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Thomas T. Alspach

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NOTES

RETHINKING IN PARI DELICTO:
AN ANTITRUST POLICY ANALYSIS

I. INTRODUCTION

The Ford Administration apparently has concluded that price-fixing conspiracies contribute significantly to the inflation that plagues the American economy. Accordingly, the Antitrust Division of the Justice Department has launched an increasingly vigorous campaign against those who flout the antitrust laws, with special attention to price-fixers. It is common knowledge that private treble damage actions usually follow on the heels of a government indictment. Plaintiffs in private actions are by statute permitted to build a prima facie case upon prior decisions in government-initiated suits. Thus treble damage actions, which already have begun to multiply in recent years after a history of near-dormancy, likely will continue to increase in number.

The private treble damage action was authorized by Congress not only to salve the wounds of the injured plaintiff, but also to supplement federal antitrust enforcement efforts. The difficulty the Justice Department had in keeping pace with the "business ingenuity" of corporate executives, a problem that continues today, was to be partially mitigated by a legion of private attorneys general. Private actions, it was hoped, would uncover local violations and sporadic misconduct with which the Justice Department could not contend while focusing on problems national in scope.

Although many factors doubtlessly have contributed to the initially dismal performance of treble damage plaintiffs, one obvious impediment to successful private suits has been the ancient doctrine of in

2. Id.
5. One commentator notes that, on the average, there was only one successful private treble damage action per year during the first 50 years of the Sherman Act's existence. Lockhart, Violation of the Anti-trust Laws as a Defense in Civil Actions, 31 Minn. L. Rev. 507, 570-71 (1947).
8. See generally MacIntyre, The Role of the Private Litigant in Anti-trust Enforcement, 7 Antitrust Bull. 113 (1962).
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pari delicto. Literally meaning "of equal fault," the doctrine grew out of the traditional equitable notion that the courts should not aid one who is himself a wrongdoer. In pari delicto first crept into the antitrust field in 1900, and thereafter experienced a confused history. Generally the doctrine has been invoked to bar the claim of an antitrust plaintiff who is himself implicated in the illegal scheme with which he has charged the defendant. Not surprisingly, a treble damage plaintiff himself often will be "tainted"; it is his insider's awareness of the defendant's illegal activities that provides the knowledge—and evidence—upon which to construct a successful case.

The United States Supreme Court decision in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, which abolished the broader equitable doctrine of "unclean hands" in the antitrust area, seemed by implication to eliminate in pari delicto as well. That decision was not uniformly interpreted, however, and in pari delicto often was raised successfully thereafter when the plaintiff was equally involved in or responsible for the illegal activities of the defendant. Moreover, neither the statutory history of the Sherman Act nor that of the Clayton Act offered consolation to those seeking to determine whether the defense should be recognized in antitrust litigation. Finally, in 1968, the Supreme Court attempted to resolve the in pari delicto controversy in Perma Life Mufflers, Inc. v. International Parts Corp. Although that decision specifically examined the viability of the doctrine, the result did not measure up to the promise. The opinion is replete with ambiguity and qualification, and hence has had little effect on the lower federal courts' application of the defense. Thus, just as before Perma Life, most courts today continue to recognize the defense if the plaintiff was an initiator of or willing participant in the illegal scheme. Conversely, the defense usually is disallowed when the

11. The defense was first recognized in an antitrust setting in Bishop v. American Preservers Co., 105 F. 845 (N.D. Ill. 1900).
15. For a discussion of this doctrine see notes 26-33 and accompanying text infra.
16. See cases discussed in Comment, supra note 10, at 458-60.
17. See Bushby, supra note 12, at 787-88. See also 47 Tex. L. Rev. 322, 323 n.9 (1969).
19. See cases discussed in text accompanying notes 75-94 infra.
plaintiff has been "coerced" into the enterprise by a defendant with superior economic bargaining power.\textsuperscript{20}

The continued vitality of the in pari delicto defense seems short-sighted and counterproductive. The defense should be unavailable in antitrust litigation regardless of the plaintiff's own culpability. Total abolition of in pari delicto would further the antitrust enforcement objectives of the Ford Administration. This note reflects an attempt to develop a rationale, founded on antitrust policy, for this conclusion. After defining terms and considering \textit{Perma Life} in greater detail, that rationale will be elaborated.

\textbf{II. Related Defenses: "Illegality" and "Unclean Hands"}

At the outset it is important to distinguish the defense of in pari delicto from two other closely related antitrust defenses: "illegality" and "unclean hands." The defense of illegality arises when the defendant, in a non-antitrust action such as a suit for breach of contract, interposes a plaintiff's antitrust violation as an affirmative defense. The defendant might claim, for example, that certain contract provisions violate the antitrust laws and therefore should be held void. The leading decision on this issue is \textit{Kelly v. Kosuga}.\textsuperscript{21} In return for plaintiff's promise not to deliver his entire surplus onion supply on the futures markets, the defendant, an onion marketer, had agreed to purchase a portion of that surplus himself. The defendant later reneged and plaintiff filed suit. At trial the defendant argued that the agreement had been intended to stabilize the price of onions, in violation of the Sherman Act, and therefore was unenforceable. The Supreme Court, while agreeing that the promise not to deliver onions was unlawful and invalid, concluded that the defendant's promise to buy the onions was "a lawful sale for a fair consideration"\textsuperscript{22} and would be upheld. The Court reasoned that "[p]ast the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy . . . 'of preventing people from getting other people's property for nothing when they purport to be buying it.' "\textsuperscript{23} Put another way, a defense based on a plaintiff's alleged antitrust violation will be recognized only if, by enforcing the contract, the court would facilitate or align itself with a breach of the antitrust laws.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{20} See id.
\item \textsuperscript{21} 358 U.S. 516 (1959).
\item \textsuperscript{22} Id. at 521.
\item \textsuperscript{23} Id. at 520-21, quoting Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 271 (1909) (dissenting opinion).
\item \textsuperscript{24} See also D. R. Wilder Mfg. Co. v. Corn Prods. Ref. Co., 236 U.S. 165, 174-
\end{itemize}
Accordingly, the lower courts have recognized the illegality defense only when the specific contract provision at issue is "‘infected with illegality.’"\(^{25}\)

The unclean hands defense could arise when the defendant in a treble damage action charges plaintiff with an *independent and unrelated* violation of the antitrust laws.\(^{26}\) The defense is premised on the moral principle that the court should not aid a plaintiff who is himself a wrongdoer.\(^{27}\) *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,*\(^{28}\) however, permanently interred this defense. The Supreme Court in *Kiefer-Stewart* held that the plaintiff's own independent infraction of the antitrust laws would not foreclose its right to bring suit against defendants for their resale price-fixing activities.\(^{29}\) *Kiefer-Stewart* laid the foundation for the principle, later developed in *Perma Life,* that the policy of encouraging private attorneys general to enforce the antitrust laws may be more compelling than the policy of denying wrongdoers access to the courts.\(^{30}\) Although one court\(^{31}\) has suggested that unclean hands, an equitable defense, might still be available to a defendant contesting a Clayton Act injunction action,\(^{32}\) *Kiefer-Stewart* remains sound law today.\(^{33}\)

75 (1915) (Sherman Act's express remedies may not be supplemented judicially by including avoidance of private contracts as a sanction); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902) (purchaser of merchandise from conspirator in alleged restraint of trade not permitted to raise that allegation in defense to action for purchase price). Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909), involved a successful attempt to raise the defense of illegality. The defendant in that case had purchased materials from the plaintiff corporation, which had been established to act as a selling agent for various wallpaper companies. These companies were doing business as a pool and were selling at allegedly excessive prices fixed through the pooling arrangement. The Court therefore concluded that to give judgment for the purchase price would be "to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination." 212 U.S. at 261.


27. *See id.* at 459.


29. *Id.* at 214.

30. The *Perma Life* Court stated, "A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement." 392 U.S. at 139.


Although courts sometimes confuse the defenses mentioned above with in pari delicto, there is a distinction among them that is more than a matter of form. The decision to recognize or to bar each defense involves different policy considerations. In each case the public interest in enforcement of the antitrust laws must be balanced against the “morality” of granting wrongdoers access to the courts—but the result of that balancing may differ with regard to each defense. The illegality defense presents the easiest case: if that defense were abolished a court might be compelled to enforce a contract violative of the antitrust laws. The plaintiff's suit would in no way further the interest of antitrust enforcement; in fact, it would do exactly the opposite. It therefore seems reasonable to retain the defense, at least as limited by Kelly v. Kosuga.

The defense of unclean hands presents a more difficult question. To disallow that defense is to encourage suits that do foster the objective of private antitrust enforcement. At the same time, however, a plaintiff who himself has violated the antitrust laws—albeit in a different manner—is permitted to invoke the judicial process. Kiefer-Stewart embodied a balancing of these competing interests, and that balance tipped in favor of private antitrust enforcement.

When the same balancing concept is applied it is clear that in pari delicto raises the most troublesome question of all. Again, if the defense is barred and plaintiff is permitted to pursue his private action, the public interest in vigorous antitrust enforcement is fostered. But here the “enforcer” himself is a party to the very antitrust violation for which he seeks damages from the defendant. Perhaps he is no more

35. 340 U.S. at 211. Justice Black in his Perma Life opinion observed that both Kiefer-Stewart and Simpson v. Union Oil Co., 377 U.S. 13 (1964), “were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.” 392 U.S. at 139. See Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947). See also Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595 (S.D.N.Y. 1952):

“Courts of equity may . . . go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” More specifically, public policy may preclude an application of the doctrine of “unclean hands.” Whatever equities may be present as between private litigants, they must yield to the overall public policy of the antitrust laws to prevent monopolies and restraints of trade.

Id. at 599 (footnotes omitted).
"morally fit" than is the plaintiff with unclean hands; nevertheless, the fact that his treble damage recovery would compensate an injury arising in part from his own illegal dealing seems to taint his position somewhat more.\textsuperscript{36} Thus the conflict between antitrust enforcement and denial of the courts to a wrongdoer seems even more sharply drawn. It is not surprising, then, that most courts have expressed reservations about totally abolishing the in pari delicto defense.\textsuperscript{37}

In spite of these competing interests, however, the defense of in pari delicto should be totally eliminated from antitrust litigation—regardless of the degree to which the plaintiff is implicated in the plot with which he charges the defendant. Even where the plaintiff is as "guilty" as the defendant, the balance should tip in favor of antitrust enforcement; the plaintiff should be permitted to proceed unhampered by the in pari delicto defense. This is not the conventional wisdom.\textsuperscript{38} Nevertheless, for reasons that will be elaborated below, society would benefit more by allowing the tainted plaintiff's suit than it would suffer by "aiding" a wrongdoer. This conclusion will be defended first by analyzing \textit{Perma Life} and its reception in the lower federal courts and then by questioning the rationale for the continued recognition of in pari delicto among those courts.

III. \textbf{IN PARI DELICTO: THE JUDICIAL ATTITUDE}

\textbf{A. The United States Supreme Court}

The Supreme Court decision in \textit{Perma Life Mufflers, Inc. v. International Parts Corp.}\textsuperscript{39} was prompted by a group of disenchanted Midas Muffler franchisees. The franchise agreements provided for resale price maintenance, obligated franchisees to deal only with Midas and required them to honor the Midas guarantee on mufflers sold by any dealer. In return, costs of the guarantee were underwritten by Midas, dealers were entitled to use the Midas trademark and each was granted exclusive dealership privileges in a particular territory. Alleging that these agreements restrained trade in violation of the Sherman and Clayton Acts, the franchisees brought suit against Midas,

\textsuperscript{36} The \textit{Perma Life} court suggested, however, that the plaintiff's "reward" be offset by the "beneficial byproducts"—that is, those aspects of the agreement that benefited the plaintiff should be taken into account in computing damages. 392 U.S. at 140 (1968).

\textsuperscript{37} \textit{See} cases cited notes 75-94 infra.

\textsuperscript{38} \textit{Id. See also} Ellis, \textit{In Defense of In Pari Delicto}, 56 A.B.A.J. 346 (1970); 57 ILL. B.J. 413, 418-19 (1969). Apparently only one commentator has suggested that a total abolition of in pari delicto might have a beneficial effect on antitrust law enforcement. \textit{See} 47 \textit{Tex. L. Rev.} 922, 925-26 (1969).

\textsuperscript{39} 392 U.S. 134 (1968).
its parent corporation International Parts, two other subsidiaries and six corporate officers.\footnote{40}

The district court entered summary judgment for defendants. The Seventh Circuit reversed in part, but affirmed the lower court's determination that the Sherman and Clayton Act claims were barred because the plaintiffs were in pari delicto with defendants.\footnote{41} Because the Seventh Circuit's decision "seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States,"\footnote{42} the Supreme Court granted certiorari\footnote{43} and reversed.\footnote{44} Although the Court purported to abolish the in pari delicto defense in certain antitrust actions, the scope of that abolition was not definitively established.

1. \textit{The Opinion of the Court}.—\textit{Perma Life} was a plurality opinion, prepared by Justice Black and subscribed to by only three other Justices.\footnote{45} Justice Black first noted that nothing in the language of the antitrust laws suggested Congress' intention to incorporate the common law in pari delicto defense into the statutory treble damage action.\footnote{46} More persuasive, however, was the Court's own previously articulated belief in the "inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes."\footnote{47} Black reasoned that antitrust policy objectives could best be achieved by encouraging the private action as an "ever-present threat" to businessmen contemplating anti-competitive activity. "The plaintiff who reaps the reward of treble damages," Black continued, "may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition."\footnote{48} Moreover, the "morally reprehensible" plaintiff could be prevented from realizing a windfall profit, since he would remain subject to both criminal and civil suits on the part of the government and third parties.\footnote{49}

These public policy considerations led Justice Black to the ultimate conclusion that "the doctrine of \textit{in pari delicto}, with its complex scope,
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contents, and effects, is not to be recognized as a defense to an anti-
trust action." Although this holding seems definitive and com-
prehensive, Black added several gratuitous observations arguably intended to limit its impact. For example, the holding seemed qualified by the premise that "the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it . . . ." Additionally, Justice Black noted that the plaintiffs' participation in the illegal enterprise "was not voluntary in any meaningful sense" and was "thrust upon them" by Midas. Most significantly, Justice Black appended a cryptic disclaimer to his holding: "We need not decide, however, whether . . . truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of in pari delicto, for barring a plaintiff's cause of action . . . ." The particulars of such a defense, whatever they might be, were not elaborated. Taken literally, however, this final observation seems to circumscribe the reach of the Court's broadly phrased holding.

2. The Concurring Opinions.—The ambiguity of Justice Black's Perma Life plurality opinion is reflected in the views of Justices White, Fortas and Marshall. Those Justices concurred in the result reached by the plurality, but felt constrained to express certain reservations to Justice Black's broad language. Justice White interpreted the Black opinion to bar in pari delicto only where an illegal arrangement has been "thrust on" the plaintiff. White seemed troubled by the possibility that, if in pari delicto were totally abolished, a plaintiff might be able to recover damages for a business injury that he himself had perpetuated. Where plaintiff and defendant are equally implicated in illegal dealing, White reasoned, recovery should be precluded since the plaintiff would be unable to prove that defendant was "the more substantial cause of the injury.”

Justice White's conclusion, then, was that in pari delicto should remain a sound defense when "plaintiff and defendant bear substantially

50. Id. at 140.
51. Id.
52. Id. at 139, 141.
53. Id. at 140 (emphasis added).
54. Indeed, several lower federal courts have interpreted this language to suggest the existence of a distinguishable defense. See cases discussed notes 87-94 infra.
55. 392 U.S. at 143 (White, J., concurring).
56. Id. at 146. In other words, Justice White would, in the circumstances postulated, increase the burden that the plaintiff must bear in proving causation. In such cases, as Justice White himself observed, "it would be enough with respect to causation if the defendant 'materially contributed' to plaintiff's injury, . . . or 'substantially contributed, notwithstanding other factors contributed also,' . . . ." Id. at 143-44 (citations omitted).
equal responsibility for injury resulting to one of them . . . ."57 This conclusion was premised on the belief that to allow the equally tainted plaintiff to recover could serve as a counterdeterrent. If in pari delicto were totally abolished such a plaintiff would be assured of illegal profits if the plan were to succeed, and a treble damage action if it were to fail. Therefore, abolition of in pari delicto "may encourage what the Act was designed to prevent."58 This rationale has become something of a rallying point for those who favor partial retention of the defense.59

In his brief concurrence Justice Fortas endorsed the view that if the fault of the parties is reasonably equal then in pari delicto should bar the plaintiff's recovery.60 Justice Fortas did not suggest whether he, unlike Justice White, read the Black opinion to abolish the defense in all situations, regardless of the magnitude of plaintiff's illegal conduct. Although Fortas was careful to state that he agreed "with the result in this case,"61 he did not intimate any acceptance of the plurality opinion. Thus one might conclude that Justice Fortas interpreted that opinion to abolish in pari delicto entirely, and that he considered it necessary to set forth his own contrary view.

Justice Marshall clearly interpreted the Perma Life plurality to eliminate entirely the in pari delicto defense from the antitrust area.62 But while Justice Marshall disagreed with Justice White to that extent, he did reach the same conclusion that White and Fortas had embraced: "I would hold that where a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should be barred from imposing liability on the defendant."63 Marshall expressed reservations about allowing a wrong-doer "to profit through his own wrongdoing"64 and agreed with Justice White's theory that allowing the tainted plaintiff to recover would create a "new incentive" for potential antitrust law violators.65 Accordingly, Justice Marshall would bar in pari delicto only if the above quoted formulation were applied.

3. Summary and Observations.—In sum, five of the nine Justices rejected the view that in pari delicto has no place in antitrust litiga-

57. id. at 146.
58. id.
59. See, e.g., Ellis, supra note 38.
60. 392 U.S. at 147 (Fortas, J., concurring in the result).
61. Id.
62. 392 U.S. at 148 (Marshall, J., concurring in the result).
63. Id. at 149.
64. Id. at 151.
65. Id.
tion. Put another way, a majority of the Court would allow a tainted plaintiff to sue his coconspirators only if he did not take part in the formulation of the illegal scheme or was “coerced” into participating. If the concurring and dissenting views are considered as a whole, there emerge three reasons for preserving the in pari delicto defense when an equally culpable plaintiff files suit. First, there is a disinclination to allow monetary recovery essentially for one’s own acts. To sanction a treble damage suit facilitating such recovery would be to promote unjust enrichment. Secondly, allowing the tainted plaintiff to recover is viewed as an incentive to antitrust violations. The potential violator is provided with a “sure thing”: extra profit through a successful restraint of trade or a treble damage recovery from his coconspirator. Finally, there is an apparent, albeit unspoken, revulsion at the prospect of providing judicial aid and comfort for one who, by his actions, has exhibited only disdain for the rule of law. Each of these reasons for retaining the in pari delicto defense will shortly be examined in some detail.

B. Perma Life in the Federal Courts: The Current Interpretation

The ambiguity of the Black opinion in Perma Life, along with the alternative views expressed by the concurring Justices, has promoted considerable difference of opinion among the lower federal courts. The weight of authority, however, reads Perma Life to bar the in pari delicto defense only when the plaintiff has been “coerced” to join in an illegal endeavor by a defendant with superior bargaining power. The willing participant, on the other hand, remains vulnerable to the defense. In short, Perma Life has not appreciably affected the judicial attitude toward in pari delicto that existed even before the Supreme Court opinion was rendered.

66. Justice Harlan, joined by Justice Stewart, concurred in part and dissented in part. In Harlan’s view the in pari delicto defense, if literally interpreted, “should be permitted in antitrust cases.” Id. at 153. In other words, the critical question is whether “the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants” for the alleged restraint of trade. Id. at 156.

67. The issue of “coercion” in the context of antitrust proceedings raises special problems of its own. See notes 132-40 and accompanying text infra.

68. For a more detailed examination of this argument see notes 108-11 and accompanying text infra.

69. For a more detailed examination of this argument see notes 101-04 and accompanying text infra.

70. For a more detailed examination of this argument see notes 105-07 and accompanying text infra.

71. See cases discussed in text accompanying notes 75-94 infra.

72. Id.

73. The pre-Perma Life attitude is represented by Crest Auto Supplies, Inc. v. Ero
The Fourth and Seventh Circuits recently have considered the *Perma Life* opinion in some detail. Both courts were influenced by the apparent qualifications to the purportedly comprehensive ban of in pari delicto articulated by Justice Black. Additionally, in *Columbia Nitrogen Corp. v. Royster Co.*, the Fourth Circuit looked to the fact that five of the nine Justices agreed that "when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other." In other words, when a plaintiff has participated in a "non-coercive" agreement, the defendant may interpose the in pari delicto defense. In *Premier Electrical Construction Co v. Miller-Davis Co.*, the Seventh Circuit reached a similar conclusion, allowing a plaintiff to avoid the defense only if "economic pressures" forced him to join the illegal scheme or he did not "bear equal responsibility" for its formulation.

In a more summary fashion the Fifth and Sixth Circuits apparently have concluded that in pari delicto does retain vitality after *Perma Life*. Those conclusions, however, were expressed only by way of dicta. In *South-East Coal Co. v. Consolidation Coal Co.*, the court was not compelled to reach the question of whether "the type of antitrust conspiracy involved in this case falls into the category of those antitrust conspiracies in which the defense of in pari delicto is available." Although *James v. DuBreuil* was a rule 10(b)(5) action, the Fifth Circuit relied on *Perma Life* to bar plaintiff's suit where the fault of the parties was "clearly mutual, simultaneous, and relatively equal." Similarly, the Second Circuit in *Pearlstein v. Scudder & German*, another securities case, read *Perma Life* only "to deny recovery

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74. See notes 51-54 and accompanying text supra.
75. 451 F.2d 3 (4th Cir. 1971).
76. Id. at 15-16.
77. Id. at 16.
78. 422 F.2d 1132 (7th Cir.), cert. denied, 400 U.S. 828 (1970).
80. 434 F.2d 767 (6th Cir. 1970).
81. Id. at 784.
82. 500 F.2d 155 (5th Cir. 1974).
83. Id. at 160. But see Kuehnert v. Texstar Corp., 412 F.2d 700, 705-06 (5th Cir. 1969) (Godbold, J., dissenting).
84. 429 F.2d 1136 (2d Cir. 1970).
to plaintiffs who had not been coerced but who had benefited from the arrangement equally with the defendant . . . .”

Several courts have disallowed a plaintiff's suit by focusing on Justice Black's reference to "truly complete involvement" in an illegal scheme "wholly apart from" in pari delicto. Effectively, of course, there is no difference between a defense based upon such involvement and in pari delicto. Regardless of the terminology employed, the plaintiff's recovery is barred because he was as responsible for the illegal enterprise as was the defendant. No court of appeals has yet embraced this "wholly apart from" view, but it has been recognized by district courts in the Second, Third, Fourth, and Ninth Circuits. Dobbins v. Kawasaki Motors Corp. is perhaps the best example of this approach. It is worth reemphasizing, however, that Justice Black did not recognize such "total involvement" as a defense to a treble damage action; he merely declined to rule on the question one way or the other. It should be added at this point that any purported "total involvement" defense is equally as objectionable as the defense of in pari delicto. The policy reasons supporting abolition of the latter are equally applicable to nonrecognition of the former.

Finally, one smaller group of courts has opted for the expansive interpretation of Perma Life, totally eliminating the in pari delicto defense. Several district courts have made the bald statement that the defense is completely abolished after Perma Life. Two decisions from the Tenth Circuit, Semke v. Enid Automobile Dealers Associa-

85. Id. at 1141. The court, however, did not apply this Perma Life rule to the facts before it. Id. See also Columbia Pictures Indus., Inc. v. American Broad. Cos., 501 F.2d 894 (2d Cir. 1974).
86. See text accompanying notes 53-54 supra.
92. Id. The plaintiff in Dobbins enjoyed an exclusive sales territory under the terms of his agreement with the defendant supplier. At trial the defendant raised the in pari delicto defense on the basis of that exclusive territory; plaintiff moved for summary judgment, citing Perma Life. The court denied plaintiff's motion, concluding that "the defense of plaintiffs' complete participation and involvement in the alleged monopolistic scheme . . . exists, although not as the defense of in pari delicto . . . ." Id. at 64.
93. 392 U.S. at 140.
94. See discussion at pp. 372-81 infra.
tion and Sahm v. V-1 Oil Co., are in accord. In neither decision, however, was the court actually required to consider whether plaintiff's equal responsibility in the illegality charged should alter its conclusion. Semke was actually an unclean hands case. Sahm involved a plaintiff with less bargaining power than the defendant, the classic situation in which the majority of courts find a "coercive" agreement. Thus, on the facts of Sahm, even those courts favoring the restricted view of Perma Life (i.e., partially retaining the defense) would have allowed plaintiff to proceed.

To summarize, only a few opinions have suggested that in pari delicto will never again be recognized after Perma Life. Most have interpreted the Supreme Court opinion to bar in pari delicto only in cases involving coercion, or have adopted the plaintiff's total involvement in an illegal scheme as an alternative defense. The minority view, however, is the better law. The most serious shortcoming with those few decisions that have totally abolished in pari delicto is that no policy supporting that conclusion has been put forward. Given the prevailing view that the defense should at least partially be retained, the minority position is likely to remain exactly that unless some persuasive arguments are mustered on its behalf. The remainder of this note is directed to that end.

IV. SOME POLICY CONSIDERATIONS

The three basic arguments supporting continued recognition of in pari delicto when a plaintiff has been a willing participant in an illegal scheme have already been summarized. Those arguments now will be considered in greater detail. The objective is twofold: to demonstrate that those arguments are unpersuasive and to suggest that continued recognition of in pari delicto is counterproductive in terms of antitrust enforcement policy.

The contention that toleration of a tainted plaintiff's treble damage action actually encourages antitrust violations, articulated by several Justices in Perma Life, draws further support from a variety of commentators. The argument is premised on the belief that a

96. 456 F.2d 1361 (10th Cir. 1972).
97. 402 F.2d 69 (10th Cir. 1968).
98. Plaintiff in Semke was not implicated in the same illegal conduct with which he charged defendants; rather, he was charged with violating a separate state licensing statute. 456 F.2d at 1364-65.
99. Plaintiff was a lessee of defendant, a large oil company. 402 F.2d at 70.
100. See text accompanying notes 68-70 supra.
101. 392 U.S. at 146 (White, J., concurring); 392 U.S. at 151 (Marshall, J., concurring).
102. See, e.g., Ellis, supra note 38, at 358; Comment, supra note 10, at 461.
businessman will be less inclined to join an illegal conspiracy if he realizes a future treble damage action against his coconspirators will be barred by in pari delicto. This conclusion, however, seems to misconceive the motivation of the culpable plaintiff. Moreover, it seeks to deter at a time when such deterrence is likely to be ineffective. Although the question is not susceptible of empirical proof, it seems unrealistic to argue that a potential conspirator, contemplating illegal business dealings, seriously considers whether legal redress from his coconspirators will be available should the enterprise fail. Rather, it is more likely that he agrees to cooperate only after he is convinced that the scheme will not fail. This is the only rational course of behavior since the consequences, should the illegality be exposed, are too great to risk. Exposure almost certainly would prompt Justice Department investigation and possibly criminal charges. Even greater danger is posed by the threat of costly treble damage actions likely to follow on the heels of such an investigation. Shareholders would be angered and, depending upon the magnitude of the scandal, might even stir from their customary lethargy to press for changes in management. Additionally, the public image of the corporation, as well as its stock market performance, likely would suffer. Finally, and as unlikely as it may seem in a society that does not punish white collar crime, those at the highest echelons of the corporate structure might wind up in the slammer.

In the face of these less than appealing consequences it seems inconceivable that any reasonable corporate executive conspires to violate the antitrust laws unless he is absolutely convinced that the conspiracy will escape detection and succeed. That being the case, it is specious to suggest that the future availability of a treble damage action against his coconspirators will in any way influence the decision to join in an illegal agreement. And if that influence is nonexistent, there is no substance to the argument that allowing defendants to raise in pari delicto against equally culpable plaintiffs will discourage those plaintiffs


104. Prison sentences for offenders of the antitrust laws, though still infrequent, are increasing in number. Of the 46 executives sent to prison under the Sherman Act, 27 were sentenced during the last four years. Price-Fixing: Crackdown Under Way, BUS. WEEK, June 2, 1975, at 48. Moreover, with the recent passage of the Antitrust Penalties and Procedures Act, Pub. L. No. 93-528, 88 Stat. 1706 (Dec. 21, 1974) (codified in scattered sections of 15, 47, 49 U.S.C.A.), Congress has upped the ante for potential antitrust law offenders. The new statute provides for corporate fines of up to $1 million. It makes violation of the antitrust laws a felony, and subjects individual offenders to prison terms of up to three years and fines of up to $100,000. See Keeffe, What Hath ITT Wrought: A New Poker Game?, 61 A.B.A.J. 877 (1975).
from violating the antitrust laws. Conversely, and contrary to majority thinking, total abolition of in pari delicto would not further encourage antitrust lawbreaking by making the treble damage action available to the willing participant turned plaintiff. The decision to break the law will have been prompted by the perceived certainty of success, not by the future availability of suit.

The second argument advanced in support of the in pari delicto defense—that the courts should not aid a wrongdoer—seems equally unpersuasive. Both courts and commentators have expressed distaste for granting the “morally undeserving”\(^{105}\) plaintiff access to the judicial system. When this attitude is applied to the area of antitrust law enforcement, however, a question of priorities necessarily arises: two competing interests are drawn into sharp conflict. If the “purity” of the judicial system is accorded higher priority—that is, if the courts will not deign to “help” the errant plaintiff by striking the in pari delicto defense—then antitrust enforcement must remain of secondary importance. On the other hand, if vigorous enforcement of the antitrust laws is assigned a higher priority, we are compelled to put aside questions of the plaintiff’s own “immorality”; his suit must be forborne by disallowing in pari delicto, regardless of his personal transgressions.

From a policy standpoint the latter course seems more desirable. What does society really gain, aside from some vague feeling of self-righteousness, by barring the culpable plaintiff’s suit through recognition of the in pari delicto defense? Such “punishment” of the wrongdoer serves only to preclude exposure and prosecution of a defendant whose illegal acts might otherwise go unchecked. By sanctioning the defense, therefore, society effectively punishes itself as well as the tainted plaintiff. Moreover, even if he is able to avoid the “punishment” of in pari delicto, the plaintiff remains vulnerable to Justice Department prosecution and third party treble damage actions—a more effective punishment than disallowance of a plaintiff’s own suit, and one that will not promote continued immunization of defendant’s activities.

In short, sound antitrust enforcement policy dictates that we put aside any aversion for “aiding a wrongdoer” and recognize that it is to society’s benefit to allow the culpable plaintiff’s suit. The Supreme Court already has taken a step in that direction by abolishing the unclean hands defense in Kiefer-Stewart.\(^{106}\) That decision clearly em-

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105. Note, supra note 103, at 1244. See also 392 U.S. at 151-52 (Marshall, J., concurring); 392 U.S. at 154 (Harlan, J., concurring and dissenting).
bodies the principle that enforcement of the antitrust laws should have priority over barring the unworthy plaintiff's recovery. The Court in *Kiefer-Stewart* observed that the "unclean" plaintiff still may be punished by defendant's counterclaim or by an independent action\(^{107}\)—a principle which, as previously noted, is equally applicable to the plaintiff who is in *in pari delicto* with the defendant.

A third and closely related equitable argument against total abolition of *in pari delicto* is that the culpable plaintiff should not be permitted to enrich himself unjustly through a treble damage action against his coconspirators. Abolition of *in pari delicto*, opined Justice Harlan, "rests upon the principle of well-compensated dishonor among thieves."\(^{108}\) A nationally recognized authority on the antitrust laws has concluded: "There exists no reason to afford such a [culpable] plaintiff the windfall of treble damages while at the same time permitting him to retain the fruits of his conduct. To allow the plaintiff a right of recovery under these circumstances would be detrimental to the efficient enforcement of the antitrust laws and contrary to the underlying policy of those laws."\(^{109}\)

On the contrary, to *disallow* recovery under such circumstances would be detrimental to the efficient enforcement of the antitrust laws. The culpable plaintiff is indeed "unjustly enriched," but at whose expense? If he succeeds at trial it is not society but another guilty party who is compelled to provide him his "unjust" riches. Society pays nothing, and meanwhile those riches may be diminished by defendant's counterclaim and by treble damage actions initiated by third parties.\(^{110}\) Moreover, society is saved the unnecessary expense of a tax-supported Justice Department investigation and prosecution, as well as the incalculable indirect cost of a perpetuated conspiracy.\(^{111}\) In short, before concluding that the plaintiff's unjust enrichment should be foreclosed, it should be recognized that his suit will cost society nothing and at the same time will provide substantial benefits.

The reluctance to see a wrongdoer profit from his illegal scheming is reflected in the settled principle that only damages occurring *after*

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107. 340 U.S. at 214.
108. 392 U.S. at 154 (Harlan, J., concurring and dissenting).
110. Additionally, Justice Black suggested in *Perma Life* that the "beneficial by-products" of plaintiff's agreement with defendant be taken into account in computing damages. 392 U.S. at 140. In other words, the value of those provisions of the agreement favorable to the plaintiff should be offset against the recovery. *See also The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 265-66 (1968).
111. One government witness in a recent price-fixing prosecution claimed that 15% of the increase in the price of bread was traceable to the illegal conspiracy. *Price-Fixing: Crackdown Under Way*, *Bus. Week*, June 2, 1975, at 42.
his withdrawal from the conspiracy are recoverable. This rule indeed precludes unjust enrichment, but seems undesirable from a policy standpoint. When one party withdraws from a conspiracy he increases the likelihood that the agreement will collapse. The other conspirators rightfully will fear that their former cohort intends to sue for damages, publicizing the entire affair. The threat of Justice Department prosecution and independent treble damage actions suddenly will seem quite real. Additionally, astute antitrust counsel will advise that the departed conspirator will be unable to recover damages if he is not injured by the conspiracy after his withdrawal. Thus there will be intense pressure on the remaining conspirators to terminate their arrangement.

Unfortunately, under the prevailing rule governing damages, such pressure might not be brought to bear. Since a conspiracy is likely to terminate upon the withdrawal of one conspirator there will be little reason for him to withdraw; recovery for damages sustained during the conspiracy period will be foreclosed, and he will be unable to show injury after his withdrawal and the agreement's subsequent collapse. Therefore plaintiff would be better advised to remain a participant in the illegal enterprise and hope illegal profits will increase, than to withdraw and seek a treble damage recovery. There is no point in filing suit if recovery will be unavailable and, at the same time, the plaintiff himself will be exposed to prosecution. In other words, by allowing recovery for damages that accrue only after withdrawal from a conspiracy, perpetuation of that conspiracy is encouraged. This seems a high price to pay in order to ensure that the tainted plaintiff will not be unjustly enriched—particularly when, as previously noted, that enrichment may be offset by counterclaim or by independent suits.

To this point an attempt has been made to refute the principal arguments advanced in support of in pari delicto. Hopefully, this discussion has revealed certain weaknesses in those arguments. But the case against in pari delicto is even stronger. There are a variety of other troublesome aspects to the defense that point to the need for its total abolition, regardless of the degree of a plaintiff's "guilt."

To begin, it seems counterproductive to recognize a procedural device that will bar the suit of that party in the best position to ex-

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114. Sometimes a conspirator will have little choice but to withdraw from the agreement. Here, however, we are considering the motivation of a conspirator who is not yet experiencing monumental losses and who therefore needs some incentive to withdraw.
pose and prove a violation of the law. The equally culpable plaintiff presumably helped formulate the conspiracy; he will be able to relate the words and actions of those involved, and probably will possess documentary evidence to bolster his case. Proof of an "agreement," the basic prerequisite to a Sherman Act section 1 charge, often is no easy matter. How much more readily might collusion be established if an actual party to the agreement were to introduce the necessary proof. On the other hand, by prohibiting the plaintiff's suit through in pari delicto this considerable burden of proof is imposed on the Justice Department (at taxpayer expense, of course) or on third parties, both less intimately familiar with the conspiracy. The likely result is fewer and less efficient prosecutions.

As with the "no recovery before withdrawal" rule, continued recognition of in pari delicto is likely to encourage the perpetuation of restraints of trade. Assume two mutually powerful steel producers agree voluntarily to fix prices in a given area. The agreement does not succeed as planned; the parties misjudge the scope of the market and a third, more distant producer is able to undercut the fixed price even when additional transportation costs are taken into account. Consequently the conspirators begin to lose sales and profits. One conspirator, however, is part of a larger conglomerate; his losses are of no immediate concern as they can be offset by profits elsewhere. That conspirator wants to hold firm. He reasons that the third party does not have access to a sufficient supply of raw material to satisfy all customers indefinitely, and therefore the price fixers ultimately will succeed. The other conspirator, however, is in a more precarious situation. He is unable to absorb losses for any significant length of time and already has lost more than he can afford. He would like to withdraw from the agreement and, a firm believer in the survival of the fittest, contemplates suit against his "partner" ("he lured me into it, anyway") to recover those losses.

This hypothetical situation is not at all improbable. If a conspiracy begins to falter, it is unlikely that all participants will suffer equal losses and will be disposed to terminate the agreement at the

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115. The Sherman Act, § 1, 15 U.S.C. § 1 (1970), states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal . . . ."


117. 53 MINN. L. REV. 827, 834 (1969). See also Note, supra note 105, at 1243.

118. It might be added that, in addition to expense, political considerations may in some instances influence the Justice Department's inclination to proceed with an investigation and/or prosecution.

119. See notes 112-13 and accompanying text supra.
same time. Therefore one is likely to be more inclined to sue than are the others.

It was suggested previously that the unavailability of future suit is not likely to deter the party about to enter into an illegal agreement. Because of the serious risk of adverse publicity, Justice Department prosecution and private treble damage actions, he will join the conspiracy only if he is convinced it will succeed. Thus he will be unconcerned that in pari delicto may foreclose a future treble damage action against his coconspirators. But if the conspiracy already has been implemented, and it has failed to produce the expected results, a different situation obtains. Then our hypothetical conspirator may be faced with monumental losses; he may need desperately to terminate the agreement and to recover some of that loss. The fear of Justice Department and third party actions may then be less compelling, as it will be neutralized by the already realized damage of lost sales and, depending on the size of the business, perhaps the possibility of its total demise. The conspirator in this position may have no alternative but to bring suit; his continued solvency may depend upon a treble damage recovery.

But given the prevailing view regarding in pari delicto, the party in this unenviable situation may be barred from suit. Since he was a willing participant in the first place, his coconspirator would have a sound defense. Thus a party who otherwise might file suit, exposing and terminating the agreement, is instead faced with only two alternatives: to withdraw quietly and hope that business will improve, or to acquiesce in the agreement and hope that future illegal profits will offset present misery. There would be no incentive for the damaged party to expose the illegality. His own treble damage action would be barred by in pari delicto and such exposure might only subject him to prosecution. This result is hardly promotive of antitrust enforcement policy. The conspiracy is likely to go undetected and the public unprotected.

On the other hand, this result, unfortunate for both society and the injured party, could be eliminated if in pari delicto were totally abolished. Then our oppressed conspirator would enjoy a more palatable alternative: a treble damage action against his coconspirator regardless of his own involvement in the illegality. This alternative would serve society as well, since the suit would expose the conspiracy, leaving the other conspirators accountable both to the Justice Department and to others they have defrauded. And the plaintiff himself

120. See notes 101-04 and accompanying text supra.
would remain vulnerable to suit for his own wrongdoing.\textsuperscript{121} Therefore antitrust enforcement policy again points to nonrecognition of the in pari delicto defense.

Some commentators have suggested that total abolition of in pari delicto would in fact serve no purpose, since a culpable plaintiff would not bring suit for fear of exposing his own complicity.\textsuperscript{122} As already suggested, any reluctance to sue should be overcome by the intense pressure to which a conspirator faced with monumental losses is subjected. There is ample empirical evidence to support this conclusion. A variety of treble damage actions have been initiated, since \textit{Perma Life}, by plaintiffs equally implicated in the illegal activity with which they charged defendants.\textsuperscript{123} Apparently these plaintiffs were not deterred by the fact that they almost certainly would expose their own complicity by filing suit. So the evidence suggests that a culpable party will be inclined to hazard the risk of exposing his own illegal conduct—at least if his treble damage recovery is not barred by in pari delicto.

There is still another troublesome aspect of the view that the equally guilty plaintiff should be unable to recover treble damages. Only the vaguest guidelines exist by which to determine when plaintiff's guilt reaches the level that will support a successful in pari delicto defense. The concurring Justices in \textit{Perma Life} articulated the basic test in several ways: that plaintiff's "delictum" is "par";\textsuperscript{124} that plaintiff is "substantially equally at fault";\textsuperscript{125} that plaintiff's own conduct is the most substantial cause of injury.\textsuperscript{126} While these formulations may seem clear enough, difficulty arises in determining exactly what constitutes equality of guilt. Justice White, finding "little mystery" in what evidence would be relevant, suggested that a court look to

facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under §1; proof of whether one party attempted to terminate the arrangement and encountered resistance or countermeasures from the other; facts showing who ultimately profited or suffered from the arrangement.\textsuperscript{127}

\textsuperscript{121} Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).
\textsuperscript{122} See, e.g., Note, supra note 103, at 1244.
\textsuperscript{124} 392 U.S. at 147 (Fortas, J., concurring).
\textsuperscript{125} Id. at 149 (Marshall, J., concurring).
\textsuperscript{126} Id. at 146 (White, J., concurring).
\textsuperscript{127} Id. at 146-47.
Such considerations obviously will raise complicated factual issues in determining whether in pari delicto is appropriate. In Premier Electrical Construction Co. v. Miller-Davis Co.,\(^{128}\) for example, the plaintiff and defendant willingly agreed to a mutually beneficial arrangement; nonetheless, the Seventh Circuit remanded the case for an assessment of the bargaining power of each and a determination of who actually had initiated the agreement.\(^{129}\) Similar factual determinations have been required in other circuits.\(^{130}\)

Because the guidelines for determining equality of guilt are so open-ended and imprecise, substantial irregularity of treatment is likely to result. And the probability of such disuniformity raises additional questions about the theory supporting retention of in pari delicto. According to that theory, availability of the defense will deter potential conspirators because their coequal guilt will bar future treble damage recoveries.\(^{131}\) Yet, if the plaintiff must await a complex factual inquiry at trial to determine whether his recovery is barred, that deterrent effect is subverted. The situation is somewhat analogous to informing a purveyor of filth that if he continues to disseminate his salacious material he may be convicted of selling pornography—but we’re not sure yet because we won’t know what pornography is until we consider that question at trial. A deterrent is of little effect unless it is evenly and certainly applied. The nature of the in pari delicto defense precludes any certainty of application, which substantially subverts its purported deterrent value.

Effective antitrust enforcement policy should provide even the culpable plaintiff with every conceivable incentive to expose the misdeeds of his partners in crime. Hopefully, the foregoing has suggested that even a limited retention of in pari delicto undermines that incentive and provides little compensating benefit to society. Comprehensive antitrust law enforcement would more likely be achieved by a total elimination of the defense. A primary goal of the antitrust laws should be to induce mutual paranoia among competing businessmen. Much as the Ku Klux Klan views every new recruit as a potential FBI informer, conspirators in restraint of trade should be encouraged to suspect that each of their number might become a treble damage claimant, armed with intimate knowledge of their illegal scheming.

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129. Id. at 1138-39.
131. See pp. 372-73 supra.
The result should be fewer conspiracies and swifter termination of those that already exist.

V. A Comment on "Coercion"

Central to the issue of whether a plaintiff's recovery will be barred by in pari delicto is the degree of willingness he exhibited in joining the illegal agreement. Most courts have framed this issue with reference to "coercion"; the determinative question is whether plaintiff effectively was "forced" to participate by a party with superior economic bargaining power. In the context of antitrust proceedings determination of coercion has become increasingly liberal. Apparently a party now is able to establish coercion by arguing that, had he refused to cooperate, he would have lost a profitable business opportunity. The traditional view of economic coercion, however, has been considerably more strict. The Supreme Court at an early date concluded that to prove coercion "there must be evidence of some probable consequences . . . to person or property for which the remedy afforded by the courts is inadequate." More recently another court, summarizing the judicial attitude toward coercion, concluded that it is necessary to establish, inter alia, that the coerced party was deprived of his free will, that no alternative course of action was available and that the threatened consequences were such that the remedy at law was insufficient. The culpable plaintiff in an antitrust action usually should be unable to sustain the burden of showing coercion in this traditional sense, since a reasonable alternative or adequate remedy at law should be available. In Perma Life, for example, the plaintiffs might have sought to enjoin enforcement of the objectionable franchise agreements. But the courts' inclination to focus on "economic pressure" or on the defendant's "superior bargaining power" suggests that, in the context of in pari delicto, a different approach to the coercion question is appropriate.


137. See cases cited note 132 supra.

138. Indeed, there is substantial case law reflecting the more liberal approach to the coercion issue when the defendant has raised the defense of in pari delicto. Generally
It should be noted that although a "coerced" plaintiff is able to avoid the in pari delicto defense, he still is amenable to criminal prosecution and to independent treble damage actions.\textsuperscript{139} The initial finding of coercion does not afford him subsequent immunity. This all seems a bit odd. First we say that the plaintiff had no effective choice but to join the illegal scheme. Then, in a separate action, we prosecute him for his participation. This anomalous result is compelled by the majority view favoring retention of in pari delicto. Some method must be found for distinguishing "overly guilty" plaintiffs, whose recovery will be barred by the defense, from less culpable plaintiffs who will be permitted to proceed. Invocation of the increasingly artificial coercion rationale is viewed as a defensible means of effecting this distinction. Notice that if the defense were totally abolished no such hairsplitting would be necessary.

Subsequent prosecution of the coerced plaintiff perhaps may be justified on the theory that, just as the wrongdoing defendant should not be shielded by in pari delicto, the wrongdoing plaintiff should not escape accountability for his own misdeeds. Put another way, because of the harm he has done to society the culpable plaintiff should not be accorded the same advantage (that is, the ability to plead "coercion") in his own prosecution that he enjoys when he brings suit against another culpable party.

However one may rationalize that result, it is less easy to justify the inequity accorded a plaintiff who is deemed a willing participant, and hence is unable to avoid the in pari delicto defense. It is established law that the unwilling participant in an illegal enterprise is just as guilty as one who cooperates enthusiastically: "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."\textsuperscript{140} On principle it seems inequitable to provide one party with a procedural advantage denied to another if, in the eyes of the law, both are equally guilty of a substantive offense. Again, complete abolition of in pari delicto would eliminate this contradiction.

\textsuperscript{139} Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).
\textsuperscript{140} United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948).
VI. Conclusion

It appears that most courts recognize the advantages of encouraging former conspirators to expose the misdeeds of their compatriots through private treble damage actions. At the same time, however, those courts apparently are reluctant to facilitate windfall profits for a wrongdoer. The tension created by these conflicting interests has given rise to the prevailing judicial attitude toward in pari delicto. By recognizing the defense when the "equally guilty" plaintiff brings suit, and by disallowing it when the "coerced" plaintiff files his action, the courts have attempted to find a middle ground. The coerced plaintiff somehow seems less tainted; thus his recovery seems less offensive to one's sense of propriety. Unfortunately, while this result may salve the judicial conscience, it does little to foster vigorous enforcement of the antitrust laws. Effective antitrust policy should seek to create a healthy mistrust among competitors, and that objective could be furthered by a total abolition of in pari delicto. In short, those courts that continue to recognize in pari delicto should reexamine their position from an antitrust policy standpoint. Society derives little if any benefit from recognition of the defense, and its existence inhibits antitrust law enforcement to a substantial degree.

Thomas T. Alspach