great in the FCPA context. Fraser does not show that imprisonment is common for FCPA violators. Employees within a bribe-paying firm could theoretically race against each other for amnesty, but there seems little incentive if none are going to prison in any case. The threat of imprisoning the foreign bribe recipient is not particularly credible.[44] In order to effectively apply the antitrust model for amnesty to FCPA violations, advocates of this change need to demonstrate that imprisonment is a meaningful threat such that individuals would be willing to confess criminal conduct in order to avoid prison.

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40. *Id.* at 201.

41. *Id.* at 203–04 (noting that only three other countries enforce anti-bribery statutes).

42. Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Address Before Working Party No. 3 Prosecutors Program: Ten Strategies for Winning the Fight Against Hardcore Cartels 3 (Oct. 18, 2005), *available at* http://www.usdoj.gov/atr/public/speeches/212270.pdf.

43. Hammond, *supra* note 38, at 8 ("The antitrust bar and business community understand that the Division is serious about its policy of insisting on jail sentences for both U.S. and foreign defendants. This realization provides further incentive for corporations to apply for leniency so that their cooperating executives will receive non-prosecution coverage.").

44. While foreign officials cannot be charged under the FCPA, they may be subject to federal prosecution under other statutes, such as prohibitions on conspiracies to commit money laundering. *See* ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICE ACT HANDBOOK 3 (2010).

IV. Future Research

Fraser also provides examples of non-antitrust amnesty programs. This raises the question of whether any of these programs provide a more appropriate template for an FCPA amnesty program. For example, Fraser notes that the IRS has its own amnesty program "whereby taxpayers could voluntarily report undeclared assets and, in return, pay a reduced fine and avoid criminal sanctions."[45] This amnesty program is in some ways a better analog to a bribery amnesty program. On the one hand, corruption is like a price-fixing conspiracy in that there are multiple participants, in contrast to tax evasion which generally involves a single person or entity. However, tax evasion is similar to bribery and is dissimilar to antitrust violations in that there is little opportunity to create a race based on distrust.[46] It is worth considering whether bribery is more analogous to the crimes targeted by other amnesty programs and, if so, whether an FCPA amnesty program should more closely follow the structure of one of these programs instead of the antitrust amnesty program.

V. Conclusion

Fraser makes a strong case that more clarity is needed in the FCPA leniency procedures. He is shrewd to look for lessons in the success of the antitrust amnesty program. The missing piece of the puzzle examined in Fraser's Note is the precise catalyst that would lead the briber or the bribed to expose corruption in exchange for amnesty. In the antitrust context, distrust is the catalyst. The antitrust amnesty program succeeds in detecting and punishing cartels by exploiting the natural distrust among a cartel's members. It remains unclear to me how to create a race to the prosecutors' office based on distrust between the briber and the bribed when the parties often share a trusting (and fundamentally noncompetitive) relationship, an interest in non-confession even if they fear their partner has confessed, and a lack of anyone to race against.

45. Fraser, *supra* note 1, at 1031.

46. Fraser also makes reference to the Department of Defense's voluntary disclosure program. *Id.* This, too, may be a better analogy to the extent that it is an amnesty program that does not depend on a distrust race.